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CALIFORNIA REPORTER

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SECOND SERIES

LOS ANGELES METROPOLITAN TRANSIT AUTHORITY, Petitioner,

v.

PUBLIC UTILITIES COMMISSION of the State of California, Respondent.*

S. F. 20049.

Supreme Court of California,
In Bank.

May 12, 1959.

Rehearing Granted June 9, 1959.

Proceeding brought for annulment of order of Public Utilities Commission granting certificate of public convenience and necessity. The Supreme Court, Traynor, J., held that the 1957 Los Angeles Metropolitan Transit Authority Act precluded the Commission from authorizing new passenger stage operations in Los Angeles County; and that the Legislature had power to so limit the jurisdiction of the Commission.

Order annulled.

1. Public Service Commissions 🔑6.3

In absence of legislation otherwise providing, Public Utilities Commission's jurisdiction to regulate public utilities extends only to regulation of privately owned utilities. West's Ann.Public Util.Code Appendix, § 1.1 et seq.

2. Automobiles 🔑60, 83

The 1957 Los Angeles Metropolitan Transit Authority Act contemplated a single integrated system of public transportation in Los Angeles County, operated by Authority; and that Act precluded Public Utilities Commission from authorizing new passenger stage operations in Los Angeles County. West's Ann.Public Util. Code Appendix, § 1.1 et seq.

3. Automobiles 🔑73

Only in sense that Constitution provides that nothing therein shall limit power of Legislature to confer powers on Public Utilities Commission is Public Utilities Act "the supreme state law"; and notwithstanding Public Utilities Code section empowering Commission to certify passenger stage operations, Legislature had power to preclude Commission from authorizing new passenger stage operations in Los Angeles County. West's Ann.Public Util.Code Appendix, § 1.1 et seq.; West's Ann.Public Util.Code, § 1031; West's Ann.Const. art. 12, §§ 22, 23.

◆

Musick, Peeler & Garrett, Gerald G. Kelly and Jesse R. O'Malley, Los Angeles, for appellant.

Everett C. McKeage, Chief Counsel, Roderick B. Cassidy, Asst. Chief Counsel, William C. Bricca, Senior Counsel, J. Thomason Phelps and William Bennett, San Francisco, for respondent.

TRAYNOR, Justice.

The Los Angeles Metropolitan Transit Authority (referred to hereafter as Authority) seeks the annulment of an order of the Public Utilities Commission granting a certificate of public convenience and necessity to Charter Bus Transportation Company (referred to hereafter as Charter).

Charter's operations include seasonal passenger stage services to the Santa Anita, Hollywood Park, and Los Alamitos racetracks, all of which are located in the vicinity of Los Angeles. On April 18, 1958, Charter applied to the Commission for a certificate to engage in passenger stage service to and from the site of the home games of the Los Angeles Dodgers Baseball Club. Specifically, it requested authority "to operate bus service during the baseball season between Los Angeles, Huntington Park, Lakewood, Bellflower, Downey, Culver City, Inglewood, La Crescenta, Montrose, Glendale, San Fernando, Torrance, Gardena, Compton, Lynwood, South Gate, Burbank, Beverly Hills, and Santa Monica, California and the Los Angeles Coliseum, Los Angeles, California, (and any other place or places wherein said professional games may be played in the future) with pickups at certain hereinafter designated intermediate points."

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* Opinion vacated 343 P.2d 913.

The proposed service would be confined to those wishing transportation to and from the baseball games. The routes the busses were to follow were shown at the hearing to overlap and parallel existing routes of the Authority and of protesting transit lines. Passenger pickups were to be made from specified stops along the various routes from the foregoing cities. Only round-trip service was to be provided. The proposed fares, ranging from $1.20 to $2.80, entitled the passengers to transportation to the ball grounds before the beginning of the game and to return transportation to the original point of pickup on the same bus at the end of the games to be played that day. The various protestants, particularly the Authority, conduct regularly scheduled operations throughout the area to be served by Charter, but none presently provide the proposed type of direct, round-trip service.

Protests were filed by the Authority, Tanner Motor Tours, Ltd., Santa Monica Municipal Bus Lines, Inglewood City Lines, Culver City Municipal Bus Lines, the City of Gardena, and the City of Torrance. Public hearings were held before a Commission hearing officer on May 2, May 20, and June 4, 1958. On August 5, 1958, the Commission filed its opinion and order authorizing the passenger stage operation requested by Charter except for minor modifications not here involved.

The Authority contends that the Los Angeles Metropolitan Transit Authority Act of 1957, West's Ann.Public Utilities Code Appendix, § 1.1 et seq. (referred to hereafter as the 1957 Act) precludes the Public Utilities Commission from authorizing new passenger stage operations in Los Angeles County. The Public Utilities Commission contends that the 1957 Act does not preclude the Commission from authorizing such operations and that if it did, it would be unconstitutional.

If the Commission retained jurisdiction to issue certificates of public convenience and necessity for passenger stage service in Los Angeles County after the enactment of the 1957 Act, the question whether the differences between the proposed service and the existing service justified the issuance of a certificate of convenience and necessity would be a matter for the expert judgment and discretion of the Commission and we would therefore affirm its order. Pub.Util.Code, § 1757; California Portland Cement Co. v. Public Utilities Commission, 49 Cal.2d 171, 176, 315 P.2d 709; San Diego & Coronado Ferry Co. v. Railroad Commission, 210 Cal. 504, 508–511, 292 P. 640.

[1, 2] The two crucial questions in this case therefore are: (1) Does the 1957 Act preclude the Commission from authorizing new passenger stage operations in Los Angeles County? (2) Does the Legislature have the power to so limit the jurisdiction of the Commission?

The original Los Angeles Metropolitan Transit Authority Act was enacted in 1951 to alleviate the transit problems of Los Angeles County. Stats.1951, ch. 1668, p. 3804.[1] This legislation proved to be inadequate.

The 1957 Act gives the Authority greatly increased powers to establish an integrated mass rapid transit[2] system in Los Angeles

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[1] Rapid transit was defined by that act (section 2.7) as: "* * * [T]ransportation of passengers, mail and hand baggage * * * by means of suspended overhead monorail on routes which the California Public Utilities Commission has first determined are required by public convenience and necessity, together with any supplemental feeder bus lines which established common carriers of passengers serving the area decline to provide after that commission has determined they are required by public convenience and necessity."

[2] Mass rapid transit, as defined in section 2.7, is "* * * [T]ransportation of passengers, mail and hand baggage by means of motor bus, trolley coach, street railway, rail, suspended overhead rail, elevated railway, subway, or any other surface, overhead or underground transportation or any combination thereof."

County. The Authority may operate the system[3] itself,[4] may jointly[5] use facilities owned by itself or by existing transit systems, and may contract with existing corporations for the superintendence[6] of the Authority's system. It is given broad powers to acquire and dispose of property.[7] When its economic engineering studies show that it would not be feasible for it to operate transit facilities in a particular area, it may propose and support a special tax-supported transit district in that area.[8]

[3] "§ 2.8. 'System' means all real and personal property of every kind and nature whatsoever owned or held at any time by the authority for mass rapid transit * * *."

[4] "§ 4.8. * * * The authority may operate motor bus lines, and motor busses upon any public streets, highways, ways or freeways, and, subject to the requirements of the last preceding sentence with respect to new structures, may operate any other method of mass rapid transit in, upon, over, under or across public streets, highways, freeways and other public places."

[5] "§ 4.5. The authority shall have power to enter into agreements for the joint use of any property and rights by the authority and any public utility operating any transportation facilities; to enter into agreements with any public utility operating any transportation facilities either within or without the metropolitan area for the joint use of any property of the authority or public utility, or the establishment of through routes, joint fares and transfer of passengers."

[6] Section 3.6(b) "The authority may to the extent permitted by the Constitution of the State of California, make a contract for superintendence with any corporation (sometimes in this act referred to as the superintending corporation) which has executive personnel with experience and skill applicable to the superintendence of the operation and maintenance of any part of the system for the furnishing of its services and the services of experienced and qualified personnel for the superintendence of the operation and maintenance of the system or any part thereof * * *. Neither such contract, nor the corporation which is a party thereto with respect to its rights and duties thereunder, shall be subject to control or regulation by the Public Utilities Commission or by any political subdivision of the State of California other than by the authority as provided in such contract."

[7] "§ 4.3. The authority may acquire by grant, purchase, gift, devise or lease, and may hold, use, sell, lease or dispose of, real and personal property of every kind and nature whatsoever, licenses, patents, rights and interests necessary for the full exercise, or convenient or useful for the carrying on of, any of its powers pursuant to the provisions of this act.

"§ 4.4. The authority shall have power to acquire, construct, complete, develop, own, operate and maintain the system; including power to acquire by purchase, lease, gift or otherwise all or any part of any patents, licenses, rights, interests, engineering studies, data or reports owned or held by any person and determined by the authority to be necessary, convenient or useful to the authority in connection with the acquisition, construction, completion, development, ownership, operation or maintenance of the system. * * *

"§ 4.6. The authority may exercise the right of eminent domain for the condemnation of real or personal property or any right or interest therein for its use within the metropolitan area, including the power to acquire real property in fee simple or any lesser estate or interest for rights of way or other uses of the authority * * *. Sections 1401 to 1421, inclusive, of the Public Utilities Code shall not apply to any such condemnation of property of a privately owned public utility with the consent of such public utility at a price agreed to between the authority and such public utility, and the Public Utilities Commission of the State of California shall have no jurisdiction with respect thereto. * * *"

[8] "§ 6.12. The governing body of any public corporation within the metropolitan area may petition the authority by resolution for an extension of mass rapid transit service, and the authority shall provide for a public hearing to consider such petion.

"Upon conclusion of the public hearing, the authority shall make economic engineering studies concerning such extension of mass rapid transit services; and if such extension is shown to be economically feasible, the authority shall proceed to engineer, finance, construct, and operate such mass rapid transit services."

"§ 11.2. In the event economic engineering studies of the authority show public transit needs to exist in specific areas but that studies of feasibility do not show sufficient income to support the required

The 1951 Act gave the Authority some of the foregoing powers, but expressly provided that it could exercise its powers only under the regulatory control of the Public Utilities Commission.[9] The Authority's routes [10] and rates, [11] and contracts [12] were also subject to control by the Public Utilities Commission. Under the 1957 Act the Commission has no control over the Authority with respect to any of these matters. In the absence of legislation otherwise providing, the Commission's jurisdiction to regulate public utilities extends only to the regulation of privately owned utilities. City of San Bernardino v. Railroad Commission, 190 Cal. 562, 213 P. 980; Civic Center Ass'n of Los Angeles v. Railroad Commission, 175 Cal. 441, 445, 166 P. 351; Colman v. Montebello, 24 C.R.C. 930, 931.

There can be no doubt that the 1957 Act contemplates a single integrated system of public transportation in Los Angeles County, operated by the Authority. The legislative policy that prompted the adoption of the 1957 Act is stated in section 1.1 as follows: "It is hereby declared to be the policy of the State of California to develop mass rapid transit systems in the various metropolitan areas within the State for the benefit of the people. A necessity exists within Los Angeles County * * * for such a system. Because of the numerous separate municipal corporations and unincorporated populated areas in the * * * [County], *only* a specially created authority can operate effectively in said metropolitan area. Because of the unique problem presented by that metropolitan area and the facts and circumstances relative to the establishment of a mass rapid transit system therein, the adoption of a special act and the creation of a *special* authority is required." (Italics added.)

By its findings in this section that a necessity exists in Los Angeles County for a mass rapid transit system and that *only* a specially created authority can operate effectively in that area, the Legislature plainly states its objective to establish a single mass transportation system in Los

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financing by revenue bonds, then the authority in cooperation with public agencies within said area shall determine the boundaries of a transit district within the Los Angeles metropolitan area which requires such services and, through duly constituted powers of local agencies propose and support the creation of said transit district with powers provided by voters for the taxation of property and the financing of said district through general obligation bonds adequate to engineer, construct and operate such required system of transit. The said district may operate such facilities independently for the benefit of the people or, by contract or otherwise, may enter into agreement with the Los Angeles Metropolitan Transit Authority for coordinated operation of such facilities and the authority shall thereupon integrate the operations of such system with all its other transit operations to develop public transit services for the benefit of the people of the metropolitan area."

[9] "The Legislature, in placing the authority under the jurisdiction of the Public Utilities Commission * * * has made exceptions to a long established policy because of the unique character of the authority and the particular circumstances and conditions requiring its creation. It is not the intent of the Legislature that these exceptions be deemed, in any way, a precedent with respect to any other public corporation." Stats. 1951, ch. 1668, § 13.4.

[10] "'Rapid transit' means transportation * * * by means of suspended overhead monorail on routes which the California Public Utilities Commission has first determined are required by public convenience and necessity, together with any supplemental feeder bus lines which established common carriers of passengers serving the area decline to provide after that commission has determined they are required by public convenience and necessity." Stats.1951, ch. 1668, § 2.7.
or other charges. * * *" Stats.1951, ch. 1668, § 4.9.

[11] "Subject to the jurisdiction of the Public Utilities Commission, the authority may fix rates, fares, tolls, charges, rents

[12] "Subject to the provisions of the Public Utilities Act and authorization pursuant thereto from the Public Utilities Commission, the authority may make contracts, leases and agreements with any person or public corporation. * * *" Stats.1951, ch. 1668, § 4.12.

Angeles County operated by a special authority. In these findings the Legislature has already determined what mass transportation service "public convenience and necessity" require in Los Angeles County. When, despite this legislative determination, the Public Utilities Commission determines that "public convenience and necessity" require that service shall not be limited to "only a specially created authority" but require a service competitive to that of the special authority created by the Legislature, it not only repudiates the Legislature's determination of what public convenience and necessity require but defeats the Legislature's purpose to establish a single mass transportation system in that county operated by its specially created authority.

There is no merit in the Commission's contention that it was not the legislative purpose to integrate into a single system all mass transportation systems in the Los Angeles area but only to integrate the publicly operated transportation systems. The sentence of section 1.1 invoked by the Commission, "Because of the numerous separate municipal corporations and unincorporated populated areas in the metropolitan area * * * only a specially created authority can operate effectively in said metropolitan area" does not refer to transportation systems, either public or private, but to agencies exercising governmental authority. The obvious purport of the sentence is that owing to the number and the limited authority of such agencies, only a public agency with overriding powers can attain an integrated mass transportation system. Any doubt that the Act did not include the integration of private as well as public transportation systems is dispelled by other sections of the Act. Thus section 4.21 provides: "One of the purposes of this act is to coordinate any operations of the authority with the operations of *any* then *existing* system. * * *" (Italics added.) Section 3.6(e) requires the authority to observe existing labor contracts "whenever the authority acquires existing facilities from a publicly *or privately owned* public utility." (Italics added.) Section 4.22 authorizes the Authority to pay accrued taxes of any *existing privately owned* system acquired by the Authority.

The only publicly operated public transportation systems in Los Angeles County when the act was passed were the comparatively small systems operated by the cities of Torrance, Santa Monica, Gardena and Montebello. The integration of four small publicly owned systems in separate sections of the county would not carry out "the policy of the State of California to develop mass rapid transit systems in the various metropolitan areas." When the act was passed all of the major local transportation companies of Los Angeles County were privately owned, including the Los Angeles Transit Lines and Metropolitan Coach Lines, the two major transportation systems, which were united on March 3, 1958, to form the system now operated by the Authority.

The only exception to the legislative policy that "only a specially created authority can operate effectively in said metropolitan area" is stated in section 4.21 of the Act, which provides for the continuance of the existing privately owned public transportation systems, until the Authority purchases such systems under the procedures set forth therein. Section 4.21 contemplates the issuance by the Authority of revenue bonds to finance the acquisition of privately owned systems. Under section 5.4 these bonds are obligations of the Authority only and must contain on their face a recital that neither principal nor interest constitutes an obligation of any county or city of the state. All privately owned systems in existence when the Authority was created are fully protected by section 4.21 which speaks of coordinating the operations of the Authority with the operation of any "existing system." Neither that section nor any other contemplates that new services may be commenced by a private carrier and then purchased by the Authority. The integration into a single system of all mass transportation in Los Angeles County contemplated by the Legislature could never be accomplished if new services were constantly added, and even if it were once accomplished the process of integration would have to commence all over as new services were authorized by the Commission. The Commission contends, however, that under section 1031 of the Public Utilities Code it retains jurisdiction to authorize passenger stage operations in Los Angeles County, and that if the Legislature meant to limit its jurisdiction thereunder it would have done so expressly as it did in other instances in which it expressly provided that the Commission should not have jurisdiction.[13] Section 1031 provides, "No passenger stage corporation shall operate or cause to be operated any passenger stage over any public highway in this State without first having obtained from the commission a certificate declaring that public convenience and necessity require such operation. * * *" This section would still preclude a privately owned stage corporation from operating a passenger stage over any public highway without obtaining a certificate of public convenience and necessity from the Commission, but it does not authorize such a certificate when public convenience and necessity do not require such operation. In the 1957 Act the Legislature has determined what public convenience and necessity require with respect to passenger stage operations in Los Angeles County. This legislative determination of public convenience and necessity precludes an inconsistent determination by the Commission. Thus the integrity of both the 1957 Act and section 1031 of the Public Utilities Code are maintained. The latter controls all passenger stage operations in the state except those in Los Angeles County, with respect to which the Legislature has determined that public convenience and necessity require a single integrated transportation system operated by a special authority.

[3] The Commission contends, however, that section 1031 of the Public Utilities Code, empowering it to certify passenger stage operations, controls anything in the 1957 Act, on the ground that the Public Utilities Act "is the supreme state law, even paramount to the state Constitution." Sections 22 and 23 of the California Constitution, Article 12, however, provide that nothing in the Constitution shall limit the power of the Legislature to confer powers on the Commission. In that sense only is the Public Utilities Act "the supreme state law." See Pacific Tel. & Tel. Co. v. Eshleman, 166 Cal. 640, 658, 137 P. 1119, 50 L.R.A.,N.S., 652.

The Commission's powers to certify passenger stage operations are derived entirely from the Legislature under section 23 of Article XII of the California Constitution.[14] That section provides: "Every private corporation * * * owning, operating, managing, or controlling any commercial railroad, interurban railroad, street railroad * * * and every common carrier, is hereby declared to be a public utility subject to *such control* and regulation by the * * * Commission *as may be provided by the Legislature.* * * * The * * * Commission shall have and exercise *such power and jurisdiction* to supervise and regulate public utilities, in the State of California, and to fix rates to be charged for commodities furnished, or services rendered by public utilities *as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the * * * Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution.*" (Italics added.)

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[13] Section 3.6(b) (The Authority may enter into contracts for superintendence of the system): "* * * Neither such contract, nor the corporation which is a party thereto with respect to its rights and duties thereunder, shall be subject to control or regulation by the Public Utilities Commission. * * *"

Section 4.6 (The Authority may condemn privately owned passenger stage operations): "* * * Sections 1401 to 1421, inclusive, of the Public Utilities Code shall not apply to any such condemnation of property of a privately owned public utility with the consent of such public utility at a price agreed to between the authority and such public utility, and the Public Utilities Commission of the State of California shall have no jurisdiction with respect thereto. * * *"

Section 4.21 (The Authority must purchase certain existing privately owned systems): "Section 851 of the Public Utilities Code shall not apply to any contract for sale or sale of an existing system or portion thereof or other action taken pursuant to this section, and the Public Utilities Commission of the State of California shall have no jurisdiction with respect thereto."

Section 6.10 (The Authority may purchase other privately owned systems): "* * * Section 851 of the Public Utilities Code shall not apply to such contract, or to any sale of assets or other action taken pursuant to such contract, and the Public Utilities Commission of the State of California shall have no jurisdiction with respect thereto."

In view of the plain language of this section it cannot reasonably be contended that the Legislature does not have the same power to modify or withdraw as it has to add to any jurisdiction previously conferred on the Commission. Had the Constitution vested jurisdiction in the Commission to grant certificates of public convenience and necessity, the Legislature, of course, could not "modify, curtail, or abridge" that jurisdiction (People v. Western Air Lines, Inc., 42 Cal.2d 621, 637, 268 P.2d 723, 724). Since the Commission's jurisdiction to grant such certificates is derived entirely from the Legislature, that body has plenary power to modify, curtail or abridge that jurisdiction. Cal.Const. Art. XII, § 23.

The order is annulled.

GIBSON, C. J., and SHENK, SCHAUER, SPENCE, McCOMB, and PETERS, JJ., concur.

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[14] Section 22 of Article XII provides:

"Said commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates, established by said commission than the rates, fares and charges which are specified in such tariff. The commission shall have the further power to examine books, records and papers of all railroad and other transportation companies; to hear and determine complaints against railroad and other transportation companies; to issue subpenas and all necessary process and send for persons and papers; and the commission and each of the commissioners shall have the power to administer oaths, take testimony and punish for contempt in the same manner and to the same extent as courts of record; the commission may prescribe a uniform system of accounts to be kept by all railroad and other transportation companies.

"No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Public Utilities Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Public Utilities Commission in this Constitution, and *the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution.*" (Italics added.)

The power to certify passenger stage operations or other operations is not among those given the Commission under this section, and the granting of such power by the Legislature or its subsequent modification or withdrawal would therefore not be "inconsistent with the powers conferred upon the Public Utilities Commission in this Constitution."

52 Cal.2d 149

Harry TRABIN, Respondent,
v.
TITLE INSURANCE AND TRUST COMPANY (a Corporation), as Executor, etc., et al., Appellants.

L.A. 25309.

Supreme Court of California,
In Bank.
May 19, 1959.

Action against wife and deceased husband's executors for balance allegedly due under oral contract on which spouses were joint obligors. The Superior Court, Los Angeles County, Roger Alton Pfaff, J., entered judgment for plaintiff, and defendants appealed. The Supreme Court, Gibson, J., the word "parties", in dead man's statute, has reference to those persons who "assert claims" against estate, and that defendant wife's testimony, which tended to establish her own responsibility as well as that of the estate, had properly been received in evidence.

Affirmed.

Opinion, 332 P.2d 124, vacated.

1. Witnesses 🔑139(11)

The word "parties", in dead man's statute, has reference to those persons who "assert claims" against estate; and in action against wife and deceased husband's executors for balance allegedly due under contract on which spouses were joint obligors, wife's testimony, which tended to establish her own responsibility as well as that of the estate, was properly received in evidence; overruling Moore v. Schofield, 96 Cal. 486, 31 P. 532, and Blood v. Fairbanks, 50 Cal. 420, and disapproving Roncelli v. Fugazi, 44 Cal.App. 249, 186 P. 373. West's Ann.Code Civ.Proc. § 1880, subd. 3.

2. Frauds, Statute of 🔑129(1)

Statute of frauds was no bar to enforcement of oral agreement where part payment had been made thereunder. West's Ann.Civ.Code, § 1624a.

3. Husband and Wife 🔑17

Where invoices were not prepared until after plaintiff had delivered furnishings in reliance on oral agreement, and such documents contained no provision indicating an intent by plaintiff to relinquish his rights against defendant-wife, it would be unreasonable to hold that his failure to procure her signature on invoices had had effect of releasing her from obligation under oral agreement. West's Ann.Civ.Code, §§ 1624a, 1724.

◆

Clement H. Jacomini, Los Angeles, Lever & Anker and Sidney Dorfman, Beverly Hills, for appellants.

Samuel Duskin and David S. Smith, Los Angeles, for respondent.

GIBSON, Chief Justice.

Plaintiff brought this action against Mr. and Mrs. Milton Kauffman, alleging that he had supplied household furnishings to them at an agreed price of $18,245.42 and that only $2,332.30 had been paid, leaving a balance of $15,913.12. The answer admitted the existence of an agreement between plaintiff and the Kauffmans but alleged that the price agreed upon was $10,000 and that the balance due plaintiff was $7,667.70. After the answer was filed, Mr. Kauffman died, and the action was continued against the executors of his estate and Mrs. Kauffman. The court found in favor of plaintiff, and defendants have taken this appeal.

Six invoices bearing plaintiff's letterhead and addressed to "Mr. and Mrs. Milton Kauffman" were introduced into evidence by plaintiff. Each of the invoices sets forth an itemized list of household furnishings and their respective prices, with an over-all figure below. At the bottom there appears the statement, "It is understood and agreed that title in above merchandise remains vested in seller until fully paid for," and the word, "Signed," followed by the signature, "Milton Kauffman." The over-all figures on the six invoices total $18,245.42.

When plaintiff sought to examine Mrs. Kauffman as an adverse party under section 2055 of the Code of Civil Procedure, the executors objected to her giving any testimony, claiming that she was disqualified as a witness by subdivision 3 of section 1880 of the Code of Civil Procedure.* The objection was overruled, and she testified that she and her husband requested plaintiff's son, Bernard Trabin, to visit their home in Carlsbad with a view to furnishing it at a cost not to exceed $30,000. Bernard Trabin went with Mr. and Mrs. Kauffman to their home where they pointed out the rooms to be furnished and described the kind of furniture desired. Mrs. Kauffman stated that all of the furnishings listed in the invoices were delivered by plaintiff and that the signature on the invoices was that of Mr. Kauffman. She acknowledged that only $2,332.30 of the total bill of $18,245.42 had been paid.

Bernard Trabin, whose sole financial interest in his father's business was that of a salaried employee, testified to substantially the same facts as those related by Mrs. Kauffman, except that he did not identify the signature on the invoices.

Defendants did not introduce any evidence.

Appeal of the Executors

[1] The evidence is clearly sufficient to support the judgment against the executors if Mrs. Kauffman's testimony was properly received. The executors urge, however, that her testimony was not admissible by reason of subdivision 3 of section 1880 of the Code of Civil Procedure. See footnote, at page 339 of 137 P.2d.

At early common law witnesses having a direct pecuniary or proprietary interest in the outcome of a case were disqualified on the theory that permitting them to testify would often lead to perjury which would go undetected and that more injustice would result from receiving their testimony than from excluding it. In the nineteenth century this general disqualification was recognized to be unsound and was abolished by legislative reform. However, in this country, unlike England, an exception was made, and the common law rule was to varying extents kept in force with respect to cases involving the estates of deceased persons by statutes like subdivision 3 of section 1880. The exception was apparently based on the view that, because the lips of a decedent were sealed, there was too great a danger that interested survivors would take advantage of his estate. (For historical discussion see 2 Wigmore on Evidence (3d ed. 1940), pp. 674, 695–701; Chadbourn, History and Interpretation of the California Dead Man Statute: A Proposal for Liberalization, 4 U.C.L.A. L.Rev. 175.) Writers in the field of evidence have vigorously attacked such legislation, reasoning in substance that it represents an anomalous retention of a discredited common law doctrine and is productive of injustice at least as great as, and more concrete than, the evil sought to be prevented. (See 2 Wigmore on Evidence (3d ed. 1940), pp. 695–701; McCormick on Evidence, pp. 142–144; Chadbourn, History and Interpretation of the California Dead Man Statute: A Proposal for Liberalization, 4 U.C.L.A.L.Rev. 175, 206 et seq.; Hale, The California "Dead Man's Statute," 9 So.Cal.L.Rev. 35, 43 et seq.)

This court has been reluctant to extend the effect of subdivision 3 of section 1880 beyond what is compelled by its language and in many cases has narrowly construed the statute against the disqualification of a witness and in favor of the admissibility of evidence. See Todd v. Martin, 4 Cal. Unrep. 805, 810–811, 37 P. 872; Chase v. Evoy, 51 Cal. 618, 619–620; In re Estate

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* Section 1880 of the Code of Civil Procedure provides: "The following persons cannot be witnesses: . . . 3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person."

of Wieling, 37 Cal.2d 106, 109, 230 P.2d 808; Jones v. Clark, 19 Cal.2d 156, 161, 119 P.2d 731; Porter v. Van Denburgh, 15 Cal.2d 173, 176–177, 99 P.2d 265; Badover v. Guaranty Trust, etc., Bank, 186 Cal. 775, 781, 200 P. 638; Cullen v. Bisbee, 168 Cal. 695, 698–699, 144 P. 968; Wadleigh v. Phelps, 149 Cal. 627, 640, 87 P. 93; Bollinger v. Wright, 143 Cal. 292, 296, 76 P. 1108; Calmon v. Sarraille, 142 Cal. 638, 642, 76 P. 486; City Savings Bank v. Enos, 135 Cal. 167, 172, 67 P. 52; Joost v. Sullivan, 111 Cal. 286, 297, 43 P. 896; Myers v. Reinstein, 67 Cal. 89, 91–92, 7 P. 192.

There is no sound basis for concluding that subdivision 3 of section 1880, when considered in the light of its background and purpose, disqualifies a witness in Mrs. Kauffman's position. She was joined as a defendant on the theory that she and Mr. Kauffman were joint obligors, and her testimony tended to establish her own responsibility, as well as that of the estate. In these circumstances the possibility that plaintiff might seek satisfaction from the estate rather than from Mrs. Kauffman could not have furnished a motive for falsehood. She could have served her own interests best by denying the validity of the claim, and the fact that she nevertheless testified in support of plaintiff was a strong indication that she was telling the truth. In keeping with the purpose of the statute the word "Parties" in subdivision 3 of section 1880 must be construed as referring to those persons who *assert claims* against an estate. Todd v. Martin, 4 Cal.Unrep. 805, 810–811, 37 P. 872. Mrs. Kauffman was not such a party, and the trial court properly refused to disqualify her as a witness.

The cases of Moore v. Schofield, 96 Cal. 486, 31 P. 532, and Blood v. Fairbanks, 50 Cal. 420, are overruled, and the case of Roncelli v. Fugazi, 44 Cal.App. 249, 186 P. 373, is disapproved insofar as it is inconsistent with the views expressed in this opinion.

Other claims of error made by the executors rest on the premise that Mrs. Kauffman's testimony was inadmissible, and they need not be discussed.

Appeal of Mrs. Kauffman

[2, 3] The record also warrants the judgment against Mrs. Kauffman. Her admissions in the answer, as well as her testimony and that of Bernard Trabin, amply support the court's determination that there was an oral agreement which was as binding upon her as upon Mr. Kauffman. Since the Kauffmans admittedly made a part payment, there is no merit in the claim that the statute of frauds prevents enforcement of the agreement. See Civ.Code, §§ 1624a, 1724. There is likewise no merit in the argument that the invoices were intended to constitute a written agreement superseding the oral one and that, since Mrs. Kauffman did not sign the invoices, she is not liable. The invoices were not prepared until after plaintiff had delivered the furnishings in reliance on the oral agreement, and the documents did not contain any provision indicating an intent by plaintiff to relinquish his rights against Mrs. Kauffman. It would be unreasonable in these circumstances to hold that the fact that Mrs. Kauffman did not sign the invoices had the effect of releasing her from her obligation under the oral agreement.

The judgment is affirmed.

SHENK, TRAYNOR, SCHAUER, SPENCE, McCOMB, and PETERS, JJ., concur.

170 Cal.App.2d 318

William JOHNSON, Plaintiff and Appellant,
v.
A. SCHILLING & COMPANY, a corporation, McCormick & Company, Inc., a corporation, Defendants and Respondents.

Civ. 18208.

District Court of Appeal, First District,
Division 2, California.
May 12, 1959.
Rehearing Denied June 11, 1959.
Hearing Denied July 10, 1959.

Action for injuries sustained by sheet-metal worker, employed by firm hired by defendant to install roofing material, insulation and flashing upon existing roof on building owned by defendant, when glass pane of skylight, which was already cracked, broke under his weight and he fell through skylight. The Superior Court, City and County of San Francisco, H. A. van der Zee, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Dooling, J., held that as to unsafe conditions of employment which exist in place of employment at time it is turned over by owner to independent contractor, owner is an "employer" within meaning of Labor Code section, that as such owner is obligated to furnish place of employment which is "safe for the employees therein", and that such statutory duty cannot be satisfied by mere warning or obviousness.

Judgment reversed.

1. Trial 🔑139(1)

If there was any evidence in testimony or offer of proof which would support a judgment for plaintiff, it was error to direct verdict for defendants.

2. Negligence 🔑32(2.10)

As employee of contractor in carrying out his contract with owner, employee was invitee of owner.

3. Negligence 🔑32(1), 50, 52

Landowner owes duty to invitee not to expose him to risk of injury from dangerous condition of which landowner knows or reasonably should know and which is not obvious, or actually known, to invitee; owner's duty being either to remedy such dangerous condition or to warn invitee thereof.

4. Negligence 🔑136(22)

In action for injuries sustained by sheet-metal worker, employed by firm hired by defendant to install roofing material, insulation and flashing upon existing roof on building owned by defendant, when glass pane of skylight, which was already cracked, broke under his weight and he fell through skylight which he was using to steady himself, plaintiff's evidence and offer of proof were sufficient to take case against defendant to jury.

5. Master and Servant 🔑316(1), 327

As to unsafe conditions of employment which exist in place of employment at time it is turned over by owner to independent contractor, owner is an "employer" within meaning of Labor Code section, and as such owner is obligated to furnish place of employment which is "safe for the employees therein"; and such statutory duty cannot be satisfied by mere warning or obviousness, those questions going only to question of injured party's contributory negligence. West's Ann.Labor Code, §§ 6304, 6400.

6. Master and Servant 🔑330(2)

In action for injuries sustained by sheet-metal worker, employed by firm hired by defendant to install roofing material, insulation and flashing upon existing roof on building owned by defendant, when glass pane of skylight, which was already cracked, broke under his weight and he fell through skylight, evidence of unsafe condition of roof for man working thereon at time it was turned over to contractor, without regard to its obvious character, was relevant to question of whether defendant, as "employer" under Labor Code section, had violated statutory duty of care; and this included as well cracked and unsafe condition of glass in skylight and whether, under circumstances, railing should have been constructed about it or boards laid across it for protection of workmen on roof. West's Ann.Labor Code, § 6304.

7. Evidence 🔑513(2)

In action for injuries sustained by sheet-metal worker, employed by firm hired by defendant to install roofing material, insulation and flashing upon existing roof on building owned by defendant, when glass pane of skylight, which was already cracked, broke under his weight and he fell through skylight, expert testimony going to establish structurally unsafe character of roof for man working thereon should not have been excluded. West's Ann.Labor Code, § 6304.

8. Negligence 🔑124(3)

In action for injuries sustained by sheet-metal worker, employed by firm hired by defendant to install roofing material, insulation and flashing upon existing roof on building owned by defendant, when glass pane of skylight, which was already cracked, broke under his weight and he fell through skylight, relevant evidence of general custom and usage of owners of buildings was admissible not as establishing measure of due care but as evidence to be considered by jury on that question.

9. Evidence 🔑506

Expert testimony is not inadmissible merely because it coincides with ultimate issue of fact.

10. Statutes 🔑219

Courts are bound by statute, not by individual opinions of its interpretation.

11. Appeal and Error 🔑766

Where briefs purported to set out certain sections of San Francisco Building Code but without transcript references, reviewing court could not consider questions raised concerning possible application of sections to case. West's Ann.Labor Code, § 6304; West's Ann.Rules on Appeal, rule 15(a).

◆

Jack H. Werchick, San Francisco, for appellant.

Boyd, Taylor, Nave & Flageollet, San Francisco, for respondents.

DOOLING, Justice.

Plaintiff appeals from a judgment in favor of defendants entered upon a verdict directed by the court.

Appellant was a sheet-metal worker employed by East Bay Sheet Metal Company. That company had a contract to furnish the labor and materials for the installation of roofing material, insulation and flashing upon an existing roof on a building owned by respondent A. Schilling & Company. The building had a sloping corrugated iron roof with an 18-degree pitch and had been constructed in 1938. On December 21, 1953, appellant was instructed by his foreman to install flashings around a skylight on this roof. He had only been on the roof about one hour when he started to walk to the top of the roof to get certain tools and material. He took two or three steps, slightly missed his balance and attempted to put his hand on the frame of the skylight to steady himself. His hand missed the frame and rested on a glass pane of the skylight which was already cracked and which broke under his weight so that he fell through the broken skylight suffering the injuries of which he complains.

After the case had been partly tried the trial judge indicated that appellant had not made a case against respondents and the balance of appellant's evidence was presented to the court by an offer of proof outside the presence of the jury, none of which the court ruled would be sufficient to establish any liability.

Appellant argues on appeal:

1. That the evidence and offer of proof would sustain a judgment against respondents on the common-law liability of an owner to an invitee;

2. That the court erred in ruling that the owner did not owe the statutory duties of an employer to appellant under Labor Code sections 6304, 6400 and 6401;

3. That the court erred in ruling that certain sections of the San Francisco Building Code were not applicable.

[1-3] If there is any evidence in the testimony or offer of proof which would

support a judgment for the plaintiff it was, of course, error to direct a verdict for defendants. Burlingham v. Gray, 22 Cal.2d 87, 94, 137 P.2d 9. The appellant as employee of the contractor in carrying out his contract with the owner is an invitee of the owner. Austin v. Riverside Portland Cement Co., 44 Cal.2d 225, 232, 282 P.2d 69. The landowner owes a duty to such invitee not to expose him to a risk of injury from a dangerous condition of which the landowner knows or reasonably should know and which is not obvious, or actually known, to the invitee. His duty is either to remedy such dangerous condition or warn the invitee thereof. Austin v. Riverside Portland Cement Co., supra, 44 Cal.2d 225, 233, 282 P.2d 69.

There was testimony that the roof was steep, wet and shaky with lumps of tar thereon. These facts were, perhaps, as obvious to appellant as to the owner. However, in the offer of proof, there was an offer to prove that the witness Washington after the accident had examined the roof and found "that the corrugated iron was not resting directly on the beams or the trusses * * * that there was a space between the corrugated iron and the supports beneath it at that point; that these spaces were located in the area where the plaintiff was walking at the time of the accident * * *"; that this space was readily observable from the interior of the building but could not be seen from the roof; and that the presence of this space made the roof more unstable at this point and created a greater hazard to a man walking thereon.

[4] We are satisfied that this proffered evidence with the inferences which the jury might have reasonably drawn therefrom would have supported a finding that the plaintiff's injuries were proximately caused by a defect of which the plaintiff was not aware but which either was, or should in the exercise of reasonable care have been, known to the defendant landowner. This conclusion is sufficient in itself to necessitate a reversal. However the necessities of a new trial require us to consider the other questions presented.

[5, 6] Section 6302 Labor Code defines "place of employment" as "any place, and the premises appurtenant thereto, where employment is carried on * * *." Section 6304 reads: "'Employer' shall have the same meaning as in section 3300 and shall also include every person having direction, management, control, or custody of any employment, *place of employment*, or any employee." (Emphasis ours.) This definition is obviously intended to enlarge the meaning of "employer" beyond its usual meaning for the purposes of Division 5 of the Labor Code in which it is found and which deals specifically with "Safety In Employment." Where an owner of real property contracts to have work done on his property such property becomes a place "where employment is carried on" and hence a place of employment under the definition of section 6302. Since the owner has "custody and control" of his own property, he then has custody and control of a "place of employment" and hence is an "employer" within the definition of section 6304. This was the specific holding of the court in Maia v. Security Lumber & Concrete Co., 160 Cal.App.2d 16, 324 P.2d 657. In that case a safety order adopted pursuant to the authority of Division 5 of the Labor Code required a safety control to be locked in the "off" position or the machine to be disconnected from its source of power, and certain cautionary signs to be placed thereon, whenever any repairs were being made on a power-driven machine. While such a machine was being repaired by the employee of a contractor with the owner the machine was started resulting in injury to the contractor's employee. The trial court instructed that this safety order applied only to the contractor and not to the owner unless the jury found that the repair work was undertaken by the employee of the owner as well as the contractor's employee. Following a defendant's verdict the District Court of Appeal reversed for error in this instruction holding that within the meaning of section

6304 the landowner was an employer and the jury should have been instructed that the duty of carrying out the safety order rested on it as well as on the contractor. 160 Cal.App.2d at page 20, 324 P.2d 657. A hearing was denied by the Supreme Court.

Cases such as Deorosan v. Haslett Warehouse Co., 165 Cal.App.2d 599, 332 P.2d 422, and Hard v. Hollywood Turf Club, 112 Cal.App.2d 263, 246 P.2d 716, are distinguishable on their facts. In those cases the dangerous condition was created by the injured employee's immediate employer during the course of the work, a condition over which the owner in the one case and the general contractor in the other did not have "direction, management, control, or custody" within the meaning of section 6304 Labor Code. Deorosan v. Haslett Warehouse Co., supra, 165 Cal.App. 2d 599, 332 P.2d 422. It was because of this distinction that the court in Atherley v. MacDonald, Young and Nelson, 142 Cal. App.2d 575, 298 P.2d 700, stressed the fact that the owner in that case was also in fact the builder, with the contractor acting as its agent, since the dangerous condition in Atherley was created by the contractor in the course of construction, a matter over which the owner *as owner* would not have had "direction, management, control, or custody."

To make the owner responsible as "employer" under section 6304 as construed by the cases the dangerous condition must exist in the place of employment when it is turned over to the contractor. It was on this ground that we held in the recent case of Decker v. S. H. Kress Co., 168 Cal.App. 2d 365, 335 P.2d 952, 337 P.2d 163, that section 6400 of the Labor Code had no application to an obvious danger from an appliance furnished to the employee of an independent contractor by the owner, where the employee had complete control of the appliance and its use and the dangerous condition was not inherent in the appliance itself but only in the manner in which the employee chose to use it with full knowledge of the danger which he was thereby permitting to exist.

We are satisfied that as to unsafe conditions of employment which exist in the place of employment at the time that it is turned over by the owner to an independent contractor the owner is an "employer" within the meaning of Labor Code section 6304. This being so the owner's duties as "employer" under 6304 were obviously greater than his common-law duties as invitor to an invitee. As "employer" under that section he was obliged under section 6400 Labor Code to furnish a place of employment which was "safe for the employees therein." This is a statutory duty which cannot be satisfied by mere warning or obviousness, those questions going only to the question of the injured party's contributory negligence. Atherley v. MacDonald, Young and Nelson, supra, 142 Cal. App.2d at page 587, 298 P.2d 700.

It follows that all of the evidence of the unsafe condition of the roof for a man working thereon at the time it was turned over to the contractor, without regard to its obvious character, was relevant to the question of whether respondents, as "employer" under section 6304, had violated the statutory duty of care; and this as well included the cracked and unsafe condition of the glass in the skylight and whether under the circumstances a railing should have been constructed about it or boards laid across it for the protection of workmen on the roof.

[7–10] It follows that the expert testimony going to establish the structurally unsafe character of the roof for a man working thereon should not have been excluded. In this connection for the guidance of the court on retrial of this action we should point out: (1) that relevant evidence of the general custom and usage of the owners of buildings is admissible not as establishing the measure of due care but as evidence to be considered by the jury on that question (Pauly v. King, 44 Cal.2d 649, 655, 284 P.2d 487); (2) that "in this state we have followed the modern tendency and have refused to hold that expert opinion is inadmissible merely because it coincides with an ultimate issue of fact." People v. Cole, 47 Cal.2d 99, 105, 301 P.2d 854, 857, 56 A.L.R.2d 1435; and (3) that "[c]ourts are bound by the statute, not by individual opinions of its interpretation" (Maia v. Security Lumber & Concrete Co., supra, 160 Cal.App.2d 16, 21, 324 P.2d 657, 660).

[11] The briefs purport to set out certain sections of the San Francisco Building Code but without transcript references. See Rules on Appeal, Rule 15(a). This court cannot take judicial notice of municipal ordinances (18 Cal.Jur.2d, Evidence, § 28, pp. 451–452) and absent the San Francisco Building Code from the record we cannot consider the questions raised concerning its possible application to this case.

Judgment reversed.

KAUFMAN, P. J., and DRAPER, J., concur.

Hearing denied; SCHAUER, SPENCE and McCOMB, JJ., dissenting.

WOOD (FRED B.) J., participating in place of TRAYNOR, J.

170 Cal.App.2d 600

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Mitchell ROSENBERG and Leon Morris Ostroff, Defendants.

Mitchell Rosenberg, Defendant and Appellant.

Cr. 6448.

District Court of Appeal, Second District, Division 1, California.

May 25, 1959.

Prosecuton for burglary. The Superior Court of Los Angeles County, William E. Fox, J., entered judgment of conviction and order denying motion for new trial and one of the defendants appealed. The District Court of Appeal, White, P. J., held that facts and circumstances shown in evidence reasonably justified determination by trier of fact that defendant was either one of the actors in the crime or aided and abetted his codefendant in its perpetration.

Affirmed.

1. Burglary 🔑41(1)

Evidence was sufficient to sustain finding that defendant was either one of the actors in the burglary or aided and abetted his codefendant in its perpetration, and hence was guilty of burglary in the second degree. West's Ann.Pen.Code, § 459.

2. Criminal Law 🔑1159(2)

Where evidence, circumstantial or otherwise, establishes that a crime has been committed and that the accused was perpetrator thereof, an appellate tribunal in reviewing a conviction will not appraise weight of evidence but will consider and determine only whether, upon face of evidence, it can be justly held that trier of fact could not have found sufficient facts to warrant inference of guilt.

3. Criminal Law 🔑741(2)

Question of whether or not person who was present at the time and place of commission of the crime has aided or abetted therein is one of fact for the trier of fact to decide from all of the circumstances.

4. Criminal Law 🔑1159(6)

Where circumstantial evidence was susceptible of two reasonable inferences, one looking to the guilt of the accused and the other to his innocence, evidence did not furnish grounds for setting aside judgment of conviction.

David C. Marcus, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Philip C. Griffin, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

The District Attorney of Los Angeles County filed an information wherein defendants were charged with the crime of burglary (Penal Code, sec. 459) in that they wilfully and unlawfully entered the residence of Michael Fioritto with the intent to therein commit theft. As to appellant Rosenberg, the information charged a prior conviction for passing counterfeit money in the state of New York.

Appellant entered a plea of not guilty and denied the prior conviction. Trial by jury was duly waived and the People's case was submitted on the transcript of evidence adduced at the preliminary examination, each side reserving the right to offer additional evidence. After reading the aforesaid transcript and hearing the testimony of appellant in his own behalf, the court adjudged him guilty as charged in the information and found the offense to be of the second degree. Appellant's motion for a new trial was denied and he was sentenced to state prison. As to the allegation of a prior conviction no finding was made. It was however stipulated in connection therewith that the court could consider the probation report which contained evidence of the prior felony conviction. From the judgment and order denying his motion for a new trial, appellant prosecutes this appeal.

As to the factual background surrounding this prosecution the record reflects that on March 5, 1958 Michael Fioritto lived at 2217 North Commonwealth, in the city of Los Angeles. About 9:30 or 10:00 o'clock that morning he left the house believing that everything was locked. His wife remained in the house. He returned to the house about 2:30 that afternoon to find that someone had apparently broken into the house. Missing from the house were his wife's mink stole, his suitcase, some silverware and two hats. Altogether this property was worth from $2,500 to $3,000. Mr. Fioritto had not given permission to either appellant or Ostroff to enter his home.

About 1:30 on the afternoon of March 5, 1958, Levon Kalanter who lived across the street from Mr. Fioritto at 2222 North Commonwealth, Los Angeles, observed from his dining room window an automobile parked in front of Mr. Fioritto's residence. It was a "no parking at any time" area. He observed a man step out of the driver's side of the car and examine the underside thereof, then step around to the back of the vehicle and look under it. "All the time he was doing this, he was also looking up and down North Commonwealth Avenue, rather anxiously, rather hurriedly. At the same time, all his movements were hurried." The witness identified appellant as that man. Mr. Kalanter left his house, entered his automobile, backed it out of the driveway, and took a "good look" at the man, the vehicle and its license number. The automobile was a 1948 gray Plymouth coupe, license number GSB 789. The witness did not see the co-defendant Ostroff.

Harold T. Weil, a Los Angeles city police officer, attached to the burglary detail of the detective bureau and one of the investigating officers on this case, testified that at approximately 9:00 a. m. on March 6, 1958, he had a conversation with appellant at the latter's home. Present was Mr. Slattery, a police officer. The statements made by appellant during this conversation were made freely and voluntarily. Officer Weil asked appellant if he owned the Plymouth parked in the rear of his house which appellant readily admitted. When asked if he had loaned that vehicle to anyone in the last two or three days, appellant replied that he had not. When asked if he had driven the vehicle on March 5th, appellant stated that he had. When asked if he was with anybody on that date, appellant stated that he was with a friend of his but could not recall his name; that this person and himself were obtaining subscriptions for a Los Angeles newspaper.

On the afternoon of March 6, 1958, Officer Weil had a conversation with defendant Ostroff, after which the officer took Ostroff to the police station, at which place the latter said, "he would like to converse in my presence with the other defendant, the defendant Rosenberg". Officer Weil testified that thereupon, "I then took the defendant Ostroff down to the cell at the Hollywood station, whereupon he had a conversation with the defendant Rosenburg, at which time they both agreed to relate to us as to a burglary that had been committed on Commonwealth in the Los Feliz area of Hollywood."

At this time defendant Ostroff stated that he would assist the police in the recovery of the property, whereupon he directed them to a home in the Montebello area where they recovered a mink stole and three stone marten furs. When asked if these came from the home up on Commonwealth Ostroff stated that they did. When asked if he had any pawn tickets, Ostroff stated that he had a pawn ticket for a suitcase pawned on Main Street which was taken from the home also, at the same time as were the furs.

On March 8, 1958, Officer Weil had a conversation with appellant. The statements made by him at this time were free and voluntary. Appellant said, "I guess you've got me and we would like to clear up this whole mess." Appellant then said that between him and Ostroff the articles had been divided up and placed in pawn; that each one of them had placed separate articles in pawn after committing this burglary. Then appellant assisted the police in the recovery of further property that was taken in this burglary.

Sworn as a witness in his own behalf, appellant testified that on March 5, 1958 he was employed by a newspaper as a solicitor, and in connection with that employment was engaged in soliciting for subscriptions in the neighborhood of 2217 North Commonwealth, Los Angeles, along with Ostroff. He had been thus employed for the two months prior. Their method of operation was to take different sides of the street and move from door to door selling subscriptions, then meeting from time to time to move to different locations. Appellant was having no success and decided to leave the neighborhood. So he drove down Commonwealth to pick up Ostroff and see "how he was doing". Appellant turned the corner on to Commonwealth and when halfway down the block he saw Ostroff walk to the house in question, knock at the door and enter. Appellant parked and waited. He waited about ten minutes not knowing previously nor at that time that Ostroff was going to enter this particular house or why he was in the house. Appellant supposed that he had merely been invited in, possibly for refreshments. Ostroff came out of the house with a suitcase and a couple of packages and said, "Let's go". So appellant drove off, not knowing how Ostroff procured these articles or what he had done in the house. Appellant said, "I haven't done anything in the neighborhood. Let's go somewhere else." Ostroff said, "Let's go downtown." On the way downtown appellant learned that these articles had been taken from the house, did not belong to Ostroff and that he intended to pawn them. Downtown, Ostroff got out of the car and pawned the articles. Then appellant drove Ostroff home. Appellant did not at any time enter the house in question. When asked if he had made the statement, "I guess you have got me and we would like to clear up this whole mess", appellant testified, "Well, when I said, 'you got me' I said 'you arrested me'. There was nothing to talk about. 'You arrested me'. There was nothing to talk about. 'You got me. It looks like I am going to jail'. That was it." When again asked if he made the particular statement, "We would like to clear up this whole mess", appellant replied, "I can help all I can, whatever he was going to ask me. I didn't know what he was going to ask me. He didn't ask me anything." Appellant denied that at any time he stated to the officer that any of the articles taken in the burglary had been divided between himself and his co-defendant Ostroff, or that he had pawned any of such articles. Appellant testified that he merely related to the officers what knowledge he had obtained from his co-defendant Ostroff. He denied the testimony of the officer that he assisted in the recovery of any of the stolen property.

[1, 2] Appellant's sole contention on this appeal is that the evidence lacks sufficient substantiality to sustain the trial judge's

finding of guilt. With this contention we cannot agree. As was said by this court in People v. Mangiameli, 149 Cal.App.2d 642, 644, 645, 308 P.2d 762, 764:

"* * * Where evidence, circumstantial or otherwise, establishes that a crime has been committed and that the accused was the perpetrator thereof, an appellate tribunal in reviewing a conviction will not appraise the weight of the evidence but will consider and determine only whether upon the face of the evidence it can justly be held that the trier of facts could not have found sufficient facts to warrant the inference of guilt. In other words, it must be made clearly to appear that the conclusion arrived at in the court below is unsupported by any substantial evidence upon any hypothesis whatever. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. As was said in the case just cited, 15 Cal.2d at page 681, 104 P.2d at page 780: '"We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict." If the circumstances reasonably justify the verdict of the jury, the opinion of the reviewing court that those circumstances might also reasonably be reconciled with the innocence of the defendant will not warrant interference with the determination of the jury.'"

[3, 4] Bearing in mind the rules enunciated in the case just cited, the only question is whether in the instant case, the facts and circumstances shown in evidence reasonably justified the determination by the trial judge that appellant was either one of the actors in the crime or aided and abetted his co-defendant in its perpetration. The question of whether or not a person who was present at the time and place of the commission of a crime has aided or abetted therein is one of fact for the trier of fact to decide from all the circumstances proven (People v. Silva, 143 Cal.App.2d 162, 169, 300 P.2d 25; People v. Beaulieu, 144 Cal.App.2d 536, 540, 301 P.2d 304). Because circumstancial evidence is susceptible of two reasonable inferences, one looking to the guilt of the accused and the other to his innocence, does not furnish grounds for setting aside a judgment of conviction.

We have herein set forth in detail the evidence presented at the trial, and it is unnecessary to here repeat it. Suffice it to say we are satisfied that from all the evidence in this case it could reasonably be inferred by the trial judge that appellant actively participated in the burglary, or that he had knowledge of the burglary and aided and abetted its perpetration by acting as a "lookout", driving the automobile and giving direct aid to his co-defendant in effecting an escape. Either of the above purposes mentioned would be sufficient upon which to base a reasonable inference that appellant was aiding and abetting in the commission of the burglary here in question. Such a conclusion is strengthened when consideration is given to statements made by appellant to the police.

Appellant relies upon the case of People v. Hill, 77 Cal.App.2d 287, 175 P.2d 45, wherein the conviction of the driver of a getaway vehicle was reversed. The cited case is easily distinguishable from the one now engaging our attention. In the Hill case there was no showing that the accused had any previous knowledge of the intent of his companions, in fact they exculpated him entirely by their testimony that he knew nothing of their intention to commit a robbery. The police officers testimony disclosed only that the appellant had driven his companions to the location of the crime and drove them away when they returned to the automobile. There was evidence that appellant went to sleep while the others perpetrated the robbery. And, appellant made no admissions as did appellant in the case at bar. When the evidentiary features of the Hill case are compared with those present in the case now before us, the factual distinctions are at once apparent. As pointed out by respondent, "Appellant (herein) drove to the scene and acted suspiciously. He made no comment when his partner suddenly ran from a house with a suitcase and package. Then he drove him to a downtown pawnshop and admitted that he split the loot and pawned it. He admitted he was connected with the burglary by clear implication from his statements to the police." We are persuaded that these circumstances coupled with the statements made by appellant to the police furnish a sufficient basis to support the finding of guilt. People v. Dickerson, 131 Cal.App.2d 49, 53, 279 P.2d 991; People v. Hopkins, 125 Cal.App. 457, 459, 460, 13 P.2d 975; People v. Richardson, 10 Cal.App.2d 379, 381, 51 P.2d 1114.

The judgment and the order denying defendant's motion for a new trial are, and each is affirmed.

FOURT and LILLIE, JJ., concur.

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170 Cal.App.2d 441

INTERNATIONAL INVESTMENT CO., Inc., Robert E. Hatch and Lucille F. Athearn, Plaintiffs and Appellants,

v.

Helen King CHAGNON, as Executrix of the Estate of Gladyce C. Merola, Deceased, Defendant and Respondent.

Civ. 18259.

District Court of Appeal, First District, Division 2, California.

May 19, 1959.

Rehearing Denied June 18, 1959.

Hearing Denied July 15, 1959.

Action to recover amount allegedly due for legal services rendered to defendant. From an order of the Superior Court, City and County of San Francisco, Preston Devine, J., granting defendant's motion for change of venue, the plaintiffs appealed. The District Court of Appeal, O'Donnell, J. pro tem., held that where complaint alleged that a written contract was entered into in San Francisco under which plaintiffs promised to perform certain legal services on behalf of defendant, who was a resident of Los Angeles County, for a stipulated fee and that in addition to services rendered under such agreement, defendant had become indebted to plaintiffs for other legal services rendered to defendant, but plaintiffs did not allege in what county the implied-in-fact contract concerning such other services was entered into, plaintiffs did not bring themselves within exception as to place of trial relative to contract actions and court did not abuse its discretion in denying plaintiffs' motion for a continuance in order to prepare an affidavit showing that the implied contract for other services was entered into in San Francisco, when plaintiffs were apprised by defendant's notice of motion and supporting points and authorities of points defendant proposed to make at hearing on motion for change of venue from Superior Court of San Francisco to Superior Court of Los Angeles County.

Order affirmed.

1. Pleading 🔑45
Venue 🔑72

Where complaint seeking recovery of attorneys' fees for services rendered alleged that written contract was entered into in San Francisco under which plaintiffs promised to perform certain legal services on behalf of defendant, who was a resident of Los Angeles County, for a stipulated fee and that in addition to services rendered under such agreement, defendant had become indebted to plaintiffs for other legal services rendered to defendant, but plaintiffs did not allege in what county implied-in-fact contract concerning such other services was entered into, plaintiffs did not bring themselves within exception as to place of trial relative to contract actions and court did not abuse its discretion in denying plaintiffs' motion for a continuance in order to prepare an affidavit showing that implied contract for other services was entered into in San Francisco when plaintiffs were apprised by defendant's notice of motion and supporting points and authorities of points defendant proposed to make at hearing on motion for change of venue from Superior

Court of San Francisco to Superior Court of Los Angeles County. West's Ann.Code Civ.Proc. § 395 and subd. (1).

2. Venue 🔑21

Generally, defendant is entitled to have actions tried in county of his residence, and right of plaintiff to have action tried elsewhere is the exceptional right, and must find its justification in the terms of some statute, and it is duty of plaintiff to bring himself within some exception if he can, otherwise defendant's right is to have the case tried in county of his residence. West's Ann.Code Civ.Proc. § 395(1).

3. Venue 🔑68

Where complaint seeking recovery of attorneys' fees for services rendered alleged that a written contract was entered into in San Francisco under which plaintiffs promised to perform certain legal services on behalf of defendant, who was a resident of Los Angeles County, for a stipulated fee and that in addition to services rendered under such agreement, defendant had become indebted to plaintiffs for other legal services rendered to defendant, but plaintiffs did not allege in what county the implied-in-fact contract concerning such other services was entered into, court erred in holding that deficiencies in complaint relating to venue could not be cured by an affidavit. West's Ann.Code Civ.Proc. § 395 and subd. (1).

4. Appeal and Error 🔑966(1)
Continuance 🔑7

An application for continuance is addressed to sound discretion of trial judge whose ruling will not be disturbed except for the most cogent reasons.

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Robert E. Hatch, Leighton Hatch, Athearn & Athearn, San Francisco, for appellants.

Edythe Jacobs, Los Angeles, for respondent.

O'DONNELL, Justice pro tem.

This is an appeal from an order granting defendant's motion for a change of venue from the Superior Court of the City and County of San Francisco to the Superior Court of Los Angeles County. Since the appeal in this case was perfected, the defendant and respondent Gladyce C. Merola has died. Helen King Chagnon, as executrix of her estate has been substituted as respondent in the place of Gladyce C. Merola. When we speak herein of the defendant we are referring to the decedent Gladyce C. Merola.

[1] The complaint alleges the execution by the individual plaintiffs, on the one hand, and defendant on the other, of a written contract whereunder the individual plaintiffs, who are attorneys-at-law, promised to perform certain legal services on behalf of defendant, and defendant promised to pay them a stipulated fee therefor. The complaint further alleges that the contract was executed in the City and County of San Francisco. Paragraph VIII of the Complaint reads:

> "In addition to those services rendered by plaintiffs Hatch and Athearn under the terms of said agreement, defendant has become indebted to them in the additional sum of twenty-five thousand dollars ($25,000.00) as and for the reasonable value of other legal services rendered by said plaintiffs to and at the special instance and request of said defendant and for her use and benefit."

Plaintiffs pray for judgment against defendants for the amount allegedly due them for attorneys' services.

Defendant's motion for an order changing the place of trial was made and granted on the ground that defendant was a resident of Los Angeles County. Section 395, subd. 1 of the Code of Civil Procedure provides that "the county in which the defendants, or some of them, reside at the commencement of the action, shall be a proper county for the trial of the action." The same subparagraph further provides that, "* * * When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed unless there is a special contract in writing to the contrary." It is plaintiffs' contention that the complaint in this action shows on its face that the contract was executed in the City and County of San Francisco, and that the lower court therefore erred in transferring the action to Los Angeles County for trial.

It is obvious that paragraph VIII of the Complaint, quoted above, although not set out in a separate count, states a cause of action that is entirely independent of, and different from, the cause of action based on the written contract.

[2] "The general rule is that a defendant is entitled to have actions tried in the county of his residence. The right of the plaintiff to have the action tried elsewhere is the exceptional right, and must find its justification in the terms of some statute. It is the duty of a plaintiff to bring himself within some exception if he can—otherwise, the defendant's right is to have the case tried in the county of his residence." Goossen v. Clifton, 75 Cal.App.2d 44, 47, 170 P.2d 104, 107. And on page 49 of 75 Cal.App.2d, on page 108 of 170 P.2d of the same case the court says that "* * * if a plaintiff unites in one complaint two causes of action, in one of which the defendant has the right to have it tried in the county of his residence, in the other of which he is not, the defendant is entitled to have the cause tried in the county of his residence." To the same effect see Tringali v. Vest, 106 Cal.App.2d 720, 236 P.2d 171; and Crofts & Anderson v. Johnson, 101 Cal.App.2d 418, 225 P.2d 594.

While in the case at bar plaintiffs have alleged that the express written contract was executed in San Francisco, they have not alleged in what county the implied-in-fact contract described in paragraph VIII of the complaint was entered into. As to this cause of action, therefore, plaintiffs have not brought themselves within the exception relative to contract actions set forth in section 395 of the Code of Civil Procedure.

Appellants contend however, that they could have shown, by means of affidavit, that the implied contract was in fact entered into in San Francisco but that the judge of the lower court, entertaining the erroneous opinion that the plaintiffs could not go outside the complaint to show where the implied contract was entered into, refused to grant plaintiffs a continuance in order to prepare such an affidavit, and that such refusal constituted an abuse of discretion on the part of the lower court.

[3] In the memorandum of points and authorities which accompanied defendant's notice of motion (timely service of which on plaintiffs is not questioned) she made entirely clear the basis of the motion, pointing out that the complaint contained two distinct causes of action and that, under the rules we have discussed above, she was entitled to a change of venue to the county of her residence. At the hearing of the motion and after defendant had completed her presentation, the court commented that the complaint did not allege sufficient facts to retain venue in San Francisco. Plaintiffs thereupon asked for a continuance until 2 o'clock p. m. of the same day (the motion was called for hearing at 11 o'clock a. m.) in order to prepare and file an affidavit to show that the implied contract was entered into in San Francisco. The court commented that in its opinion such an affidavit would be unavailing—that it must appear from the complaint itself that the case comes within the exception provided in Code of Civil Procedure, section 395, relating to contract actions. Plaintiffs questioned the correctness of the court's opinion on this point. In response to the court's inquiry, plaintiffs admitted that they did not have at hand any citation

of authorities on this point. Plaintiffs requested a continuance of five minutes in which to secure citations on the point from the law library. The request was denied. The court thereupon denied plaintiffs' earlier motion for a continuance to 2 o'clock on two distinct grounds: 1) that the deficiencies in the complaint relating to venue could not be cured by an affidavit, and 2) that no sufficient showing of why such an affidavit had not been prepared and ready for presentation at the time fixed for the hearing had been made.

The trial court was in error in denying the motion on the first ground. "The fact entitling a party to try the action in a county other than defendant's residence where the complaint is silent on the subject may be shown by affidavit * * *" Turner v. Simpson, 91 Cal.App.2d 590, 591, 205 P.2d 423. We must therefore consider and decide whether or not the lower court abused its discretion in denying the motion for continuance on the second ground.

[4] It is settled that an application for a continuance is addressed to the sound discretion of the trial judge whose ruling will not be disturbed except for the most cogent reasons. Slaughter v. Zimman, 105 Cal.App.2d 623, 624, 234 P.2d 94; Schlothan v. Rusalem, 41 Cal.2d 414, 260 P.2d 68. In the instant case plaintiffs were apprised by defendant's notice of motion and supporting points and authorities of the points defendant proposed to make at the hearing. From the moving papers it was obvious that the sufficiency of the implied contract allegations of the complaint to bring the case within the contract actions exception of Code of Civil Procedure, section 395 was being put in issue. Yet, at the time of the hearing of the motion, plaintiffs were admittedly not prepared to meet this issue. Plaintiffs did not present to the lower court any reason for not being prepared to meet defendant's motion other than that they thought their complaint was adequate (which it obviously was not, as we have already seen) to retain venue in San Francisco. The judge of the lower court very pertinently observed, "I think a motion for change of venue is a complete challenge to counsel for plaintiff, and that counsel has to be ready." The judge went to the heart of the matter when he said, "After all, a motion for change of venue doesn't end your case, it simply sends it to another county. * * *"

We think it was not unreasonable of the judge of the lower court to expect plaintiffs to be fully prepared to meet the issues raised by defendant's motion at the time for which it was set for hearing. We therefore conclude that there was no abuse of discretion by the lower court in denying plaintiffs' motion for a continuance to 2 o'clock.

The order is affirmed.

DOOLING, Acting P. J., and DRAPER, J., concur.

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170 Cal.App.2d 481

A. W. HOLTMAN, Plaintiff and Respondent,
v.
Opal LEDFORD, et al., Defendants,
Norman E. Thompson, Defendant and Appellant.
Civ. 9516.

District Court of Appeal, Third District, California.
May 19, 1959.

Action was brought to recover deficiency due on note, which had been signed by defendant and others, following sale of mortgaged tractor and logging trailer. The defendant contended that he was a surety and hence had a valid defense under statutory provision that a surety may require his creditor to proceed against the principal, or to pursue any other remedy in his power which the surety cannot himself pursue, and which would lighten his burden, and that if in such case the creditor neglects to do so, the surety is exonerated to extent to which he thereby prejudiced. The Superior Court, Yuba County, Warren Steel, J., entered judgment in favor of the plaintiff, and the defendant appealed. The Third District Court of Appeal, Peek, J., held that defendant was confronted with the presumption that where one signs a note with others as maker, it will be presumed that they are comakers, and liable as such, and not as principal and surety, and that evidence sustained finding of Superior Court that defendant signed as maker and not as surety.

Judgment affirmed.

1. Bills and Notes ⚿495

In action to recover deficiency due on note, which had been signed by defendant and others, following sale of mortgaged tractor and logging trailer, wherein defendant contended that he was a surety and hence had a valid defense under statute providing that a surety may require his creditor to proceed against principal, or to pursue any other remedy in his power which surety cannot himself pursue, and which would lighten his burden, and if in such case the creditor neglects to do so, surety is exonerated to extent to which he is thereby prejudiced, defendant was confronted with presumption that where one signs a note with others as maker, it will be presumed that they are comakers, and liable as such, and not as principal and surety. West's Ann.Civ.Code, § 2845.

2. Bills and Notes ⚿519

In action to recover deficiency due on note, which had been signed by defendant and others, following sale of mortgaged tractor and logging trailer, wherein defendant contended that he was a surety and hence had a valid defense under statute providing that a surety may require his creditor to proceed against principal, or to pursue any other remedy in his power which surety cannot himself pursue, and which would lighten his burden, and if in such case the creditor neglects to do so, surety is exonerated to extent to which he is thereby prejudiced, evidence sustained trial court's finding that defendant signed as a maker and not as a surety. West's Ann.Civ.Code, § 2845.

3. Bills and Notes ⚿49

In action to recover deficiency due on note, which had been signed by defendant and others following sale of mortgaged tractor and logging trailer, defense that defendant was an accommodation maker and hence entitled to all defenses of suretyship was not available to defendant, where defendant had received value for signing the note. West's Ann.Civ.Code, § 3110.

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Gray & Hewitt, Marysville, for appellant.

Victor L. Huber, Marysville, for respondent.

PEEK, Justice.

This is an appeal by defendant from a judgment in favor of plaintiff on a promissory note.

The defendant owned an equity in a G.M.C. tractor and a logging trailer which he had previously purchased from the plaintiff. A bank held an installment note secured by a chattel mortgage on both vehicles which were signed by the defendant alone. Subsequently the defendant sold the tractor and trailer to one O. T. Ledford. A new note and chattel mortgage were drawn and signed by Ledford, his wife, and the defendant. Plaintiff signed the new note and mortgage as guarantor, and the old note and mortgage were cancelled by the bank as paid in full. Ownership of the vehicles was transferred to Ledford, as was the policy of insurance covering the same.

Shortly thereafter Ledford was involved in a collision which resulted in his death and in extensive damage to the tractor. At that time only one payment had been made on the note. Apparently on the authorization of Mrs. Ledford bids were taken for repairs, and the job was awarded to a Sacramento firm. Following the completion of repairs, demand was made upon defendant for payment of the $500-deductible and also for payments then in default on the note. Receiving no reply from defendant, the plaintiff paid the deductible and took possession of the tractor, bringing it to his Marysville shop. He also took the trailer which had been left in the open and had been stripped of its tires and wheels. He made extensive repairs to both the tractor and trailer to put them in salable condition. He also paid off the note and mortgage to the bank and subsequently sold the outfit. Thereafter he instituted the present action to recover the deficiency due on the note following the sale.

Defendant's primary contention is that he was a surety and hence had a valid defense under the provisions of Civil Code, section 2845, which reads: "A surety may require his creditor to proceed against the principal, or to pursue any other remedy in his power which the surety can not himself pursue, and which would lighten his burden; and if in such case the creditor neglects to do so, the surety is exonerated to the extent to which he is thereby prejudiced." His argument in support of such contention is predicated upon acts which he testified he took; that is, he requested the bank to apply the insurance against the indebtedness and to let him sell the damaged truck and trailer and pay the bank the difference. Much of his testimony in this regard was either contradicted or was stated to have occurred after the vehicles had been repaired.

Whether or not the defense set forth in said section was available to defendant was necessarily dependent on whether or not he was a surety, which question in turn was one of fact for the trial court. Upon the question so presented, the trial court specifically found that defendant signed the note as a maker and not as a surety.

[1, 2] It must be conceded that defendant signed the note together with the Ledfords. Thus, at the outset he is confronted with the presumption that where, as here, one signs a note with others as maker, "'* * * it will be presumed that they are co-makers, and liable as such, and not as principal and surety.'" In re Estate of Chamberlain, 44 Cal.App.2d 193, 200, 112 P.2d 53, 57, 934. The record further shows that defendant received $1,000 as consideration for the sale and for signing the note. He also received a further direct benefit from that act in that he was thereby released from sole liability on the original note and in effect substituted therefor a joint and several obligation with two other makers. Additionally there was testimony from a bank officer that had there been any suggestion that defendant was to have signed as a surety, an entirely different document would have been used. It follows that the finding of the trial court that defendant signed as maker and not as surety is amply supported by the record.

[3] Defendant, however, contends in effect that even if he cannot be considered as a surety, he was an accommodation maker and hence entitled to all defenses of suretyship. Under the facts of this case it would appear to be unnecessary to determine whether or not suretyship defenses are available to an accommodation maker. There can be no doubt that defendant did receive value for signing the note. Furthermore, at the trial his counsel specifically stated, and properly so, that such defense would not be urged since the defense of accommodation maker is not available to one who has received value. Civil Code, sec. 3110; In re Estate of Chamberlain, supra, 44 Cal.App.2d at page 201, 112 P.2d 53. See also Williams v. Reed, 48 Cal.2d 57, 64, 307 P.2d 353.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

170 Cal.App.2d 594

**George F. KINCAID, Contestant and Respondent,
v.
Henry C. BERG, Defendant and Appellant.**

**In the Matter of the Contested Election of Henry C. BERG for the Office of Supervisor of the Fourth Supervisorial District.
Civ. 18491.**

District Court of Appeal, First District, Division 1, California.
May 25, 1959.

Election contest. From a judgment of the Superior Court, County of San Benito, Anthony Brazil, J., cancelling a certificate of election, an appeal was taken. The District Court of Appeal, Hanson, J. pro tem., held that where, at primary election, there were only two candidates for office of member of board of supervisors and, after illegal votes were discounted, each candidate had received the same number of votes, neither candidate was entitled to certificate of election, and names of both candidates were to appear on ballot at general election.

Judgment affirmed.

Elections ⚿126(7), 172

Where, at primary election, there were only two candidates for office of member of board of supervisors and, after primary, election contest filed by one of candidates resulted in determination that, after illegal votes were discounted, each candidate had received the same number of votes, neither candidate was entitled to certificate of election, and names of both candidates were to appear on ballot at general election.

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Wyckoff, Parker, Boyle & Pope, Hollister, for appellant.

Rosendale, Thomas & Muller, Salinas, for respondent.

HANSON, Justice pro tem.

This is an appeal from a judgment in an election contest which cancelled a certificate of election issued to the appellant by the Board of Supervisors of San Benito County and adjudged that neither the appellant nor the respondent had been elected at the primary election.

At the primary election in June 1958 there were only two candidates for the office of member of the Board of Supervisors of San Benito County from the Fourth Supervisorial District; they were appellant Berg and the respondent Kincaid. After a canvass of the votes, the board of supervisors concluded that Berg had been elected at the primary. Thereafter respondent initiated this action to contest appellant Berg's election and requested a recount of all votes cast and that he, the respondent, be adjudged to have been elected to said office. All grounds of contest except the ground that illegal votes were cast were abandoned by respondent or stricken by the court. Upon the trial of this action, the trial court found that two votes cast for appellant and one vote cast for respondent were illegal votes, reducing the number of votes cast for appellant to 203, and reducing the number of votes cast for respondent to 203. Accordingly, the trial court determined that the election resulted in a tie; that neither appellant nor respondent was elected at said election; and the court declared null and void the certificate of election issued to appellant.

Since the submission of the case to us for decision, the Supreme Court of this state on the fifth day of this month filed its opinion in the case of Immel v. Langley, 52 Cal.2d ——, 338 P.2d 385, which likewise involved a tie vote at the primary as determined by the trial court in that case. As that case is on all fours with the instant case its holding is binding upon us.

In that case, the Supreme Court on the facts, concluded that the trial court, having found that a tie vote resulted, should have ordered that the names of both candidates go on the ballot at the general election in November. Accordingly, the Supreme Court reversed the judgment dismissing the action with instructions to cancel and annul the certificate of election.

In the instant case the trial court cancelled the certificate of election and found and adjudged that neither candidate was elected. The judgment accords with the view expressed by the Supreme Court.

Judgment affirmed.

BRAY, P. J., and FRED B. WOOD, J., concur.

WEST KEY NUMBER SYSTEM

170 Cal.App.2d 669

In the Matter of the ESTATE OF Naomi UNDERWOOD, also known as Naomi West, Deceased.

Claire SANTIAGO, Petitioner and Appellant,

v.

Bert E. UNDERWOOD, Objector and Respondent.

Civ. 18453.

District Court of Appeal, First District, Division 2, California.

May 26, 1959.

Proceeding to determine heirship. The Superior Court, Monterey County, Anthony Brazil, J., ordered distribution of the intestate portion of decedent's wholly separate property in equal shares to decedent's adopted daughter and surviving husband. The daughter appealed. The District Court of Appeal, Draper, J., held that under the circumstances, the trial court did not abuse his discretion when he denied the adopted daughter's motion to amend her statement so as to deny that the surviving husband was in fact the surviving husband.

Affirmed.

1. Pleading 🔑236(4)

In proceeding to determine heirship, denial of petitioner's motion to amend her statement, made after cross-examination of objector, was not abuse of discretion, in absence of any showing of excusable mistake or surprise on part of petitioner.

2. Pleading 🔑236(3)

Amendment of pleading during trial is not a matter of right, but rests in sound discretion of trial court.

3. Appeal and Error 🔑837(4)

In reviewing denial of motion to amend petition, District Court of Appeal could look to the evidence to determine if claims sought to be pleaded by the amendment had any merit.

4. Divorce 🔑414

Where decedent's adopted daughter petitioned for determination of heirship and decedent's surviving husband testified that after his marriage to decedent his former wife had procured a California divorce and adopted daughter sought leave to amend her statement so as to deny that husband was in fact the surviving husband, evidence relating to circumstances under which husband had procured a Nevada divorce from former wife prior to his marriage to decedent failed to show the invalidity of the Nevada divorce and therefore the adopted daughter was not prejudiced by the refusal to permit amendment of her statement.

5. Divorce 🔑386(1, 2)

Where husband procured Nevada divorce from prior wife and married a subsequent wife, the prior wife procured a California divorce and the subsequent wife drew checks in payment of alimony awarded to prior wife by the California decree, the subsequent wife was estopped to assert invalidity of the Nevada divorce decree and the subsequent wife's adopted daughter, was also estopped to assert the invalidity of the Nevada divorce in proceeding to determine heirs of subsequent wife, who had died.

Harold D. Mefford, Hayward, for appellant.

J. T. Harrington, Salinas, for respondent.

DRAPER, Justice.

This is a proceeding to determine heirship. The trial court found that the sole surviving heirs are an adopted daughter and the surviving husband, and that the estate is wholly separate property of decedent. It ordered distribution of the intestate portion thereof in equal shares to daughter and husband (Prob.Code, § 221). The daughter appeals, contending that the marriage of respondent and decedent was invalid, and that Underwood thus has no right to share in distribution.

Appellant's petition alleged that respondent was the surviving husband of decedent, but relied upon a claimed antenuptial agreement as a bar to his sharing in the estate. The claim based upon this agreement has been abandoned on appeal. Respondent had been divorced in Nevada before marrying decedent. In cross-examination of respondent, it developed that Ellen, his former wife, had secured a divorce decree from him in Monterey County after respondent's marriage to the decedent, Naomi. Appellant then sought leave to amend her statement so as to deny that respondent was the surviving husband. The court took the motion to amend under submission and permitted introduction of evidence upon the validity of the Nevada divorce, subject to motion to strike.

The evidence so taken showed that respondent was divorced from Ellen May 22, 1950 and on the same day married Naomi in Reno. He and Naomi lived together as man and wife from that date until her death December 31, 1956. Respondent had worked in Reno before February, 1950. In February, 1950 (no date specified) he went to Reno and remained there until about a week after his divorce and remarriage, when he and Naomi left Reno for Salinas. Shortly thereafter he returned to Reno, where he worked for about 10 months before going back to Salinas, where he and Naomi lived until her death. After May 22, 1950, Ellen filed an action for divorce against respondent in Monterey County. Respondent answered, alleging the Nevada divorce, but later abandoned defense of the action. Interlocutory decree was granted to Ellen. Respondent was asked "At the time that you married Naomi West you were not free to marry?", and answered "Not according to California laws, as I understand it."

[1, 2] After hearing this testimony, the court denied appellant's motion to amend her petition and statement of interest, and struck the testimony relating to the Nevada divorce, on the ground that the information as to invalidity of that divorce "was as readily available to you before we entered into trial or appeared in court" as at time of trial.

This ruling was sound. Appellant made no showing of excusable mistake or surprise. Amendment of a pleading during trial is not a matter of right, but rests in the sound discretion of the trial court. Richter v. Adams, 43 Cal.App.2d 184, 187, 110 P.2d 486; Dibblee v. Title Ins. & Trust Co., 55 Cal.App.2d 286, 130 P.2d 775. We find no abuse of discretion in denying appellant leave to amend.

[3, 4] Even if it were erroneous, the ruling in no sense prejudiced appellant. We may look to the evidence to determine whether the claim sought to be pleaded by appellant had any merit. Davies v. Symmes, 49 Cal.App.2d 433, 122 P.2d 102. Before ruling, the trial court heard all the evidence offered relating to the claimed invalidity of respondent's marriage to decedent. But the evidence so admitted wholly fails to show such invalidity. The mere fact that respondent and decedent returned to Salinas a week after their Reno marriage is not determinative, particularly in view of the fact that respondent shortly returned to Reno and worked there for some time. There is no evidence that respondent went to Reno solely for the purpose of procuring a divorce. The fact that Ellen later procured a California divorce does not, alone, show invalidity of the Reno divorce

and is not res judicata of the continued existence of the first marriage to the date of the second divorce. Rediker v. Rediker, 35 Cal.2d 796, 800–804, 221 P.2d 1, 20 A. L.R.2d 1152, of course, respondent's testimony that he was not free to marry Naomi "according to California laws, as I understand it" is a mere conclusion of law, not binding upon the court. Also, it related to his opinion as of the date of his testimony in 1957, rather than at the date of the remarriage in 1950 or at any other date during his marriage to Naomi. Since the evidence did not show invalidity of the Nevada divorce, appellant was not prejudiced by the court's striking that evidence and refusing to permit amendment of appellant's statement.

[5] If, however, the evidence did show invalidity of the Nevada divorce, it also showed an estoppel to assert such invalidity. It is doubtful that the actions of Naomi to and including the date of her marriage to respondent effected an estoppel within the rule stated in Rediker v. Rediker, supra, 35 Cal.2d at page 805, 221 P.2d at page 6. She was not a party to the Nevada divorce action nor is there any showing that she aided respondent to procure the decree or had knowledge of anything indicating that it might be invalid. However, the evidence does show that after the subsequent Monterey County decree Naomi drew checks in payment of the alimony there awarded to Ellen. Thus if the Monterey County decree of September, 1950 determined the invalidity of the Nevada divorce, as appellant contends, there can be little question that the conduct of Naomi, after knowledge of the Monterey decree, would estop her under the rationale of the established rule. Rediker v. Rediker, supra; Estate of Davis, 38 Cal. App.2d 579, 101 P.2d 761, 102 P.2d 545; Dietrich v. Dietrich, 41 Cal.2d 497, 505, 261 P.2d 269; In re Estate of Shank, 154 Cal.App.2d 808, 811, 316 P.2d 710. Estoppel of Naomi, the ancestor, operates to bar assertion of invalidity of the Nevada decree by her heir, appellant. In re Estate of Coleman, 132 Cal.App.2d 137, 140, 281 P.2d 567; Estate of Shank, supra, 154 Cal.App. 2d at page 812, 316 P.2d at page 712.

Order affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

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170 Cal.App.2d 524

PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Joseph Albert SIMPSON, Gary Fenton Taylor, and Francine Donalee Stevens,
Defendants and Appellants.
Cr. 1407.

District Court of Appeal, Fourth District, California.
May 20, 1959.
Hearing Denied July 15, 1959.

Prosecution for possession of narcotics. The Superior Court of San Diego County, John A. Hewicker, J., entered judgments of conviction and order denying new trial and two of the three defendants appealed. The District Court of Appeal, Griffin, J., held that where police officers found defendants sleeping in automobile on street and questioned them and took them to the police station where defendants were arrested for vagrancy and other charges and police officer while removing automobile from street to garage where vehicles were impounded discovered narcotics in vehicle, under circumstances, search of vehicle was not unreasonable and unlawful, and narcotics seized were admissible in evidence.

Affirmed.

1. Criminal Law 🔑394.4(12)
Searches and Seizures 🔑3(10)

Where police officers noticed defendants, one of whom was a girl whom he suspected was under age, sleeping in automobile parked on street, and questioned defendants and took them to police station, where they were arrested for vagrancy and other charges, and police, in removing vehicle from street to impounding garage, discovered narcotics in vehicle, under the circumstances, search was not unreasonable and unlawful, even though made without a warrant, and evidence obtained thereby was admissible.

2. Arrest ⚷70

When an arrest is made without a warrant by a police officer, person arrested must without unreasonable delay be taken before the nearest or most accessible magistrate in the county in which arrest is made. West's Ann.Pen.Code, § 849.

3. Automobiles ⚷349

Police officer is authorized to remove vehicle from highway to nearest garage when he arrests any person driving or in control of vehicle for an alleged offense or where such officer is by the Vehicle Code or other law required to take person arrested immediately before a magistrate. West's Ann.Vehicle Code, § 585(b) (5).

4. Criminal Law ⚷1166½(12)

In prosecution for possession of narcotics, action of trial judge in making some unnecessary statements and in cross-examining defendants and other witnesses to a great extent did not, when record was considered as a whole, amount to prejudicial misconduct. West's Ann.Health & Safety Code, § 11500.

5. Criminal Law ⚷371(1), 673(4)

In prosecution of three defendants for possession of narcotics, evidence bearing on one of the defendant's prior arrests on a narcotics charge while using the same automobile involved in present prosecution was admissible as to such defendant, and where court instructed jury that evidence was only admissible as to such defendant and not as to the others, other defendants were not prejudiced in relation to reception of that evidence.

6. Criminal Law ⚷829(3)

In prosecution for possession of narcotics, suggested instructions of defendants respecting the required knowledge that contraband was in automobile or under defendants' control were adequately covered by instructions given by the court. West's Ann.Health & Safety Code, § 11500.

7. Poisons ⚷9

In prosecution for possession of narcotics, evidence was sufficient to show defendants had actual knowledge that contraband narcotics were in the automobile in which they were found by police officers and were under their control. West's Ann. Health & Safety Code, § 11500.

◆

Thomas J. Fanning, San Diego, for appellant Joseph Albert Simpson.

Gary Fenton Taylor, in pro. per.

Enright, Von Kalinowski & Levitt, by William B. Enright, San Diego, for appellant Francine Donalee Stevens.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and Jack K. Weber, Deputy Atty. Gen., for respondent.

GRIFFIN, Presiding Justice.

Defendants-appellants Joseph A. Simpson, Gary F. Taylor, and Francine D. Stevens were convicted by a jury of the crime of possession of narcotics (marijuana) on May 31, 1958, in violation of section 11500 of the Health and Safety Code. Defendant Simpson was charged with a prior conviction of a felony (grand larceny, first degree) in New York on June 5, 1947. What disposition, if any, was made of this charge is not indicated by the record. On request of defendant Taylor, his appeal was dismissed on January 19, 1959. Defendant Stevens appealed from the judgment and order denying a new trial, and defendant Simpson appealed from the judgment.

The principal contentions involved on this appeal are (1) that the court erroneously received in evidence a narcotic obtained by means of unreasonable search and seizure; (2) that the trial judge made various comments and rulings throughout the trial indicating bias and prejudice on his part and by reason thereof a fair hearing of the defendants was precluded; (3) that the evidence is insufficient to support the verdict; and (4) that the court erred in not instructing the jury on significant points of law.

The evidence shows defendant Simpson (aged about 28) and defendant Taylor (aged 18) lived in Oregon. Taylor owned a 1953 Chevrolet sedan with an Oregon license on it. Defendant Stevens (aged 18 on May 7, 1958) and Miss Struzen (aged 17) were considering leaving their homes in Oregon. Defendant Stevens said she intended to visit her father in Arcata, in Northern California. Miss Struzen decided to run away from home and go with her. She knew defendant Simpson and suggested he take her to California. Defendant Simpson contacted defendant Taylor and they all left that same day in Taylor's automobile. Taylor was told that defendant Stevens agreed to pay the gasoline expenses and that Miss Struzen suggested they first go by way of Mexico. They left on May 27, and went to Reno, Las Vegas and Tucson, crossed the international border at Nogales, Mexico, obtained visa cards, and continued on to Hermosillo, where they stayed in a hotel overnight and returned to the border the next day. The previous nights they slept in the car while it was being driven by the two men drivers. They ate groceries obtained on the way. The girls said no improprieties occurred on the trip. On their return to Nogales, Mexico, Taylor ordered some "tea" (vernacular for marijuana) from a nearby taxi driver, and said he paid 25¢ for it. He testified he smoked a part of it in a pipe belonging to defendant Simpson, while waiting for the other occupants of his car to return, and that thereafter they drove to San Diego, arriving about midnight on the 31st of May. They pulled the car up to the curb in the lower part of town and all fell asleep. About 7 a. m. Officer Justice's suspicion became aroused. Miss Struzen was in the front seat next to the driver Taylor. Defendant Simpson (Negro) was asleep in the back seat on the left-hand side and defendant Stevens was asleep on the right-hand side. This officer testified he noticed the immaturity of the girls and he was suspicious they were juveniles under the age of 18 years and thought they may have run away from home. He observed the clothing they were wearing and they looked soiled "as though they had slept" in them. He awakened all of them and asked for identification. Both girls said they were 18. Defendant Stevens produced a vaccination certificate obtained at the border indicating she was 18. He questioned them as to the reason they were thus parked and they replied they were resting, just having returned from Mexico, and that they had originally started from Portland, Oregon. The car had Oregon license plates. A superficial observation was made of the car through the windows, and considerable clothing was strewn about in it. The officer asked Taylor if he would mind if he looked in the trunk of the car and Taylor opened it for him. Several suitcases were therein contained. No minute search was made. The officer called headquarters about the situation and defendants were asked to come out of their car. Subsequently they were asked if they would go to the police headquarters and answer a few questions. They left in the police car. There is a question as to whether Taylor's car was left locked at that time. The wind-wing had been broken out. To unlock it was not difficult. On arrival at the station defendants were questioned. After relating their stories, which were conflicting, the officer placed charges of vagrancy (violation of sec. 647, subd. 3 of the Penal Code, roaming about from place to place without any lawful business) against all of the defendants. The additional charge of suspicion of violation of the Mann Act, 18 U.S.C.A. § 2421 et seq. and contributing to the delinquency of a minor was placed against the men defendants and all were lodged in jail. Miss

Struzen was placed in the Juvenile Hall as a runaway. At the interview, one of the officers recognized defendant Taylor and asked if he had been implicated in a burglary and possession of marijuana on a prior occasion in San Diego about September, 1957, which involved this same car with an Oregon license. He denied it. A record so indicating was obtained and shown to him. In addition it showed he was then an escapee from Juvenile Hall. He still denied this but later admitted it. One narcotic officer then said he suspicioned they were transporting marijuana in that car and he wanted to search it. Another officer said he was going out to impound the car and take it to the garage where they ordinarily kept impounded cars. They left together. This latter officer put his hand through the broken wind-wing and opened the left front door. He definitely testified he was returning to the car to impound it. It does appear that he did not make this positive statement at the preliminary hearing, but said he was returning to search it. He said he seated himself at the wheel and then, readying himself to take an inventory of the impounded car, as required, he looked up and saw something in a brown paper bag placed over the visor, and that he examined it and it had the appearance of marijuana. Another brown paper bag containing some substance was found tucked between the right rear seat cushion and the back cushion, partially protruding. Marijuana seeds and debris were found on the floor of the car, both front and back, and also an envelope containing a picture of Miss Struzen, together with other personal articles belonging to her, as well as an envelope addressed to defendant Stevens showing her father's address. All this evidence was taken by the officers. The car was taken to the garage. The officers returned to the station and again interviewed defendants. Defendant Taylor then admitted he paid 25¢ for some "tea" in Nogales, Mexico and said he and Simpson smoked part of it in a pipe the officers found in the car over the right visor.

At the trial he denied defendant Simpson had a part in the smoking of the marijuana or in its possession. Taylor said he knew nothing about the bag of marijuana on the back seat but said Miss Struzen, in her sleep overturned a bag of marijuana which was lying in the car, and that seeds and debris fell out and he put the bag over the visor. Simpson was asked if he ever had associations with the police and he replied he had once been a "look-out for a mugging". After the marijuana was shown to Taylor one officer asked him if he could go and make further search of his car and he told him he could do so. Marijuana seeds and debris were found on the floor in various places and the pipe was discovered over the visor. A chemist testified this debris, as well as the contents of the bags and the pipe, contained marijuana substance. It is conceded no search warrant was obtained to search the car at any time.

[1] The question is, under this showing, was the trial court nevertheless authorized to admit exhibits in evidence over objection on the ground that the search of the car was unreasonable and unlawful. Defendants' argument is that the search was without consent, that from the evidence produced the officers were not justified in believing the offense here charged was being committed, either prior to or at the time the car was searched; and that such search was not an incident to the arrest; that no offense was committed in the presence of the officers; and that defendants' arrest for vagrancy and other charges indicated was, under the evidence, unauthorized, citing such authority as People v. Wilson, 145 Cal.App.2d 1, 301 P.2d 974; People v. Sanders, 46 Cal.2d 247, 294 P.2d 10; People v. Blodgett, 46 Cal.2d 114, 293 P.2d 57; People v. Molarius, 146 Cal.App.2d 129, 303 P.2d 350; Hernandez v. Superior Court, 143 Cal.App.2d 20, 299 P.2d 678; and People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, 50 A.L.R.2d 513.

[2, 3] To defendants it might appear, as claimed by them, that their entire escapade

was free from any suspicion or immoral propensities and the officer's suspicion that they were vagrants or violators of the Juvenile Court Law was unjustified. We would not want to hold that under this evidence the officer's suspicions were unfounded. Without discussing other arguments why it might be readily held, as the trial court did, that the search was authorized, it sufficiently appears that defendants were arrested and charged with a crime and were being held in jail on such charges. When an arrest is made without a warrant by a peace officer, the person arrested must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the arrest is made. Sec. 849, Penal Code. Defendant Taylor's car was left on the street under the conditions above described. A police officer is authorized to remove a vehicle from the highway to the nearest garage, when he arrests any person driving or in control of a vehicle for an alleged offense, or where such officer is by the Vehicle Code or other law required to take the person arrested immediately before a magistrate. Sec. 585, subd. (b), subsec. (5) Vehicle Code. It thus appears the officers had a lawful right to impound the car and that, at the time, they had taken possession of it for that purpose. In People v. Ortiz, 147 Cal.App. 2d 248, 305 P.2d 145, it was held, quoting from the syllabuses:

> "A police officer who, on investigating a parked car during an early morning hour, discovered defendant lying on the front seat asleep, shook him and 'finally got him awake,' and then, after discovering that his breath was alcoholic and that defendant 'staggered badly, as he walked to the rear of his car,' arrested him for 'drunk auto.,' could reasonably conclude that defendant was 'in control' of the vehicle, and not just a passenger, at the time of arrest, and hence was entitled to impound the car (Veh.Code, §§ 585, subd. (b), 585.2) and thus take possession of it.
>
> "Where a police officer was properly making an inventory of the contents of a parked automobile prior to impounding it, marijuana found in a car during the course of making such inventory was not discovered as a result of an unreasonable search and therefore was not inadmissible in evidence.
>
> "Where an automobile is lawfully in the custody of a peace officer, marijuana or other contraband articles contained in it are legally in his (possession) and their discovery by him is not a result of an unreasonable search.
>
> "An officer who is making a reasonable search of an automobile is not required to close his eyes to contraband he discovered simply because it is disconnected with the initial purpose of the search or not related to the crime for which defendant was arrested."

See also People v. Baker, 135 Cal.App. 2d 1, 4, 286 P.2d 510; People v. Melody, 164 Cal.App.2d 728, 331 P.2d 72; People v. Cook, 146 Cal.App.2d 1, 303 P.2d 35; 28 Op.Atty.Gen. 185; People v. Hickens, 165 Cal.App.2d 364, 331 P.2d 796; People v. Ball, 162 Cal.App.2d 465, 328 P.2d 276; People v. Collier, 169 Cal.App.2d 19, 336 P.2d 582; People v. Adame, 169 Cal.App. 2d 587, 337 P.2d 477.

There is evidence that Taylor did authorize the officers, in the first instance, to open up and search the trunk of the car; that after finding the marijuana he again authorized another officer to go and search his car. Seeds and debris and the pipe were obtained under this authorized search. We conclude, under the circumstances here related, that no unlawful or unreasonable search of the car was made. The authorities relied upon by defendants are factually dissimilar.

Complaint is next made as to the conduct of the trial judge in reference to his rulings and numerous statements made during the trial of the case. In this connection it is argued, in effect, that the court rendered a service to the prosecution on cross-examining the defendants and in an endeavor to produce evidence of justification for the search; that the court's conduct amounted to advocacy and deprived defendants of a fair hearing, citing People v. Huff, 134 Cal.App.2d 182, 285 P.2d 17.

[4] Without specifying each incident it does appear that the trial judge did make some unnecessary statements and cross-examined the defendants and other witnesses to a great extent, particularly when he thought an untruth was being related, or at least when he believed their explanation of certain facts was inconsistent with other facts fairly well established. This is not necessarily reversible error when it is done for the purpose indicated. Of course, care should be taken in so doing not to throw the weight of the judge's judicial position either for or against the defendant. From an examination of the entire record we cannot say that the conduct of the trial judge, and statements made by him, when considered as a whole, actually amounted to prejudicial misconduct justifying a reversal. Although it might reasonably appear to defendant that the court was endeavoring to aid the prosecutor in establishing some additional reasonable suspicion for the arrest of the defendants by the officer in the first instance, it appears that these efforts, if it should be so claimed, were thwarted by the honesty of the officer himself. The dialogue was as follows:

> Examination by the Court: "* * * Officer, they were asking about some other ordinance, do you know they have an ordinance about sleeping in the streets? A. No, sir, I am not acquainted, Your Honor, with that ordinance.
>
> "The Court: Do you know of any ordinance called the curfew where people are supposed to get off the streets at certain ages? A. Yes, sir, I am acquainted with that.
>
> "The Court: Did you have that in mind when you picked up these folks? * * * A. Your Honor, I had more in mind that the girls were run-a-ways from Portland without permission from their parents to be in this area."

In view of the answer given, no prejudicial error resulted.

[5] Objection was made as to the evidence admitted bearing on defendant Taylor's prior arrest on a narcotics charge while in this same automobile. It was received over objections as bearing on the question of knowledge and intent. As to Taylor it would appear that it was properly admitted. People v. Hatch, 163 Cal. 368, 378, 125 P. 907; People v. Copeland, 169 Cal.App.2d 713, 338 P.2d 1; People v. George, 169 Cal.App.2d 740, 338 P.2d 240.

The court instructed the jury, at defendant's request, that this line of evidence was only admissible as to defendant Taylor and not as to the other defendants (appellants herein). Taylor did not perfect his appeal. Appealing defendants were not prejudiced in relation to the reception of this evidence under the limitation given.

[6, 7] Defendant Stevens also argues that the court erred in not instructing the jury, on its own motion, more fully on the law as to the required knowledge on her part that the contraband was in the automobile or under her control, citing People v. Gory, 28 Cal.2d 450, 170 P.2d 433; and People v. Foster, 115 Cal.App.2d 866, 253 P.2d 50. The record is not clear whether defendants offered additional instructions on this subject which were not covered by instructions given. The argument is that the court failed to instruct that actual knowledge and possession are necessary for the offense, and that mere presence is insufficient. The court did instruct the jury to the effect that:

> "* * * a person is in possession of a narcotic when it is under his dominion and control and he knows that it is a narcotic, and knows that it either is carried on his person, or is in his presence and custody, or, if not on his person or in his presence, the possession thereof is immediate, accessible and exclusive to him, provided, however, that two or more persons may have joint possession of a narcotic if

> jointly and knowingly they have the dominion, control and exclusive possession I have described."

It appears to us that the suggested instructions of defendants were adequately covered by the instructions given by the court on the subject, and that the facts shown were sufficient to show such knowledge on the part of both appealing defendants. People v. Hoffman, 195 Cal. 295, 312, 232 P. 974.

Judgments and order affirmed.

MUSSELL and SHEPARD, JJ., concur.

Hearing denied; PETERS, J., dissenting.

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170 Cal.App.2d 446

PEOPLE of the State of California, Plaintiff and Respondent,

v.

William E. SCOTT, Defendant and Appellant.

Cr. 3398.

District Court of Appeal, First District, Division 2, California.

May 19, 1959.

Rehearing Denied June 18, 1959.

Hearing Denied July 15, 1959.

Prosecution for unlawful sale of narcotics. The Superior Court, City and County of San Francisco, Harry J. Neubarth, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Kaufman, P. J., held that evidence, including testimony that an informer was stripped and searched, given marked money, and sent into a residence occupied by defendant, and that shortly thereafter, informer returned, and delivered narcotics to the officers, and was again searched, and found to be without any other narcotics, and to no longer have had possession of the marked money, and that a portion of the marked money was found in defendant's room in the house in question, sustained conviction, even though two other people were in the house in question.

Judgment affirmed.

1. Arrest 🔑63(4)

Under the Penal Code, an officer may make an arrest without a warrant when a felony has, in fact, been committed, and he has reasonable cause for believing the person arrested to have committed it. West's Ann.Pen.Code, § 836, subd. 3.

2. Arrest 🔑63(4)

"Reasonable cause" justifying an arrest without a warrant is such a state of facts as would lead a man of ordinary care and prudence to believe, or entertain an honest, strong suspicion that the person in question is guilty of a crime. West's Ann. Pen.Code, § 836, subd. 3.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable Cause".

3. Arrest 🔑63(4)

Reasonable cause justifying an arrest without a warrant is not limited to evidence that would be admissible at the trial on the issue of guilt, but may include a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that a defendant is guilty of a crime. West's Ann.Pen.Code, § 836, subd. 3.

4. Criminal Law 🔑736(1)

What is reasonable cause justifying an arrest without a warrant is a question of fact which depends on the circumstances and facts of each case. West's Ann.Pen. Code, § 836, subd. 3.

5. Arrest 🔑63(4)

It is not necessary that a felony be committed in the presence of the arresting officer in order to justify an arrest without a warrant. West's Ann.Pen.Code, § 836, subd. 3.

6. Arrest 🔑63(4), 68

Where police officers on several occasions searched an informer and then provided him with marked money, and sent him into a home occupied by defendant, and upon his leaving the home, informer turned over narcotics to the officers, officers had reasonable cause to believe that occupants of the house were guilty of unlawful sale of heroin, and their arrest of occupants of the house without a warrant was legal even though officers resorted to trickery to get the door open and make the arrest. West's Ann.Pen.Code, § 836, subd. 3.

7. Arrest ⟜68

Where there is reasonable and probable cause for an arrest without a warrant, fact that officers resort to trickery to accomplish the arrest is immaterial to the legality of the arrest. West's Ann.Pen.Code, § 836, subd. 3.

8. Arrest ⟜71

The legality of an arrest is not necessarily determinative of the lawfulness of the search incident thereto.

9. Searches and Seizures ⟜7(12)

Where an arrest is legal, the test of the lawfulness of a search conducted incident thereto is reasonableness of the search under the circumstances.

10. Arrest ⟜71

A search incident to a lawful arrest extends to the premises under the control of the defendant.

11. Criminal Law ⟜394.4(9)

Where officers made a lawful arrest of occupants of a house, search of the premises occupied by defendants was proper, and evidence found in the search was admissible, even though such search and seizure were conducted without a warrant.

12. Arrest ⟜71

Where a police officer has reasonable cause to make an arrest without a warrant, a violation of statute requiring the person making an arrest to inform the person of the cause of the arrest is unrelated and collateral to the securing of evidence by a search incident to the arrest. West's Ann. Pen.Code, § 841.

13. Arrest ⟜68

Where it is reasonably apparent from defendant's conduct at the time of an arrest without a warrant that he knew the person making the arrest was an officer, it is immaterial whether arresting officer literally complies with statute requiring the person making an arrest to inform the person to be arrested of the cause of the arrest, and the authority to make it. West's Ann.Pen. Code, § 841.

14. Criminal Law ⟜1088(1), 1115(1)

Record of a preliminary hearing is not a part of the record on appeal and any alleged error in such a proceeding cannot be considered by the District Court of Appeal.

15. Witnesses ⟜216

The identity of an informer must be disclosed where in connection with a claim of illegal search and seizure there is no showing of reasonable cause, apart from the informer's communication, or where, in view of the evidence, the informer would be a material witness on the issue of guilt, and nondisclosure of his identity would deprive the defendant of a fair trial.

16. Criminal Law ⟜1044

Where an officer testified during course of defendant's trial for unlawful sale of narcotics, that he had no knowledge of whereabouts of an informer at time of trial, defendant could have asked for a continuance at such point to give him an opportunity to find and produce the informer, but in view of fact he did not seek such opportunity to produce the informer he could not complain on appeal that the informer was not produced.

17. Witnesses ⟜216

There is no rule requiring the prosecution to find an informer for use as a witness for a defendant.

18. Poisons ⟜9

In prosecution for unlawful sale of heroin, evidence, including testimony that an informer was stripped and searched, given marked money, and sent into a residence occupied by defendant, and that shortly thereafter informer returned and delivered narcotics to the officers, and was again searched, and found to be without any other narcotics, and to no longer have had possession of the marked money, and that a portion of the marked money was found in defendant's room in the house, sustained conviction, even though two other people were in the house. West's Ann.Health & Safety Code, § 11500.

◆

Milton Jacobs, San Francisco, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Edward P. O'Brien, Deputy Atty. Gen., for respondent.

KAUFMAN, Presiding Justice.

Alice Jones, Robert L. Pittman and defendant William E. Scott were charged by information with the sale of heroin on November 23, 1956, in violation of section 11500 of the Health & Safety Code. The information also charged the defendant Scott with a prior conviction for possession of narcotics in March 1956. All three pleaded not guilty and personally waived a jury trial. The defendant Scott denied the prior conviction. After a trial, the court found Alice Jones and Robert L. Pittman not guilty. Defendant William E. Scott was found guilty and sentenced to the State Prison for the term prescribed by law.

He appeals from the judgment of conviction and the order denying his motion for a new trial, contending that: (1) His arrest without a warrant was illegal and void; (2) The arrest was made in complete disregard of section 841 of the Penal Code, as he was not informed of the cause of the arrest; (3) The trial court erred in permitting the introduction of evidence obtained by unlawful search and seizure; (4) The disclosure of the name of the informer, without other identification or indication as to where he might be found, was in violation of due process; (5) The evidence was insufficient to establish that the informer contacted no one other than the defendant during the time the informer was out of sight of the police officers, and that the defendant knowingly had possession or exclusive control of the heroin sold.

The record reveals the following: About noon on November 21, 1956, the informer, Harrison Burris, was taken to the State Building and searched. After no narcotics were found, Burris was supplied with $20 in marked State funds and taken to the vicinity of 1812 Scott Street in San Francisco by Inspectors Coster, Chasten and McHugh. Eighteen twelve Scott Street is a single dwelling, two story old structure. Inspector Chasten saw Burris step through the threshold of 1812 Scott Street. Shortly thereafter, Burris came out of the house and surrendered a bindle of heroin to the inspectors. Burris was again stripped and searched. No funds were found in his possession. Substantially the same procedure was followed on November 23. After being stripped and searched, Burris was again given $20 in marked State funds, $19 in currency, a 50-cent piece and two quarters. Inspectors Coster, Chasten and McHugh accompanied him to 1812 Scott Street. Inspector Chasten watched Burris ring the door bell. He saw Alice Jones open the door and let Burris in. A few minutes later, Burris returned and gave Inspector Coster two bindles of heroin. Coster again searched Burris and found no funds or narcotics in his possession.

A few minutes after Burris left the premises, one Robert L. Pittman left. The officers did not stop or search him. Inspectors Coster and McHugh, who were dressed in white smocks and carrying a green leather couch, rang the door bell of 1812 Scott Street. Alice Jones opened the door. Inspector Coster pushed open the door and said "You are under arrest". The defendant Scott, dressed only in his shorts, was in the downstairs bedroom. The officers thoroughly searched the premises upstairs and down. No narcotics were found. The officers found $18 of the marked currency which had previously been given to Burris under a mattress in the downstairs bedroom. Alice Jones stated to the officers that this was her "household money". The defendant Scott stated it was his "house money". The officer also noticed two or three dollars in currency on top of the dresser in the bedroom. While the officers were searching the premises, Pittman returned, and was questioned. Pittman was searched and $1 in currency and the 50-cent piece of the marked money given to Burris was found on his person. He told the officers that Alice Jones had given him the money to buy some groceries. He had come back without the groceries as the nearby store was closed.

The officers found a hypodermic needle on the floor in the hall-way outside the kitchen door. Defendant and Alice Jones denied ever having seen it before. In the upstairs bathroom, under the bathtub, the officers found a can of milk sugar [a common adulterant used by addicts to cut the strength of the heroin]. Alice Jones told the officers that she gave the milk sugar to her three year old son. Defendant admitted that he and Alice Jones were not married but lived together at 1812 Scott Street. At the trial the defendant testified that he had known Burris for about 12 years; that Burris was a pretty good friend of his; that he saw Burris quite often. The defendant further testified that Burris had brought $20 to 1812 Scott Street about 9 A.M. on November 23, 1956, because Burris owed him $30. The defendant denied selling narcotics to Burris. Pittman testified that he had slept at 1812 Scott Street on the night of November 22, and that after he woke up, defendant and Alice Jones asked him to pick up some groceries at a store nearby. He saw no one else in the house at 1812 Scott Street except the defendant and Alice Jones. Alice Jones testified that on November 23, she opened the door for Mr. Burris, whose name she did not know. However, she recognized him as one of Scott's friends. She took Burris to the downstairs bedroom, woke up the defendant and then returned to the kitchen to feed her child. She did not see Burris leave the house. Later, she testified the defendant gave her some money which was on the top of the dresser in the bedroom. She gave some of this money to Pittman to shop for groceries.

Inspector Chasten testified that on October 19, 21, and 24, 1955, he had made "buys" of narcotics through an informer from 264 Oak Street in San Francisco, where the defendant Scott was living with Alice Jones. On October 25, 1955, the inspector entered the premises. On the person of the defendant Scott he found $47 in marked State funds which had been given to the informer on prior occasions. A quantity of heroin was also found on the premises. The defendant pleaded guilty to a count of possession of heroin and on his plea the second count of maintaining a place where narcotics was used was dismissed on motion of the district attorney. On March 8, 1956, the defendant Scott was sentenced to one year in the county jail which term was later modified to six months. At the trial the defendant denied the sale in March 1956, but admitted using and possessing narcotics at that time.

[1–7] Defendant's first argument on appeal is that in the above circumstances, an arrest without a warrant was unlawful. Under subsection 3 of section 836 of the Penal Code, an officer may make an arrest without a warrant when a felony has, in fact, been committed, and he has reasonable cause for believing the person arrested to have committed it. Reasonable cause has been defined by our Supreme Court as such a state of facts as would lead a man of ordinary care and prudence to believe, or entertain an honest, strong, suspicion that the person in question is guilty of a crime. People v. Kilvington, 104 Cal. 86, 37 P. 799. Reasonable cause justifying an arrest is not limited to evidence that could be admissible at the trial on the issue of guilt. People v. Boyles, 45 Cal.2d 652, 290 P.2d 535. Probable cause has been defined as a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true. Bompensiero v. Superior Court, 44 Cal.2d 178, 281 P.2d 250; People v. Brite, 9 Cal.2d 666, 72 P.2d 122. What is reasonable is a question of fact which depends on the circumstances and facts of each case. People v. White, 159 Cal.App.2d 586, 324 P.2d 296; Go-Bart Importing Co. v. United States, 282 U.S. 344, 357, 51 S.Ct. 153, 75 L.Ed. 374. Defendant argues that there is no reasonable cause under the facts of this case, as under the rule established by People v. Lawrence, 149 Cal.App.2d 435, 450, 308 P.2d 821, the crime is committed when the sale is made and not when the informer delivers the contraband to the officers and tells them about the sale. There are many cases holding that an arrest and search may be made solely on the basis of information received from a reliable informer. See People v. Boyd, 162 Cal.App.2d 332, 327 P.2d 913. Thus, it is not necessary that the felony be committed in the presence of the arresting officer. People v. White, 159 Cal.App. 2d 586, 324 P.2d 296. The trial court must determine from the evidence before it whether the informer was reliable and whether the officer relied on the information. It is for the court to say whether the officer acted reasonably under the circumstances. People v. Dean, 151 Cal.App.2d 165, 311 P.2d 85; Lorenzen v. Superior Court, 150 Cal.App.2d 506, 310 P.2d 180. Under the facts of this case there can be no question that the trial court properly concluded that the arrest was legal. Defendant also points to the fact that the officers resorted to trickery to get the door open and make the arrest. As we pointed out in People v. Lawrence, 149 Cal.App.2d 435, at page 446, 308 P.2d 821, this fact is immaterial where there is reasonable and probable cause.

[8–11] Defendant also argues that the search made incident to the arrest was unlawful, and that therefore the hypodermic needle, marked money, and milk sugar found at 1812 Scott Street was erroneously admitted at the trial. The legality of an arrest is not necessarily determinative of the lawfulness of the search incident thereto. Where an arrest is legal, the test is reasonableness of the search under the particular circumstances. People v. Brown, 45 Cal.2d 640, 290 P.2d 528; People v. Simon, 45 Cal.2d 645, 290 P.2d 531; People v. Allen, 142 Cal.App.2d 267, 298 P.2d 714. It is well established that a search incident to a lawful arrest extends to the premises under the control of the defendant. In re Dixon, 41 Cal.2d 756, 264 P.2d 513; People v. Dixon, 46 Cal.2d 456, 296 P.2d 557. Under the rules of the cases cited supra, the search was proper and the evidence properly admitted.

[12, 13] Defendant next argues that the arrest is unlawful for another reason, the failure of the arresting officers to inform him of the cause of the arrest. Section 841 of the Penal Code provides: "The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or is pursued immediately after its commission, or after an escape." It has been held, however, that where an officer has a reasonable cause to make an arrest, a violation of section 841 is unrelated and collateral to the securing of the evidence by a search incident to the arrest. People v. Harris, 146 Cal.App.2d 142, 304 P.2d 178; People v. Romero, 156 Cal.App. 2d 48, 318 P.2d 835; People v. Maddox, 46 Cal.2d 301, 294 P.2d 6. At the trial, the defendant testified that he knew what the officers were searching for without being told. There is also some evidence indicating that the defendant knew the arresting officers were police officers. Inspector Chasten had arrested him on the prior narcotics offense a few months earlier. Where it is reasonably apparent from the defendant's conduct at the time of the arrest that he knew the person making the arrest was an officer, it is immaterial whether an officer literally complied with section 841 of the Penal Code. People v. Jaurequi, 142 Cal.App.2d 555, 298 P.2d 896.

[14, 15] Defendant further argues that judgment must be reversed as there was a violation of due process. He complains of the failure of the prosecution to disclose

the name of the informer at the preliminary, and the failure of the prosecution at the trial to provide specific information about the whereabouts of Burris. As to the first point, the preliminary hearing in the instant case was held before People v. Lawrence, 149 Cal.App.2d 435, 308 P.2d 821, and the later decisions which have clarified the law on this point. The record of the preliminary hearing is not a part of the record on appeal and any alleged error cannot therefore be considered by this court. People v. Justice, 167 Cal.App.2d 616, 334 P.2d 1031. Our Supreme Court recently decided that the identity of the informer must be disclosed where in connection with a claim of illegal search and seizure there is no showing of reasonable cause, apart from the informer's communication (Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39), or where, in view of the evidence, the informer would be a material witness on the issue of guilt, and non-disclosure of his identity would deprive the defendant of a fair trial. People v. McShann, 50 Cal.2d 802, 330 P.2d 33; Mitchell v. Superior Court, 50 Cal.2d 827, 330 P.2d 48; People v. Williams, 51 Cal.2d 355, 333 P.2d 19.

[16, 17] In the instant case, the identity of the informer was revealed at the trial. Inspector Coster testified that to the best of his knowledge, Burris was in the County Jail. The district attorney volunteered the information that although Burris had been sentenced to six months in the county jail on January 8, 1957, his sentence had been modified and he had been released on March 8, 1957, less than a month before the beginning of this trial on April 2, 1957. Inspector Coster further testified that he was unaware of Burris' release and had no knowledge of his whereabouts at the time of this trial. At this point, defendant could have asked for a continuance to give him an opportunity to find and produce Burris (See People v. Taylor, 159 Cal.App.2d 752, 756–757, 324 P.2d 715). He had testified that Burris was well known to him. Since he did not seek this opportunity to produce Burris, he cannot now complain that Burris was not produced. There is no indication that the prosecution withheld any information it had as to Burris' whereabouts. We know of no rule requiring the prosecution to find such a witness.

[18] Defendant's last two arguments relate to the sufficiency of the evidence to sustain the judgment of the trial court. First he argues that the evidence is insufficient to show that Burris sold narcotics to him to the exclusion of all others, during the time Burris was out of sight of the officers. He relies on People v. Barnett, 118 Cal.App.2d 336, 257 P.2d 1041; People v. Richardson, 152 Cal.App.2d 310, 313 P.2d 651; and People v. Morgan, 157 Cal.App.2d 756, 321 P.2d 873. In the Barnett case, the informer was not searched before or after the sale, and the police officer saw the informer leave in a car with the defendant and did not see him again until the informer returned an hour later with the narcotics. This court (Division I) held that the chain of circumstances was too tenuous to support an implied finding that Barnett had sold heroin to the informer. In the Richardson case, supra, the officer stayed in the car while the defendant, the informer, and another person entered the defendant's residence. About twenty minutes later, the informer returned and handed the officer a packet containing heroin. The informer was not searched before or after the sale. The evidence was held insufficient to justify a conviction for the sale of heroin. In the Morgan case, the informer was searched on three separate occasions, given marked money and taken to defendant's residence. The informer entered while the officers waited in the street. After a brief interval, the informer returned with the heroin and without the marked money. There was no direct evidence that the defendant was at home except on the third occasion. The sale conviction was reversed for the prosecution's failure to prove that the informer-participant contacted no one upon his way to or from the defendant's apartment, and the prosecution's failure to disclose the name of the informer-participant.

The instant case is similar to the above cases, and the more recently decided People v. Lawrence, 168 Cal.App.2d 510, 336 P.2d 189. There, the informer, one Dandridge, was stripped, searched and given $200 in marked currency. He was under the observation of the officer witness while he entered the defendant's place of residence. After remaining for 2½ to 3 hours, Dandridge came out, took a taxi for two blocks. He then got out, delivered a package of heroin to one of the officers, was searched and found to have none of the State's money in his possession. One Gerald Williams entered defendant's apartment a few minutes after Dandridge did, and remained until Dandridge left. He was not searched upon his apprehension after leaving the defendant's apartment. The defendant's wife entered a few minutes after Williams and remained inside for a period of time. She then left and made some purchases in a store with one of the $10 bills which had been given to Dandridge by the State. The sum of $250, including $170 of the money the State had furnished Dandridge, was found in a box on a bedside table in the apartment. Heroin was found in various places in the apartment and the defendant admitted the ownership and use thereof. The only other evidence connecting the defendant with the sale was a telephone conversation which occurred shortly before Dandridge entered the apartment. Dandridge called the defendant. "A voice said, 'Hello?'—Mr. Dandridge said, 'Hello, is that you Jesse?' The answer was: 'Yes.' He said, 'Is anything happening?' to which the reply by Mr. Lawrence was, 'Yes.' He says, 'Well, I'd like to get something. Can I come by?' And the voice on the other end of the line said, 'Yes.'" This Court (Division I) found a total gap in the chain of evidence connecting the defendant to the sale, and reversed the conviction on the sale count.

Factually, the situation here is different from the Lawrence case. The present state of the record clearly supports an inference that Burris bought the heroin from one of the three persons at 1812 Scott Street. The question is whether the State proved facts sufficient to justify the court's finding that Scott was the guilty person rather than Mrs. Jones or Pittman. The State argues that it did so and that therefore the instant case is clearly distinguishable from People v. Lawrence, supra. As no heroin was found on the premises, it could be inferred that all of it was sold to Burris or that Pittman took it with him when he left the house, shortly after Burris entered. The presence of the marked money in the house lends support to an inference that the sale was by one of the regular occupants of the house, the defendant Scott or Mrs. Jones. Pittman's explanation that Mrs. Jones had given him the money to buy groceries was corroborated by Mrs. Jones. Also, Mrs. Jones' testimony that the defendant had given her the marked money supports an inference that he, in fact, sold the narcotics to Burris. This testimony of Mrs. Jones completes the chain lacking in People v. Lawrence, supra. This, together with the fact that most of the marked money was found in a room occupied by the defendant, supports an inference that the defendant was the seller. Defendant admitted receiving $20 from Burris on the day in question. Burris did not testify at the trial, and thus the defendant could not corroborate his testimony of the debt owed to him by Burris.

In view of the foregoing, the judgment finds support in the record before us.

Judgment affirmed.

DOOLING and DRAPER, JJ., concur.

169 Cal.App.2d 873

A. J. BLACKMAN, Elizabeth B. Johnson, and George Batchelor, Petitioners and Respondents,

v.

Charles B. MacCOY, Judge of the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California, Defendant and Appellant.

Civ. 23448.

District Court of Appeal, Second District, Division 2, California.

May 22, 1959.

Proceedings on petition for rehearing filed by appellant after affirmance, 338 P.2d 234, of judgment. The District Court of Appeal held that contention not set forth by appellant in his briefs or in oral argument would not be considered for the first time on petition for rehearing.

Petition for rehearing denied.

Ashburn, J., dissented.

Appeal and Error 🔑835(2)

Contention not set forth by appellant in his briefs or in oral argument would not be considered for the first time on petition for rehearing.

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Harold W. Kennedy, County Counsel, Robert C. Lynch, Deputy County Counsel, Los Angeles, for appellant.

Marvin Zinman, Los Angeles, for respondents.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., William E. James, Asst. Atty. Gen., William B. McKesson, Dist. Atty., County of Los Angeles, Manley J. Bowler, Chief Deputy Dist. Atty., John W. Dickey, Deputy Dist. Atty., Los Angeles, amici curiae on behalf of respondents.

PER CURIAM.

On petition for rehearing appellant seeks to raise for the first time a point not previously argued, viz., that the affidavit of bias and prejudice related only to the personal disqualification of the appellant and not to the jurisdiction of the municipal court. This contention was not set forth by appellant in his briefs nor in oral argument, and will not be considered for the first time on a petition for rehearing. As stated in Smith v. Crocker First Nat. Bank, 152 Cal.App.2d 832, 836–837, 314 P.2d 237, 241: "Counsel are not permitted to argue their cases in a piecemeal fashion and points not previously argued will not be considered where raised for the first time on petition for rehearing. (Citations.)" As the question of the superior court's jurisdiction to grant the peremptory writ as issued is not involved, the rule noted in Sime v. Malouf, 95 Cal.App.2d 82, 116, 212 P.2d 946, 213 P.2d 788, regarding rehearings to consider jurisdictional questions is not applicable.

The petition for rehearing is denied.

ASHBURN, J., is of the opinion that the petition should be granted.

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170 Cal.App.2d 652

Leola WASHINGTON, Plaintiff and Respondent,

v.

George WASHINGTON, Defendant and Appellant.

Nos. 17736, 17737.

District Court of Appeal, First District, Division 2, California.

May 26, 1959.

Rehearing Denied June 25, 1959.

Hearing Denied in No. 17736 July 22, 1959.

Divorce proceeding and property action in which the Superior Court, City and County of San Francisco, John B. Molinari, J., entered orders from which husband appealed. The District Court of Appeal, Dooling, J., held that where both interlocutory decree of divorce and final decree as well as subsequent order for child support were allowed to become final, and the decrees and order all declared the child to be minor daughter of the parties, husband could not thereafter raise issue as to paternity of child.

Orders affirmed.

1. Divorce ⚷311

Where husband allowed both interlocutory and final decree in wife's divorce action as well as subsequent order for child support, all of which declared that child was minor daughter of the parties, to become final, husband could not raise issue as to paternity of child in proceeding to determine amount of money which had accrued under prior court order for child support.

2. Divorce ⚷256

Where former wife commenced action to recover one half of amount of personal injury judgment recovered by ex-husband as community property, and defendants in personal injury action satisfied judgment by paying money to county clerk pursuant to court order and wife's judgment for one-half interest in such money was reversed by the Supreme Court, but trial court imposed lien upon ex-husband's interest to secure payment of accrued temporary alimony, an action was pending within meaning of statute authorizing court to impose a lien in a pending action in favor of a judgment creditor as reversal of judgment by Supreme Court was not a final determination on appeal since its effect was to annul judgment of trial court and remand cause for further proceedings. West's Ann.Code Civ.Proc. §§ 688.1, 1049.

3. Divorce ⚷256

Where order of court imposed a lien on husband's funds in hands of county clerk to secure payment to ex-wife of accrued temporary alimony but order did not impose a lien for any certain amount, on appeal from such order ex-husband's argument that he was entitled to credit against amount accrued under alimony award because ex-wife had expended community property of parties and received certain additional payments, was made too soon. West's Ann.Code Civ.Proc. §§ 688.1, 1049.

Edward B. Mabson, San Francisco, for appellant.

Terry A. Francois, San Francisco, for respondent.

DOOLING, Justice.

Two separate appeals are here presented: 1. an appeal by defendant from an order of December 14, 1956, in superior court action No. 358362 (hereinafter called the divorce action); 2. an appeal by defendant from an order made on December 31, 1956, in superior court action No. 439265 (hereinafter called the property action). The two appeals present different questions and will be treated separately.

The Order in the Divorce Action

Respondent sued appellant for divorce and in March 1950 an interlocutory decree of divorce was entered granting respondent's prayer for divorce. This decree made no provision for alimony or child support and ordered "that the plaintiff have the complete care, custody and control of the minor daughter of said parties." This interlocutory decree and a final decree containing the same provisions entered in 1951 were not appealed from and both have long since become final. In February 1955 on motion of respondent the court made an order modifying the final decree of divorce to require the payment of $75 per month by appellant commencing March 1, 1955, for the support of the child of the parties and for attorney's fees and costs. This order was likewise not appealed from and has also become final. On December 14, 1956, pursuant to proceedings commenced by appellant the court determined that $1,815 had accrued under the order for child support of February 1955 and was owing and unpaid thereunder. From this order appellant has appealed.

[1] Most of the arguments made on this appeal were urged by appellant on his appeal from the order for attorney's fees

and costs to resist this appeal and were disposed of by us on that appeal. There is no reason for repeating them here. See Washington v. Washington, 163 Cal.App.2d 129, 131–132, 329 P.2d 115. Appellant's attempt at this late date to raise the issue of the paternity of the child cannot succeed. Both the interlocutory decree and the final decree as well as the order for child support of February 1955, all of which have been allowed to become final, have declared the child to be "the minor daughter of said parties."

The Order in the Property Action

In the divorce action before the entry of the interlocutory decree an order had been made for temporary alimony, counsel fees and costs. See Washington v. Washington, supra, 163 Cal.App.2d at page 130, 329 P.2d at page 116. Thereafter appellant recovered judgment for serious personal injuries which judgment was affirmed in Washington v. City and County of San Francisco, 123 Cal.App.2d 235, 266 P.2d 828. After this judgment became final respondent commenced an action to recover one-half thereof as community property (the property action). She recovered judgment for a one-half interest but this judgment was reversed in Washington v. Washington, 47 Cal.2d 249, 302 P.2d 569, the Supreme Court ruling that as a matter of law the proceeds of the judgment for personal injuries were appellant's property in which his ex-wife had no interest.

Before the property action was tried the defendants in the personal injury action satisfied the appellant's judgment against them by paying the money necessary for that purpose to the County Clerk of San Francisco pursuant to an order of court making the balance thereof to which appellant was entitled subject to the disposition of the court in the property action.

On December 31, 1956, in the property action the court made an order imposing a lien upon appellant's interest in the property action in favor of respondent to secure the payment to her of the amounts accrued under the order for temporary alimony between the time of the making of that order and the entry of the interlocutory decree of divorce. Washington v. Washington, supra, 163 Cal.App.2d at page 131, 329 P.2d at page 117.

[2] The order was made under section 688.1 Code of Civil Procedure, which authorizes the court to impose a lien in a "pending" action in favor of a judgment creditor "upon all moneys recovered by his judgment debtor in such action." Appellant claims that when the lien was imposed the action was no longer pending and cites Code of Civil Procedure section 1049: "An action is deemed to be pending from the time of its commencement until its final determination upon appeal * * *" Since the order of reversal in Washington v. Washington, supra, 47 Cal.2d 249, 302 P.2d 569, became final 30 days after October 30, 1956, appellant argues that that action was not pending on December 31, 1956, the date when the order imposing the lien was made. Section 1049 Code of Civil Procedure provides that an action is deemed to be pending "until its *final* determination upon appeal." A reversal is not a *final* determination on appeal. Its effect is to annul the judgment of the trial court and remand for further proceedings in the trial court. The order of the Supreme Court reversing the previous judgment did not conclude the matter. The fund in the custody of the clerk was still under the jurisdiction of the superior court in the property action and the action was still pending until the superior court entered a new judgment awarding the fund to appellant pursuant to the Supreme Court's ruling. We conclude that the lien was properly imposed under section 688.1.

[3] Appellant's argument that he is entitled to credits against the amount accrued under the alimony award because respondent expended the community property of the parties and received certain additional payments is made too soon. The order appealed from imposes a lien but not for any certain amount. It provides in that

particular: "the amount of which shall be determined by appropriate proceedings." In such "appropriate proceedings" appellant will have his opportunity to claim any proper payment or set-off. Other points urged are disposed of in Washington v. Washington, supra, 163 Cal.App.2d at page 131, 329 P.2d at page 117.

Orders affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

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170 Cal.App.2d 613

PEOPLE of the State of California, Plaintiff and Respondent,
v.
Thomas George CARTIER, Defendant and Appellant.
Cr. 6619.

District Court of Appeal, Second District, Division 3, California.
May 25, 1959.

Prosecution for second-degree burglary. The Superior Court, Los Angeles County, Albert Wheatcroft, J., entered judgment of conviction and defendant appealed from such judgment and denial of his motion for new trial. The District Court of Appeal, Shinn, J., held that evidence, including testimony that defendant had in his possession a tool used in the burglary, together with evidence of his presence in the establishment on the night of the crime, and his inconsistent statements regarding ownership of the tool used in the burglary, sustained conviction.

Judgment and order affirmed.

1. Burglary 🔑41(1)

Evidence, including testimony that defendant had in his possession a tool used in the burglary, together with evidence of his presence in the establishment on the night of crime, and his inconsistent statements regarding ownership of the tool used in the burglary, sustained conviction for second-degree burglary.

2. Criminal Law 🔑406(1)

In burglary prosecution, testimony of employee of burglarized place of business that someone had entered the premises with intention of committing theft was a sufficient showing of corpus delicti to warrant admission of defendant's extrajudicial statements to a police officer in regard to whether burglary tools found in defendant's apartment belonged to defendant.

3. Arrest 🔑63(4)

Reasonable cause to justify an arrest without a warrant may consist of information obtained from others and may be shown by evidence that would not be admissible on issue of guilt.

4. Arrest 🔑63(4), 71
Criminal Law 🔑394.4(14)

Where a police officer had no previous experience with an informer, but information he received from informer in the course of his investigation tended to show his reliability, and such information, together with informer's statements furnished officer with reasonable ground for a strong suspicion that defendant had committed a certain burglary, officer had reasonable cause to believe defendant was guilty of a felony, and another officer was justified in arresting defendant without a warrant in reliance on an all-points bulletin issued by investigating officer, and since such arrest was lawful, arresting officer had the right without a warrant to make a reasonable search of the premises under defendant's immediate control and to seize evidence apparently related to that offense, and such evidence was not rendered inadmissible even though defendant was arrested on the belief that he was guilty of a burglary other than the one for which he was convicted.

5. Criminal Law ⚪394.4(14)

In burglary prosecution, tools found in defendant's possession, and photographs prepared by an expert for the state showing that a punch found among such tools had marks which compared with marks found on the face of a burglarized safe, were admissible in evidence, and were not to be excluded merely because they were obtained as result of a lawful search for evidence connected with another burglary.

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Thomas George Cartier, in pro. per.

Stanley Mosk, Atty. Gen., for respondent.

SHINN, Presiding Justice.

In a court trial, Thomas George Cartier was convicted of second-degree burglary and was sentenced to nine months in the county jail. He appeals from the judgment and from the denial of his motion for new trial.

Upon application of appellant for appointment of counsel the matter was referred to the Committee on Criminal Appeals of the Los Angeles Bar Association with a request for a report which would direct our attention to any matter disclosed by the record which would indicate that the applicant might be entitled to some relief. Upon receipt of a report from a member of the committee that no meritorious ground of appeal had been found, and in accordance with our settled practice, we examined the record in order to ascertain whether appointment of counsel would serve any useful purpose. Having determined that the appeal appeared to be without merit we denied the application for appointment of counsel and notified appellant of our order, substantially extending his time to file a brief. No brief having been filed, we have re-examined the record and are disposing of the appeal by written opinion.

[1] The evidence consisted of that received at the preliminary hearing and additional evidence introduced at the trial. On the morning of June 19, 1958, an employe of Durlund's Fireside Cafe in Los Angeles discovered that the premises had been broken into and the office ransacked; a floor safe containing about $1,100 in cash and checks had been cracked and damaged and money sacks were lying on the floor. It was established that the safe had been opened by punching out the dial. Cartier was identified by Durlund's bartender as having been drinking at the bar in the company of another man from midnight to 2 a. m. on June 19th.

Four Los Angeles police officers assigned to the Hollywood Detective Bureau went to the apartment occupied by appellant and his wife on Los Feliz Boulevard shortly after midnight on July 3rd. The officers had neither a search warrant nor a warrant for Cartier's arrest. They entered the apartment using a passkey supplied by the apartment house manager, identified themselves as police officers and placed the Cartiers under arrest for burglary. The officers made a search of the premises and discovered a suitcase and an overnight bag in a closet in the kitchen. Inside the bags they found two punches, a dial puller, a flashlight, a pair of cotton gloves, pry bars, hammers and other tools. Officer Gabard, a qualified police chemist, testified that he made a microscopic comparison of marks found on the punches and on the lid belonging to the damaged safe in Durlund's office. He stated his opinion that the marks on the lid were made by one of the punches found in Cartier's apartment. The punches, the safe lid and several photographs showing the marks on the punches and on the lid were received in evidence. The punch, which is before us as an exhibit, shows many definite irregularities. The photograph of the lid also shows clear and distinct indentations made by the tool that was used in punching out the dial. The exhibits furnished a sound basis for an accurate comparison of the marks on the punch with the marks on the safe.

Officer Peter Bishonden was one of the investigating officers in the case. Over the objection of appellant's counsel that the corpus delicti had not been established, Bishonden was permitted to relate the substance of several conversations he had with Cartier at the police station between July 3rd and 10th, the date of the latter's arraignment. Bishonden testified that on July 3rd he showed Cartier the tools found in the apartment and asked whether they were his; appellant replied that they were. During the conversation on July 10th, Cartier told the officer that he used the tools in making minor electrical repairs around his apartment. When the officer suggested that the tools were burglar's tools and that appellant had been using them on "jobs", Cartier denied knowing that they were burglar's tools and stated: "Well, I never said they were mine." Upon being asked what he used the punches for, appellant told Bishonden that he could not remember. In response to the officer's questions about the Durlund's burglary, Cartier said: "There is nothing I can tell you about it."

Appellant, testifying in his own behalf, denied his guilt of burglary. The tools he had in his apartment were ordinary household tools and none of the tools shown to him at the police station by Officer Bishonden belonged to him. The suitcase and the bag discovered by the officers were not his. He did not own any punches and denied telling Bishonden that the punches which were received in evidence as exhibits were his.

There was sufficient evidence to prove Cartier guilty of burglary. The court could reasonably infer from the testimony of the police technician that the punch found in his apartment had been used to force open Durlund's safe. The fact that appellant had in his possession the tool used in the burglary, together with the evidence of his presence in the establishment on the night of the crime and of his inconsistent statements regarding ownership of the punch, amply justified a finding that he perpetrated the offense. People v. Ross, 120 Cal.App.2d 882, 887, 262 P.2d 343; People v. Godlewski, 22 Cal.2d 677, 140 P.2d 381.

[2] The court did not commit error in permitting Officer Bishonden to relate his conversations with appellant. The testimony of Durlund's employe clearly established that someone had entered the premises with the intention of committing theft. This was a sufficient showing of the corpus delicti to warrant the admission of Cartier's extra-judicial statements. 9 Cal.Jur.2d 488–489.

At the close of the People's case, appellant's counsel unsuccessfully objected to the introduction in evidence of the punches and photographs upon the ground that Cartier had been arrested without probable cause and that the exhibits were obtained as the result of an unlawful search and seizure. The objection was properly overruled.

The evidence we are about to relate clearly established that the officers had reasonable cause for the arrest of Cartier. Officer Berger of the Hollywood Detective Bureau testified that on the afternoon of July 2nd his supervisor handed him an all-points bulletin issued by the Newport Police Department and ordered him to make an investigation. The communication was received in evidence as an exhibit. The teletype stated that appellant, his wife and another man were wanted for arrest and investigation in connection with a safe burglary; it contained a description of appellant, listed the license number of his car and stated that Cartier was living in the Los Feliz area. Shortly thereafter, Berger obtained appellant's address from another officer. Berger and his fellow officers then went to the apartment house and after ascertaining that the car mentioned in the teletype was parked nearby, they obtained a passkey from the landlady and entered the apartment.

Captain Allen Johnson of the Newport Police Department testified at length on the issue of probable cause. The following is the substance of his testimony. On June 28th, Johnson was informed by Officer Cook that two men were planning to burglarize the Driftroom, a bar in Corona del Mar, on the morning of the 30th. Cook had obtained the information from James Sullivan, a bartender at the Driftroom, who said that he had been asked by the suspects to furnish them with a key to the premises so that they could obtain a duplicate. Johnson told Cook to tell Sullivan not to furnish a key and ordered Cook to place the suspects under surveillance. Cook reported on the following day that he had observed Sullivan and two men sitting in a car with a Nevada license that was subsequently identified as appellant's. Johnson was informed by another officer on June 29th that appellant's car had been seen that day in the vicinity of Christian's Hut, a barroom in Newport. On the morning of the 30th, the officers placed the Driftroom under observation but no one attempted to burglarize it; however, Christian's Hut was burglarized that morning and the safe was forced open; the premises were apparently entered with a key. Johnson had a conversation with Sullivan on June 30th. Sullivan related to Johnson what he had told Officer Cook and stated that the two suspects had told him they had a device that would open a safe in 15 minutes. Sullivan knew the suspects only as "Tom" and "Jerry." By telephoning the Las Vegas police, Johnson ascertained that the car with the Nevada plates was registered to Mrs. Cartier. Johnson issued the all-points bulletin on June 30th. On July 2nd, Sullivan identified a photograph of Cartier as that of one of the men who had sought to obtain a key from him. Johnson testified that on the basis of the information he had received, he believed that Cartier was implicated in the burglary of Christian's Hut. He had no knowledge of Sullivan's whereabouts at the time of the trial.

[3, 4] There was probable cause for the arrest of Cartier if Berger and his fellow officers were warranted in a reasonable belief that he had committed a felony. It is settled that reasonable cause to justify an arrest may consist of information obtained from others and may be shown by evidence that would not be admissible on the issue of guilt. People v. Boyles, 45 Cal. 2d 652, 290 P.2d 535. If Johnson had reasonable cause to believe that appellant was guilty of a felony, Berger was justified in arresting him in reliance on the teletype. Although Johnson had no previous experience with the informer Sullivan, the information he received in the course of his investigation tended to show the latter's reliability and, together with Sullivan's statements, furnished him with reasonable grounds for a strong suspicion that appellant had committed the Newport burglary.

[5] Since the arrest was lawful, Berger and his fellow officers had the right to make a reasonable search of the premises under appellant's immediate control and to seize evidence related to that offense. People v. Guy, 145 Cal.App.2d 481, 489, 490, 302 P.2d 657, and cases cited. The burglar's tools which they discovered would have been competent and material evidence against appellant in a trial for the Newport burglary. The tools and the photographs prepared by the People's expert also furnished strong evidence of his guilt of the Durlund's burglary. They were not to be excluded merely because they were obtained as the result of a lawful search for evidence connected with the other offense. People v. Schmitt, 155 Cal.App.2d 87, 102, 317 P.2d 673.

The judgment and order appealed from are affirmed.

PARKER WOOD and VALLÉE, J., concur.

170 Cal.App.2d 379

Eva L. GILB, Plaintiff and Respondent,

v.

Frank A. GILB, Defendant and Appellant.

Civ. 23042.

District Court of Appeal, Second District, Division 3, California.

May 15, 1959.

Wife's action for divorce in which husband filed cross complaint seeking an annulment or, in the alternative, a divorce. The Superior Court, Los Angeles County, Clarence B. Runkle, J., entered judgment denying annulment and granting each party a divorce on ground of mental cruelty and making a division of community property, and husband appealed. The District Court of Appeal, Shinn, P. J., held that there was substantial evidence to sustain finding that husband, who it was claimed provided transportation for wife to Nevada and paid a part of her expenses so that she could obtain a divorce from her first husband, and had married wife in reliance on validity of Nevada decree, was estopped some 12 years later from attacking such decree.

Affirmed.

1. Divorce ⚷413

In wife's action for divorce in which husband filed cross complaint seeking an annulment, there was substantial evidence to support finding that husband who allegedly provided transportation for wife to Nevada and paid some of her expenses while she obtained a divorce from her first husband, and had married wife in reliance on validity of Nevada divorce decree, was estopped some 12 years later from asserting the invalidity of divorce from her former husband.

2. Divorce ⚷172

The validity of a divorce decree may not be contested by a party who has procured the decree, or a party who has remarried in reliance thereon, or by one who has aided another to procure decree so that the latter will be free to remarry.

3. Divorce ⚷252

Where court awarded each spouse a divorce on ground of mental cruelty, court was required to order an equal division of the community property.

4. Divorce ⚷254

Divorce decree making an equal division of community property and providing for payment from community funds for husband's reasonable expenses in defending an action for attorney's fees brought by his former attorney was not invalid on ground that judgment gave husband no method for ascertaining what payment of costs or attorney's fees would be reasonably necessary, and if husband was in doubt as to what could be used for defense of case, he could apply to court for approval of any payment he proposed to make.

5. Divorce ⚷254

Where divorce decree ordered an equal division of community property, there could be no objection to court's deferring ultimate division of community property to the time of final decree with respect to matters that called for judicial action in the interim, such as expenses incurred by husband in defending legal action brought against him by his former attorney for fees allegedly owing.

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Albert G. Bergman, Los Angeles, for appellant.

Stanley L. Avery, Jacob W. Silverman, David Daar, Los Angeles, for respondent.

SHINN, Presiding Justice.

Eva sued Frank for divorce. Frank filed a cross-complaint in which he sought an annulment or, in the alternative, a divorce. After a trial lasting 32 days, the court made findings and entered judgment denying Frank an annulment and awarding each spouse a divorce upon the ground of mental cruelty. The judgment also contained provisions for the custody and support of the Gilb's minor daughter, for a division of the community property, and for the payment from community funds of Frank's reasonable expenses in defending an action for attorneys' fees brought by his former attorneys and to enable Eva to pay her costs and attorneys' fees in the present action. Frank appeals.

The court tried first the annulment issue and announced its decision; it then tried separately the divorce issues which included the community property issues. Certain of appellant's contentions in his brief related to the community property issues. He furnished a record of the oral proceedings upon the annulment issue but none as to the divorce and community property issues. Upon respondent's application for augmentation of the record the court gave appellant a choice between providing an adequate record or abandoning those points. He failed to provide such a record; he abandoned some of his points and others were stricken from his brief by the court for failure to provide an adequate record with respect thereto.

Although the appeal is from the judgment in its entirety, it is limited by appellant's brief, and the only contentions requiring decision are that appellant should have been granted an annulment on his cross-complaint and that the court erred in provisions of the judgment relating to allocations made to the parties from community funds.

We shall first consider appellant's contention that the court erred in denying him an annulment.

The parties were married in Tijuana, Mexico, on September 2, 1939; they separated in June 1952. Eva had previously been married to Marcus P. Kennedy. The theory of Frank's count for an annulment was that Kennedy was living in September 1939 and that the prior marriage was still in force. Civ.Code § 82, subd. 2. In her answer to the cross-complaint Eva alleged that she obtained a valid decree of divorce from Kennedy in Las Vegas, Nevada, on May 28, 1937, and she alleged as affirmative defenses that appellant had waived his right to contest the Nevada decree, that he was estopped to do so, and that he was guilty of laches. These defenses were pleaded orally in open court and were tried as if they had been pleaded in formal fashion.

The court found: (1) Eva was not a bona fide resident of Nevada at the time of her divorce from Kennedy. (2) Knowing that Eva went to Nevada for the purpose of divorcing Kennedy and having knowledge of the nature and duration of her sojourn in Nevada, appellant married her in reliance on her divorce and is estopped to attack the Nevada decree. (3) The parties cohabited from 1939 to 1952, working together and cooperating in the acquisition of community property and in the raising of their minor daughter, in reliance upon the validity of their marriage. Pursuant to these findings the court made conclusions of law to the effect that Frank is estopped to attack Eva's Nevada decree, that he is without legal standing to attack it, that he has waived his right to attack it, and that his claim is barred by laches.

In urging that he should have been granted an annulment, appellant argues that the court erred in determining that he was guilty of laches and had no standing to attack the Nevada decree and that the findings of waiver and estoppel are without support in the evidence.

The transcript of the annulment proceedings consists of over 800 pages of testimony and argument. The parties were questioned at inordinate length as to the circumstances of Eva's divorce from Kennedy. The following undisputed facts were developed in the evidence. Eva resided in San Diego, California. She married Kennedy in January 1936 but never lived with him. She met appellant in June 1936. Frank was a "sales engineer" in the laundry and dry cleaning business, traveling a regular route through California, Arizona and Nevada. In March or April 1937, he drove plaintiff to Las Vegas where she initiated divorce proceedings and obtained a divorce from Kennedy on May 28th; she left Nevada a few days later and never returned there to live.

Eva testified that she did not change her residence from California to Nevada solely in order to divorce her former husband. Appellant suggested that she go to Las Vegas; "He knew that I was going to get a divorce and I wanted a complete change of residence and to make a complete, all around change, and it was on his suggestion that I went to Las Vegas, Nevada, to establish my residence." Appellant paid her hotel bill for the first week or ten days of her stay in Las Vegas. He visited her three or four times and they went out socially; they also corresponded. On his last trip to Las Vegas, Frank brought with him Eva's sister, a Mrs. Dilley. Appellant drove the sisters back to Los Angeles after the entry of the divorce decree.

Mrs. Dilley testified that either on the way to Las Vegas or shortly after their arrival appellant told her that her sister was "there getting a divorce" but she paid no attention to his statement until her sister confirmed it. On the day of the trial, Frank drove the sisters to the courthouse but he did not attend the proceedings. Immediately after the trial respondent packed all her belongings and the three drove away and spent a week together before returning to their homes.

Appellant's testimony was in sharp conflict with that of Mrs. Gilb and her sister. He allowed Eva to accompany him on a business trip to Arizona in October 1936 and at that time she told him she had been married and divorced. When he told her in March or April 1937 that he was going to Las Vegas on his regular business route she asked to come along and he drove her to Las Vegas; the trip took 15 days during which he stopped overnight in various cities to call on customers. Eva did not tell him she was planning to get a divorce in Las Vegas or to change her residence. He left Las Vegas on the third day following their arrival. He did not pay Eva's hotel bill but he stayed in a separate room in the same hotel. He visited her three times while passing through Las Vegas on his regular route. He did not pay the expenses of her divorce. He took Mrs. Dilley with him on his last trip to Nevada at her request; she told him she was going on a vacation. He denied having driven the sisters to the courthouse. He drove the sisters back to Los Angeles at their request. He first learned that Eva had obtained a divorce in Nevada in November or December 1939, when Eva told him that she had gone to Nevada for the sole purpose of divorcing Kennedy and not in order to establish a bona fide residence.

[1] We have concluded that the evidence amply supports the challenged finding that appellant is barred by estoppel from asserting the invalidity of respondent's divorce from her former husband. Since this finding, having support in the evidence, compels an affirmance of the judgment denying Gilb an annulment, we deem it unnecessary to discuss the question of laches and waiver of the right to sue.

[2] The validity of a divorce decree may not be contested by a party who has procured the decree, or a party who has remarried in reliance thereon, or by one who has aided another to procure the decree so that the latter will be free to remarry. In re Estate of Coleman, 132 Cal.App.2d 137, 281 P.2d 567; Dietrich v. Dietrich, 41 Cal.2d 497, 261 P.2d 269.

The testimony of Mrs. Gilb and her sister, if believed by the court, clearly established that appellant knew the purpose of the trip to Nevada and that by paying Eva's hotel expenses and providing transportation for her and her sister, he materially assisted her in obtaining a divorce. Appellant asserts, however, that this testimony was unworthy of belief, and that having rejected Eva's testimony that she intended to become a bona fide resident of Nevada the court should also have rejected her testimony that appellant urged her to go to Nevada and was aware of her divorce plans. We are not persuaded by his argument. Mrs. Gilb's pretense that she intended to establish a residence in Nevada was no doubt influenced by the recollection of what she had sworn to in the Nevada court.

Having found facts which proved the invalidity of the Nevada decree, the court had to determine whether appellant had knowledge of those facts at the time he married respondent. Although appellant denied knowledge of the Nevada divorce until after his marriage to respondent, it was for the court to decide whether his activities were merely those of an innocent and obliging friend or of one who was ready and willing to help his future wife to obtain her freedom. We cannot say, as a matter of law, that the court was required to find that at the time of the marriage appellant had no knowledge of the circumstances under which the Nevada decree was procured.

We shall next consider appellant's attack upon the provisions of the judgment relating to the payment of attorney's fees and costs of suit.

It was stipulated upon the trial of the cross-actions for divorce that all the property of the parties was community property, except for a paid-up policy on the life of appellant which was stipulated to be his separate property.

[3] As we have said, each spouse was awarded a divorce upon the ground of cruelty. The court was required to order an equal division of the community property. DeBurgh v. DeBurgh, 39 Cal.2d 858, 874, 250 P.2d 598. The judgment provided for such a division upon the entry of a final decree, subject to certain adjustments. Among the adjustments mentioned therein were the two items complained of.

Pursuant to a finding that an action was pending against appellant for fees allegedly due his former attorneys, the court found: "XIV. 1. Defendant has expended for his own litigation, costs and attorney's fees the total sum of $23,254.94 and Plaintiff has heretofore been allowed by the Court for attorney's fees and litigation expenses the sum of $1,310.00. Plaintiff does not presently have sufficient funds on hand to defray her litigation expenses, including attorney's fees, and an allowance and award shall be made to Plaintiff out of the first moneys realized from the sale of the community property in the sum of $21,944.94, to enable Plaintiff to defray her litigation costs and attorney's fees on an equal basis with the Defendant. Upon the sale of the community property of the parties, said sum of $21,944.94 shall be first paid and delivered to Plaintiff for such purposes and such sums remaining thereafter from the sale of the community property of the parties, after payment of all taxes, involuntary liens or obligations against said property or any part thereof, shall be divided equally between the parties. 2. $500.00 per month is a reasonable amount to be allowed Defendant as salary for continuing the operation of the business as set forth in Paragraph VII of the foregoing Findings. There is now pending in the above Court, another suit against the Defendant entitled Donald O. Krag et al. v. Defendant, and the Defendant should be allowed to use community funds to pay only such fees and costs as are reasonably necessary for the defense thereof." It was found further: "Defendant is authorized to pay out of community funds only such attorney fees and costs as are reasonably necessary for the defense of Krag v. Gilb." The judgment conformed to these findings.

[4] Appellant says the judgment gives him no method for ascertaining what payments of costs and attorneys' fees would be "reasonably necessary" in defending the action of Krag v. Gilb. He says in his brief: "Appellant is thus left to the uncertainty of the specification in the order and the position of lacking information as to what he is or is not permitted to do. He should not be subjected to the risk of discovering such certainty, for the first time, by the decision of a court on, or in contempt proceedings." The argument is without merit.

As to the other provision, appellant contends that it is ambiguous because it cannot be determined whether it is one for the payment of attorneys' fees from his half of the community or a reduction of the community, half chargeable to Mrs. Gilb and half to himself. He argues that if the former, the order was an abuse of discretion for the reason that the findings upon which it was based are not the equivalent of findings that respondent was without the actual financial ability to pay her costs of suit and attorneys' fees or that $21,944.94 was an amount reasonably necessary to defray her expenses.

These arguments cannot be maintained.

There is no uncertainty in either provision. The judgment states that the community property will be divided at the time of the entry of a final decree; that certain adjustments will have to be made and some property sold; it specifies numerous purposes for which defendant may use community funds and it provides that the court retain jurisdiction to order sales to be made by a referee if the parties do not agree, such sales to be subject to the court's approval; and the net proceeds to be equally divided. Clearly further judicial action would be necessary before a complete division could be made.

If defendant is in doubt as to the amount he may use for the defense of the case of Krag v. Gilb he may apply to the court for approval of any payment he proposes to make.

The award to plaintiff of $21,944.94 was not a charge against defendant's share of the community property. It was not an award to plaintiff of that sum for attorney's fees. The community property had been charged with the sum of $23,254 which defendant had expended in his own litigation; he had paid plaintiff $1,310 as attorney's fees, likewise from community funds. The award to plaintiff of $21,944.94, in addition to what she had received, was merely one step in the process that would accomplish an equal division of the community property.

[5] There is and could be no objection to the court's deferring the ultimate division of the community property to the time of the final decree with respect to the matters that would call for judicial action in the interim.

The judgment is affirmed.

PARKER WOOD and VALLEE, JJ., concur.

170 Cal.App.2d 328

William HUDSON, Plaintiff, Respondent and Cross-Appellant,

v.

MORGAN & PEACOCK PROPERTIES CO., a copartnership, Amanda Hanford Morgan and Jules J. Agostini, Jr., individually and doing business as Morgan & Peacock Properties Co., Defendants, Appellants and Cross-Respondents.

Civ. 18076.

District Court of Appeal, First District, Division 2, California.

May 13, 1959.

Rehearing Denied June 12, 1959.

Hearing Denied July 8, 1959.

Action upon a claimed oral agreement for sharing between brokers of a commission on sale of realty. The Superior Court, Alameda County, Chris D. Fox, J., entered judgment for plaintiff, and subsequently granted defendants' motion for new trial but denied their motion for judgment notwithstanding verdict and to vacate the judgment. Defendants appealed from denial of the latter two motions and, by cross appeal, plaintiff asked reversal of order granting new trial. Defendants then appealed from the judgment, and moved to dismiss plaintiff's appeal. The District Court of Appeal, Draper, J., held that in view of a conflict in the evidence as to whether defendants represented to plaintiff that a licensed salesman was a broker, question of whether defendants were estopped to rely upon salesman's lack of such license was for the jury.

All orders appealed from affirmed, appeal from judgment dismissed, defendants' motion to dismiss plaintiff's appeal denied.

1. Estoppel ⚷119

Fact issues involved in a claimed estoppel are for the trier of the facts.

2. Estoppel ⚷119

In action upon a claimed oral agreement for sharing between brokers of a commission on sale of realty, in view of a conflict in the evidence as to whether defendants represented to plaintiff that a licensed salesman was a broker, question of whether defendants were estopped to rely upon salesman's lack of such license was for the jury.

3. Appeal and Error ⚷263(2)

Defendants in an action for a share of a brokerage commission, in addition to objecting to an instruction, were not required to note an exception to the instruction which in effect deprived them of the right to jury trial on the issue of estoppel, since such formalism is not required by state practice and procedure.

4. Contracts ⚷138(4)

Frauds, Statute of ⚷144

In action for a share of a brokerage commission, if jury found facts sufficient to support an estoppel of defendants to deny their holding out of a salesman as a broker, oral agreement for sharing of the commission would not be barred by the statute of frauds, nor subject to claimed bar of illegality of the contract.

5. Limitation of Actions ⚷127(2)

Where same general set of facts was alleged in amended complaint, as in the original complaint, the amended complaint would be deemed filed as of the date of the original.

6. Limitation of Actions ⚷46(8)

In action for share of a brokerage commission, where owners first executed an agreement to sell the property in February 1955, but a new agreement of sale was executed in September 1955 and escrow was not closed until October 17, 1955, and testimony as to the oral agreement would permit view that it was only when defendants received a commission that plaintiff's right arose, action commenced in May of 1957 would not be deemed barred by the two-year statute of limitations.

7. Appeal and Error ⚷671(4)

Where the District Court of Appeal lacked adequate relevant facts necessary to determine whether plaintiff was or was not a duly licensed realty broker because of a change in residence, it would not decide such issue.

8. Appeal and Error ⚷790(3)

Upon affirmance of an order granting a new trial, appeal from the judgment became moot, and it would be dismissed.

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Anderson & Peck, Oakland, Cyril Viadro, San Francisco, of counsel, for appellant William Hudson.

Wm. H. Neblett, Los Angeles, R. Arthur Bellman, Berkeley, for appellants Morgan & Peacock.

DRAPER, Justice.

This is an action upon a claimed oral agreement for the sharing between brokers of a commission on sale of real estate. Judgment was entered upon jury verdict in favor of plaintiff. Defendants moved for judgment notwithstanding the verdict or, in the alternative, for new trial (Code Civ. Proc. § 629) and later moved to vacate the judgment. The motion for new trial was granted and those for judgment notwithstanding verdict and to vacate the judgment were denied. Defendants appeal from denial of the latter two motions and, by cross-appeal, plaintiff asked reversal of the order granting new trial. Defendants then appealed from the judgment.

The trial court believed that it had erred in an instruction upon estoppel, and this is the principal ground upon which the new trial was granted. Since the contract claimed by plaintiff is oral, recovery under it is dependent upon a showing that plaintiff and defendants are real estate brokers. Defendant Agostini was licensed as a salesman and not as a broker. Plaintiff, however, asserted that defendants had represented Agostini to be a broker and thus are estopped to rely upon his lack of such license. The court instructed the jury that "as a matter of law said defendants are estopped to deny" that Agostini was a real estate broker. In granting new trial, the court decided that the fact issues involved in this instruction should have been left to the jury.

[1, 2] This conclusion is sound. The evidence was in conflict. Plaintiff conceded that Agostini had not expressly represented himself to be a "licensed real estate broker" but asserted that his representation that he was a "broker" and his conduct amounted to such a representation. Defendants offered testimony that Agostini was an insurance broker and had not represented himself as a broker of any other sort. They pointed to evidence that Agostini's license as a real estate salesman hung on his office wall next to plaintiff's own broker's license. In this state of the record, it is clear that the court could not take from the jury the question whether a misrepresentation was made by Agostini and relied on by plaintiff. The fact issues involved in a claimed estoppel are for the trier of the facts. California Packing Corp. v. Lopez, 207 Cal. 600, 603, 279 P. 664, 64 A.L.R. 1412; Sawyer v. City of San Diego, 138 Cal.App.2d 652, 662, 292 P.2d 233; Cruise v. City and County of San Francisco, 101 Cal.App.2d 558, 562, 225 P.2d 988; Lowe v. Copeland, 125 Cal. App. 315, 322, 13 P.2d 522. Most of the decisions relied upon by plaintiff hold only that a jury is not a matter of right in equity proceedings. Language of another case cited by him (Ford v. Palisades Corp., 101 Cal.App.2d 491, 499, 225 P.2d 545, 550) similarly states only that there is no right to jury trial where "the gist of the action" is in equity. Further, in that case it was held that the claimed right to a jury had been waived. In the case at bar, the existence of an estoppel turned upon resolution of conflicts in the evidence. The trial court properly granted a new trial to permit these fact questions to be left to the jury under proper instructions as to the law.

[3] Plaintiff argues that defendants waived their objection to this instruction by acquiescing in the ruling of the trial court. The record does not support this view. He also contends that the instruction in effect denied defendants the right to a jury trial on the issue of estoppel. Thus, it is argued, the point could be saved for appeal only by the noting of an exception, which would not be required for a merely erroneous instruction. We cannot accept this argument. A commonly asserted error in instructions is that in some degree they take a fact issue from the jury. Defendants' view would require counsel to note an exception in each such case. This return to formalism would run directly counter to the whole trend of California practice and procedure. We do not adopt it.

[4] Defendants argue that their motion for judgment notwithstanding the verdict should have been granted because plaintiff's recovery is barred by the statute of frauds and by claimed illegality of the contract. The same contentions were made in Holland v. Morgan & Peacock Properties Co., 168 Cal.App.2d 206, 335 P.2d 769 (hearing denied by Supreme Court April 22, 1959). Although that action was brought by other brokers as plaintiffs, it was against the same defendants and relates to the same sale of property as the case at bar. Of course, the claimed oral agreement and the evidence relating to it differ substantially from such agreement and evidence in Holland. But careful review of the record here shows that the evidence concerning the oral agreement would reasonably permit the same inferences favorable to plaintiff as were drawn by the jury in Holland. If the jury found facts sufficient to support an estoppel of defendants to deny their capacity as brokers, the oral agreement was neither barred by the statute of frauds nor

subject to the claimed bar of illegality (Holland v. Morgan & Peacock Properties, supra). Thus judgment notwithstanding the verdict would have been improper here. Defendant's motion to vacate raises the same issues, and thus was properly denied.

[5, 6] Defendants also contend that they are entitled to judgment as a matter of law because the two-year statute of limitations had run against plaintiff's action. They first argue that the action was commenced May 22, 1957, when the amended complaint was filed, rather than September 24, 1956, when the original complaint was filed. But the same general set of facts is alleged in both pleadings. Thus the amended complaint will be deemed filed as of the date of the original. Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 718, 128 P.2d 522, 141 A.L.R. 1358. Defendants also contend that the cause of action arose February 28, 1955, when the owners first executed an agreement to sell the property. But a new agreement of sale was executed September 15, 1955, and escrow was not closed until October 17, 1955. The testimony as to the oral agreement would permit the view that it was only when defendants received a commission that plaintiff's right arose. Thus there is no merit in defendants' reliance upon the statute of limitations.

[7] Defendants also contend that plaintiff was not a duly licensed real estate broker because he had moved to Nevada and had failed, in his subsequent license applications, to file the consent to service upon the Secretary of State which is required of non-residents. Bus. & Prof. Code, § 10151.5. This contention was not made in the trial court. Defendants' answer failed to deny plaintiff's allegation that he was duly licensed. The present point was first raised in the brief on appeal and by motion to dismiss plaintiff's appeal. There is some evidence in the record that plaintiff had a Nevada address after 1953. However, that evidence is by no means sufficient to establish, as a matter of law, that he was a resident of Nevada. Since there will be retrial, defendants may apply to the trial court for leave to amend their answer. If that court, in its discretion, grants such leave, it will also have the opportunity to explore the fact issues raised by plaintiff's claim that he revealed to the Real Estate Commissioner the circumstances of his residence. Lacking adequate showing of the relevant facts, we do not decide the issue of law raised.

[8] All orders appealed from are affirmed. In view of this affirmance of the order granting new trial, the appeal from the judgment becomes moot and is dismissed. Defendants' motion to dismiss plaintiff's appeal is denied. Costs are awarded to plaintiff.

KAUFMAN, P. J., and DOOLING, J., concur.

170 Cal.App.2d 606

In the Matter of the GUARDIANSHIP OF the Person and Estate of George Ernest CHANDLER, a Minor.

Louise R. CASAMELLO, Lowell H. Chandler, Petitioners and Appellants,

v.

James LaFayette HAMMAN and Edith Adabelle Hamman, Respondents.

Civ. 23566.

District Court of Appeal, Second District, Division 2, California.

May 25, 1959.

Proceeding by the father and maternal grandmother of a child for revocation of letters of guardianship granted the respondent. The Superior Court of Los Angeles County, Jesse J. Frampton, J., refused to grant relief and the petitioners appealed. The District Court of Appeal, Fox, P. J., held that the trial court did not err in refusing to appoint the nominees of the petitioners guardians because they were of the same religion as the child; that the failure to make a finding as to the fitness of the respondents to be guardians was not error under the circumstances; and that other inadvertencies in the findings did not prejudice the natural father of the child.

Judgment affirmed.

1. Guardian and Ward ⚷13(1)

Cardinal consideration governing the appointment of a guardian for a minor is how to serve most effectively the best interests and temporal, moral and mental welfare of the child, and a wide latitude is allowed the trial judge in the exercise of the discretion vested in him.

2. Guardian and Ward ⚷25

In proceeding by father and maternal grandmother of a child for revocation of letter of guardianship granted to the respondents who were found to be fit and proper persons to be the child's guardian, refusing petitioner's petition to appoint their nominees as guardians because the latter were of the same religion as the child was proper, in view of the broad discretion that the court has in such matters, where the respondents had been providing a proper home for the child for some 13 months at the time of the hearing and no reason appeared touching the child's welfare for a change.

3. Guardian and Ward ⚷10

While it is desirable that the religious belief of a guardian of a child be in harmony with that of the child's family and is a factor to be taken into account in appointing a guardian, it is not a decisive consideration and weight to be given such factors is essentially for the trial court.

4. Guardian and Ward ⚷25

In proceeding by father and maternal grandmother of a child for revocation of letter of guardianship granted respondents, failure of the trial court to make a finding as to the fitness of the respondents to be the guardians was not error under the circumstances.

5. Guardian and Ward ⚷25

In proceeding by father and maternal grandmother of a child for revocation of letter of guardianship granted the respondents, record established that the trial court intended to make a specific finding that the petitioner was the father of the minor child and which was the only finding that the evidence supported.

6. Guardian and Ward ⚷25

In proceeding by father and maternal grandmother for revocation of letters of guardianship granted respondents for the custody of a child, record established that the petitioners were not prejudiced by the inadvertencies in the preparation of findings where it was apparent that the trial judge did not take such inadvertencies into consideration in deciding the case.

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Zimmerman & Kelly and Robert Ebiner, Los Angeles, for appellants.

Hodges & Hamilton, Santa Monica, for respondents.

FOX, Presiding Justice.

In this guardianship proceeding Lowell Chandler, the father of the ward, and Louise Casamello, the child's maternal grandmother, filed separate petitions for the revocation, inter alia, of letters of guardianship that had been granted to respondents over the person and estate of George Ernest Chandler, a minor. The trial court refused to grant any relief on either petition. As a consequence, both petitioners have appealed.

Chandler married Doris, the child's mother, in the summer of 1949. George was born in August, 1955. A few weeks thereafter the parents separated, the child remaining with the mother. Subsequently Doris and the child took up residence with one Todd Carey. In approximately September, 1956, Doris entrusted George's custody to her mother, Mrs. Casamello. He remained with her until March 28, 1957, when Doris picked him up and placed him in the care of respondents, Mr. and Mrs. Hamman, with whom she had recently become acquainted through Carey. Soon after this incident Mrs. Casamello filed a petition to be appointed guardian of the child. The Hammans countered with a petition for letters of guardianship on their own behalf. The conflicting petitions were heard by Judge Evans. In August, 1957, he granted the petition of the Hammans and denied the petition of Mrs. Casamello. Chandler was not given notice of this hearing because his residence was unknown.

The present petitions of Chandler and Mrs. Casamello for the revocation of the letters of guardianship that had been issued to the Hammans were filed in April, 1958. Each petitioner sought his or her own appointment as guardian, or, in the alternative, the appointment of such petitioner's nominee.

At the hearing petitioners nominated Mr. and Mrs. Carl Mazurik. The evidence indicates that the Mazuriks are entirely fit and proper persons for such a responsibility and situated so that they could adequately provide for the child. They are of the Catholic faith—the same as that of Mrs. Casamello and Doris, who, however, testified that she ceased to be a practicing Catholic about the time her marriage with Chandler broke up and that "I don't particularly wish to consider myself a member of the Catholic Church." She further testified that the possibility of George being brought up in other than the Catholic religion "would not cause me concern." The father is not a Catholic but stated he had promised that the child should be brought up in the Catholic faith and wanted to make good his promise.

The Hammans had had the child for some 13 months at the time of the trial. They are devoted to George and are giving him good care. They have an adequate home and ample income to provide for him. The Hammans are of the Protestant faith, Mrs. Hamman having joined the Presbyterian Church when a child. More recently they have been attending various other churches.

From the time Chandler and Doris separated, when George was only a few weeks old, the father provided the mother with no financial support for the child. He has shown no interest in him until the instant proceedings were started. Since then, however, he has contributed five payments of $7.50 each toward his support. At the hearing he indicated he wanted to go back to school. At the conclusion of trial the judge appropriately commented with respect to the father's interest in the child and his asserted program for the child as follows: "From about 1955 until * * * about the time of these guardianship proceedings were filed, he [the father] doesn't appear to have evidenced any interest in the child whatever. * * * He has practically deserted this child. * * * As to his present program, he has no program."

The trial court found that Chandler, the father, "is not a fit and proper person to have the custody and control of said child." The court made a similar finding as to the fitness of Mrs. Casamello, the maternal grandmother, "because of her age, temperament and attitude, together with the uncertainty of her ability to support the minor child." The court also found that "the best interests of the child will be served by remaining in the custody and control" of the Hammans and that its best interests require that the Hammans continue as guardians of the minor. The court, however, made no finding as to the fitness of the Mazuriks.

[1] In Guardianship of Levy, 137 Cal.App.2d 237, at page 247, 290 P.2d 320, at page 327, this court stated: "The cardinal consideration governing the court in its appointment of a guardian for the person and estate of a minor is how to serve most effectively the best interests and temporal, moral, and mental welfare of the child. (Citations.) A wide latitude must be allowed the trial judge in the exercise of the

discretion vested in him, so that he may perform his statutory duty in a manner most conducive to the permanent well-being of the child." It is also pointed out in the Levy decision, 137 Cal.App.2d at page 248, 290 P.2d at page 327 that the removal of a guardian "rests within the broad discretion of the court."

[2] Counsel for appellants do not seriously challenge the propriety of the findings that their clients are not fit and proper to be little George's guardian, nor the finding implicit in the judgment that the Hammans are qualified for such responsibility. Appellants' position is that the court erred in refusing to appoint their nominees, the Mazuriks, because the latter are "much more qualified to exercise guardianship of the person and are of the same religion as the infant child." This contention is without merit for it overlooks the "broad discretion" the court has in such matters. Neither the Hammans nor the Mazuriks are related to little George. The mother placed him with the Hammans, who are giving the child love, good care, a nice home and the other things that go into making a wholesome relationship between them and George. They had been thus providing for him for some 13 months at the time of the hearing and were fully discharging their duties and responsibilities in the premises. No reason appeared, touching the child's welfare, for a change. Just how well the Mazuriks would discharge such duties and responsibilities is necessarily a matter of conjecture. The court was entitled to take these circumstances into account in exercising its discretion in favor of leaving the child in the care of the Hammans.

[3] It is, of course, desirable that the religious belief of a guardian of a child be in harmony with that of the child's family. It is therefore a factor to be taken into account in appointing a guardian. It is now, however, a decisive consideration. The weight to be given to this factor is essentially for the trial court's determination, taking into account all relevant facts touching the family's religious beliefs and practices. It was clearly not incumbent upon the court to revoke the appointment of the Hammans and appoint the Mazuriks simply because the latter family is of the same religious faith as the mother and grandmother of George.

The record shows that the trial judge exercised a fair and reasonable discretion in the trial of the case and in its decision.

[4] Appellants complain of the failure of the court to make a finding as to the fitness of the Mazuriks to be guardians of George. The findings that "the best interests of the child will be served by remaining in the custody and control" of the Hammans and that "the best interests of the minor child require" that the Hammans "continue as guardians" of George render wholly unnecessary any finding as to the fitness of the Mazuriks to be his guardians. Only in the event that a change in the custody and control of George was contemplated would a finding as to the fitness of the Mazuriks become material.

Appellants note the absence of any finding on the allegations of paragraph 6 of Chandler's petition, wherein it is alleged that in August, 1957, Judge Evans filed findings of fact and conclusions of law in the previous hearing and appointed the Hammans guardians of George and that they had filed their bond and entered upon the performance of their duties. These allegations were not denied by the Hammans and were accepted as true throughout the proceedings before Judge Frampton. There is no evidence to support a negative finding. In fact, a photostatic copy of Judge Evans' findings of fact, conclusions of law and order appointing the Hammans guardians of George is in the Clerk's Transcript in the instant proceeding. It is obvious that appellants have no basis for complaining of the absence of a finding on this matter. Logan v. Forster, 114 Cal.App.2d 587, 596, 250 P.2d 730.

[5] Appellants complain that there is a conflict in the finding with respect to

whether Chandler is the natural father of George. There is a specific finding that he "is the natural father of said minor child." Finding No. 2, however, finds that the allegations contained in paragraph II of Chandler's petition are untrue. It is there alleged, inter alia, that Chandler is the father of George. The general finding is obviously an inadvertent error due to the hurried and imprecise manner in which the finding was prepared. The Hammans did not deny Chandler's allegation that he was the father of the child and there was no suggestion during the trial that he was not in fact George's father.[1] Furthermore, it is manifest that the court considered Chandler to be the father for it recognized his status to maintain the proceeding and in his summation of the case at the conclusion of the trial Judge Frampton stated: "* * * it appears that he [Chandler] is the natural father of the child." It is clear that the specific finding that Chandler is the father of the minor is the one the court intended to make, and the only finding on this question that the evidence supports. On the question here presented, we adopt the statement of Mr. Presiding Justice Shinn in San Gabriel Valley Ready-Mixt v. Casillas, 142 Cal.App.2d 137, 141–142, 298 P.2d 76, 80: "We would treat these conflicts seriously were we not convinced from past experience with findings made by reference to certain paragraphs of the pleadings that the findings * * * were no doubt prepared by counsel while in a state of listless abstraction and unawareness of the facts to which they relate or their significance. We, therefore, disregard the findings which, due to obvious inadvertence and inattention, are the opposite of other specific findings which fully support the judgment." Furthermore, it is apparent that Chandler was in no way prejudiced by this inadvertence.

[6] Respondents filed objections to Chandler's petition. Their objections were set forth in six paragraphs and alleged a number of asserted facts which, if established, would tend to indicate Chandler's unfitness to have the care and custody of George. A blanket finding was made that the allegations contained in these objections are true. One of the statements thus found to be true is that Chandler "has spent considerable time in jail." There is no evidence to support this charge. This is simply another example of the slipshod practice too frequently followed in the preparation of findings. Since there was no evidence along this line it is plain the trial judge did not take such asserted circumstance into account in deciding the case. The judge discussed the evidence at the conclusion of the trial and announced his decision from the bench. It is apparent that Chandler was not prejudiced by the inadvertence in the preparation of the findings, which occurred some time after the decision had been announced. We find no justification for reversing the judgment.

The judgment is affirmed.

ASHBURN and HERNDON, JJ., concur.

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[1] In their initial petition for appointment as the minor's guardians, which was heard by Judge Evans, the Hammans alleged that Chandler was the father of George and Judge Evans found this allegation to be true.

170 Cal.App.2d 435

Paula Fisher FOOTE, Individually and through her guardian ad litem, Paul Fisher, Plaintiff and Appellant,

v.

Richard FOOTE and Grant Foote, Defendants,

Richard Foote, Respondent.

Civ. 9609.

District Court of Appeal, Third District, California.

May 18, 1959.

Hearing Denied July 15, 1959.

Action for injuries sustained by plaintiff while riding in an automobile driven by defendant. From adverse judgment of the Superior Court, Siskiyou County, James M. Allen, J., the plaintiff appealed. The District Court of Appeal, Warne, J. pro tem., held that fact that plaintiff subsequently married defendant did not preclude her from maintaining an action for injuries sustained prior to marriage.

Judgment reversed.

Husband and Wife ⚷205(2)

Fact that plaintiff subsequently married defendant did not preclude her from maintaining an action against defendant for injuries sustained prior to marriage while riding in an automobile driven by defendant. West's Ann.Civ.Code, §§ 162, 953.

◆

Burton & Hennessy, Yreka, for appellant.

Tebbe & Correia, Yreka, for respondent.

WARNE, Justice pro tem.

On April 12, 1957, plaintiff Paula Fisher Foote, then Paula Fisher, was injured while riding in an automobile driven by Richard Foote. On September 14, 1957, Richard and Paula intermarried and ever since that date have been husband and wife. Thereafter, on March 14, 1958, Paula filed a complaint for damages for personal injuries against her husband, Richard, and his father, Grant Foote. Grant Foote being the owner of the automobile involved in the accident. Defendants demurred to plaintiff's complaint on the ground, among others, of the marital status of the parties. The plaintiff has appealed from the judgment of dismissal following the order sustaining the demurrer of defendant Richard Foote without leave to amend on the ground that the trial court erred in holding that plaintiff could not maintain an action because she and Richard intermarried after the cause of action arose. Hence the sole question presented is whether a wife may sue her husband for a personal tort which occurred prior to marriage. In Carver v. Ferguson, 115 Cal.App.2d 641, 254 P.2d 44, this court held that a premarital tort is a chose in action as defined by section 953 of the Civil Code and that the cause of action based thereon was a wife's separate property under the terms of section 162 of the Civil Code, which provides, in part: "All property of the wife, owned by her before marriage, * * * is her separate property." And, since the cause of action constituted property and vested in the wife at the time of the accident and was "owned" by her from that day forward, she could maintain an action against her husband for such premarital tort.

Although a hearing was granted by the Supreme Court followed by a settlement and dismissal of the appeal in the Carver case, nevertheless, after a reconsideration of our views therein expressed, we see no reason now to change or modify those views. Therefor, since the issue in the present case is the same as presented in the Carver case, we adhere to that decision. From the opinion we quote the following:

"On May 2, 1950, Eleanor Carver was injured while riding in the automobile of William Ferguson, which he was then driving. She filed a complaint for damages on August 15, 1950, for personal injuries against Ferguson. On March 17, 1951, prior to the time set for trial of the matter, plaintiff and defendant intermarried, and ever since that date they have been husband and wife. On November 19, 1951, the trial court granted defendant's motion for dismissal of the action upon the ground of the marital status of the parties. From the judgment of dismissal, plaintiff appeals, presenting for determination the question of whether a wife may maintain, against her husband, an action for a tort which occurred prior to their marriage. The agreed statement of facts upon which the appeal is taken shows that defendant had public liability insurance at the time of the accident, although the materiality and relevance of this factor was and is expressly denied by the defendant.

"Counsel have ably argued their opposing contentions, respondent relying upon the common law rule that the wife may not sue the husband in tort, and appellant contending that the aforesaid rule is neither applicable nor the true state of the law in California as indicated by the several statutory changes to Code of Civil Procedure, section 370, made after the decision in Peters v. Peters, 1909, 156 Cal. 32, 103 P. 219, 23 L.R.A.,N.S., 699. However it is our view that the matter is governed by other principles.

"The cause of action sought to be asserted by plaintiff, being a right to recover payment for damages, is a chose in action, as defined by Civil Code, section 953, which provides that: 'A thing in action is a right to recover money or other personal property by a judicial proceeding.' Under this section, it was held in Everts v. Will S. Fawcett Co., 1937, 24 Cal.App.2d 213, 74 P.2d 815, 816, that a cause of action for tort, like a cause of action arising from breach of contract, is a 'thing in action'. See, also, Mortimer v. Young, 1942, 53 Cal. App.2d 317, 127 P.2d 950, and McFadden v. Santa Ana, Etc. Ry. Co., 1891, 87 Cal. 464, 25 P. 681, 11 L.R.A. 252. A thing in action is characterized by both Civil Code, section 14, subsection 3, and Code of Civil Procedure, section 17, subsection 3, as personal property. Section 1 of each of these code sections defines the general term 'property' as including both real and personal property. Thus, in Scott v. McPheeters, 1939, 33 Cal.App.2d 629, at page 632, 92 P.2d 678, 680, 93 P.2d 562, this court said that property includes the 'right to compensation for personal injuries wrongfully inflicted by the wilful or negligent acts of another person.' Hence it is apparent that the cause of action which the wife was here attempting to pursue constitutes property. Such further proof of this conclusion as may be necessary appears from the following Civil Code sections:

"654: 'The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this code, the thing of which there may be ownership is called property.'

"655: 'There may be ownership of * * all obligations * * *.'

"1427: 'An obligation is a legal duty, by which a person is bound to do or not to do a certain thing.' (1458): 'A right arising out of an obligation is the property of the person to whom it is due * * *.'

"Since that property accrued to appellant at the moment of the commission of the wrong, it becomes equally clear that the cause of action was her separate property. Civil Code, section 162, provides, in part, that: 'All property of the wife, owned by her before marriage, * * * is her separate property.' The cause of action here pleaded is the alleged breach by respondent of a duty of care owing by him to appellant, which breach caused injury to appellant; these matters are all referable to a particular moment in time when that breach and injury occurred. Whatever obligation might be found to exist upon the respondent in favor of the appellant arose at the moment of breach and injury. Therefore, the cause of action, which constituted property arose and vested in appellant at the time of the accident, and was 'owned' by her from that day forward. She thus owned it prior to her marriage to respondent and it constitutes her separate property.

"The character of property as separate or community is determined by its status as of the time of acquisition, hence any subsequent change in appellant's marital situation could have no effect upon the separate nature of property which she owned prior to marriage, and which followed her into the marriage. Finley v. Winkler, 99 Cal.App.2d Supp. 887, 222 P.2d 345; 3 Cal.Jur. 10–Yr. Supp. 505. No further authority than Civil Code, section 157, providing that 'Neither husband nor wife has any interest in the property of the other * * *', need be cited to sustain the proposition that the wife cannot be prevented from dealing with her separate property as she sees fit, nor can she be prevented from resorting to whatever legal process may be necessary to protect her interest in that property, whether it be a chose in action stemming from tort or contract, or a parcel of real estate. No justification can be found for a contrary rule which would operate to divest her of that property. In Zaragosa v. Craven, 1949, 33 Cal.2d 315, 202 P.2d 73, 6 A.L.R.2d 461, it was expressly held that the recovery on a cause of action for personal injuries bears the same character as the cause of action itself; the result in that case, that the property was community because the cause of action accrued during marriage, alters neither the substance nor applicability of the rule. See, also, Huber v. Huber, 1946, 27 Cal.2d 784, 167 P.2d 708, and authorities cited therein to the effect that property received in exchange for separate property is separate property.

"Because of the separate nature of any recovery appellant might receive upon her cause of action, the entire transaction must be regarded as one by the wife concerning her separate property, as to which no disability to litigate can be asserted according to the fortuitous circumstance of whether the defendant happens to be her husband instead of a third party. Nothing in Code of Civil Procedure, section 370, providing that a married woman may sue or be sued in her name alone in all actions, can provide comfort to respondent in his attempt to deny appellant the right to pursue her separate property interests. The fundamental feature in this case is the fact that the right accrued to the wife prior to marriage. This conclusion must follow because had the matter been first pursued to judgment, the subsequent intermarriage of the parties could have no more effect upon the legal collectibility of such a judgment than upon a judgment obtained against a third person prior to marriage. Such a judgment would constitute the wife's separate property. In the same manner, 'The right to recover damages for a personal injury, as well as the money recovered as damages, is property * * *.' McFadden v. Santa Ana, Etc. Ry. Co., 1891, supra, 87 Cal. at page 467, 25 P. 682, and the circumstances of the litigants' intermarriage prior to the rendition of judgment cannot operate to deprive the wife of property which is rightfully hers.

"While it is true that in a few jurisdictions the existence of liability insurance has been considered, nevertheless under the conclusion we have reached we do not see the materiality of such fact in the present case. Appellant's rights stem from the nature of her cause of action as a property right acquired before marriage. This concept has already been enunciated in Morrissey v. Kirkelie, 1935, 5 Cal.App.2d 183, 42 P.2d 361, in which an engaged couple, while returning from the courthouse where they had filed their notice of intention to marry, were involved in an automobile collision. In disposing of the contention that the negligence of the driver should be imputed to plaintiff because they had intermarried and were husband and wife at the time of the trial, the court stated, 5 Cal.App.2d at page 184, 42 P.2d at page 362: 'Plaintiff's recovery is not community property, since her rights thereto accrued before marriage. The rule that the negligence of a husband is imputable to his wife does not apply here', and affirmed the judgment in favor of plaintiff wife. Hearing in that case was refused by the Supreme Court.

"Not is anything herein stated in conflict with Watson v. Watson, 1952, 39 Cal.2d 305, 246 P.2d 19, where it was held that the rule that one lawful spouse may not sue the other for damages in tort applies to prevent an action for a tort occurring after entry of an interlocutory divorce decree but before entry of the final decree. In that case, the plaintiff was estopped to deny the existence of the marriage at the time the tort was committed; there was no marital relationship between appellant and respondent herein at the time the tort was committed."

The judgment of dismissal is reversed.

VAN DYKE, P. J., and PEEK, J., concur.

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170 Cal.App.2d 494

Max ARONSTEIN, Plaintiff and Respondent,

v.

Margot ARONSTEIN, by and through Max Isaak, her guardian ad litem, Defendant and Appellant.

Civ. 18148.

District Court of Appeal, First District, Division 1, California.

May 20, 1959.

Rehearing Denied June 1, 1959.

Hearing Denied July 15, 1959.

Proceedings on motion for increase of wife support provisions of decree granting husband divorce on ground of incurable insanity. The Superior Court, City and County of San Francisco, Orla St. Clair, J., increased payments from the original $35 to $50 per month, pursuant to husband's offer, and an appeal was taken from modification order insofar as it failed to provide for more than $50 per month during such periods as wife was not hospitalized. The District Court of Appeal, Tobriner, J., held that quoted term, in Code section providing that divorce granted on ground of insanity shall not relieve spouse of any "obligation" imposed by law, is inchoate and court must give it content; and held that since the "obligation" relates back to that of married spouse, measure of obligation is fixed in terms of spouse's ability to pay.

Affirmed.

1. Divorce ⚷313

Quoted term, in Code section providing that divorce granted on ground of insanity shall not relieve spouse of any "obligation" imposed by law, is inchoate and court must give it content; and since the "obligation" relates back to that of married spouse, measure of obligation is fixed in terms of spouse's ability to pay. West's Ann.Civ.Code, § 108.

See publication Words and Phrases, for other judicial constructions and definitions of "Obligation".

2. Divorce ⚷285, 286

On appeal from order modifying alimony provisions of divorce decree, reviewing court could not decide de novo whether appellant's contention should prevail over respondent's; and, also, court could not consider figures set out in briefs of parties but not contained in record.

3. Husband and Wife ⚷4

Obligation to support needy spouse takes priority over obligation to support parents, particularly where parents are not indigent.

4. Divorce ⚷245(3)

In proceedings on motion for increase of wife support provisions of decree granting husband divorce on ground of incurable insanity, evidence sustained finding that limit of husband's ability to pay for wife's support was $50. West's Ann.Civ.Code, §§ 108, 139.

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Richard O. Graw, Howard W. Wayne, Berkeley, for appellant.

Eisler & Rieman, San Francisco, for respondent.

TOBRINER, Justice.

This case presents the narrow issue whether the record supports an order that respondent pay $50 per month for support of appellant from whom respondent was divorced upon the ground of incurable insanity.

The relevant facts disclose an unfortunate series of events. Married on April 14, 1949, appellant within six months became ill with tuberculosis which caused her confinement at the Belmont Sanitarium. Upon her release from the sanitarium in June, 1950, appellant again resumed living with her husband, only to suffer a miscarriage in November, 1950. In turn, this difficulty reactivated appellant's tubercular condition, and she was sent to the National Jewish Hospital at Denver, Colorado. While there, appellant became mentally ill; she was then transferred to Kaiser Hospital in Vallejo, California. On February 13, 1952, the Superior Court for the County of Solano committed appellant to the State Hospital for the Insane at Napa, California.

Respondent obtained an interlocutory decree of divorce from appellant on the ground of incurable insanity on September 26, 1955. The final decree, entered October 8, 1956, provided that respondent pay $30 per month to the Department of Mental Hygiene for her support and $5 per month to the Social Service Department at the Napa State Hospital for her personal use. The decree also required respondent to designate appellant as the irrevocable beneficiary of a $5,000 life insurance policy on his life which he was to maintain during her lifetime.

After more than five years of confinement, appellant obtained leave from the hospital in March, 1957, and went to live with her parents. Dr. Kurt S. Brock, as appellant's physician, filed an affidavit stating that during the period of her release appellant required administration of a drug under the supervision of a physician; that her tubercular condition was "arrested"; that she was not "physically or mentally capable of accepting employment."

The 67 year old father of appellant, appointed her guardian ad litem, has moved for an increase in the support provision of the final decree, stating that appellant's minimum needs call for $125 per month, of which amount $25 is required for medical expenses alone. Respondent, an unmarried man of 42 years of age, employed by the Fairmont Hotel as a headwaiter or captain at the Venetian Room, does not challenge the claimed need for support but contends that he is unable to make such payments.

Upon hearing, the trial court denied appellant's motion for an increase in the payments. Appellant then filed a "Notice of Intention to Move for New Trial." Treating appellant's motion as a motion for reconsideration of the motion to increase, the trial court did, pursuant to respondent's offer to do so, increase the payments from the original $35 to $50 per month. The order of modification provides, likewise, that if appellant is again hospitalized respondent shall, in lieu of the $50 per month, pay $30 per month to the Department of Mental Hygiene and $5 per month for appellant's personal use to the Social Service Department of the hospital in which she is confined.

Appellant appeals from the modification order insofar as it fails to provide for more than $50 per month during such periods as she is not hospitalized. Accordingly, we must first define the nature of the obligation owed by a spouse who obtains a divorce upon the ground of incurable insanity; thereafter we must determine whether the trial court applied the proper test for fulfilling that obligation, and finally examine the record to see if it supports the court's order.

Society has been slow to recognize the propriety of a divorce granted on the ground of a spouse's incurable insanity. This reluctance probably stemmed from the concept that a divorce could rest only on "the deliberate misconduct of the defendant" and not on the "impossibility of a functioning marriage." 1 Armstrong California Family Law (1953) 177. In Great

Britain only in 1937 did the Matrimonial Causes Act of that year provide for divorce upon the ground of "unsoundness of mind," regarded after five years of duration as incurable. Encyclopedia Britannica, 1945 Ed., Vol. 7, p. 458. It was in the comparatively recent year of 1941, St. 1941, c. 951, § 2 that the Legislature of this state denominated insanity as a ground for divorce (Civ.Code, § 108) and even then posited it upon the condition that the party seeking the divorce allege in the complaint and prove at the trial that there was "reasonable ability to support the insane spouse for the remainder of the life expectancy or that such insane spouse has property sufficient to provide support for the remainder of the life expectancy * * *." When this condition was declared unconstitutional because it created an arbitrary and unreasonable class discrimination between those of different financial resources (Dribin v. Superior Court, 1951, 37 Cal.2d 345, 231 P.2d 809, 24 A.L.R.2d 864; Morganti v. Morganti, 1950, 99 Cal.App.2d 512, 222 P.2d 78), the Legislature removed it in 1951. Cal.Stats.1951, ch. 1580. The process of relieving the innocent husband or wife from a marriage that no longer existed as a human relationship and which served only as a formality to frustrate the normal life of the sane party was halting and tortuous.

The archaic discrepancy between the divorce granted for alleged fault of the party and that based upon incurable insanity remains in the differing requirements for support of the divorced spouse. While under Civil Code, section 139, the court is empowered to "compel the party against whom the decree or judgment is granted to make such suitable allowances for support and maintenance of the other party * * as the court may deem just, having regard for the circumstances of the respective parties * * *," section 108 by contrast contains this caveat: "No decree granted on this ground shall relieve the spouse granted the divorce of any obligation imposed by law as a result of the marriage for the support of the spouse against whom the divorce is granted, and the court may make such order for support, or require a bond therefor, as the circumstances require."

The wide latitude of discretion of section 139, permitting the consideration of such factors as the length of the marriage, the respective age of the parties, the degree of fault as to events leading up to the divorce, the separate estate of the ex-spouse seeking support, the need of the former spouse compared to the ability of the other (Bowman v. Bowman, 1947, 29 Cal.2d 808, 178 P.2d 751, 170 A.L.R. 246, and Thomasset v. Thomasset, 1953, 122 Cal.App.2d 116, 264 P.2d 626) finds no counterpart in section 108. Instead, that section imposes upon the spouse who obtains a divorce upon the grounds of insanity a primary and irrenounceable duty of support.

In re Guardianship of Thrasher, 1951, 105 Cal.App.2d 768, 234 P.2d 230 and In re Estate of Risse, 1957, 156 Cal.App.2d 412, 319 P.2d 789, announce the stringent rule. In both the Thrasher and the Risse cases the wife became insane and the husband was appointed guardian of the wife's estate. The husband in the Thrasher case, supra, sought to charge the expenses of her support to the wife's separate property. The husband in the Risse case, supra, sought to charge the wife's support to her half of the community property. In both cases the court required that the husband bear such expense without any contribution from the wife's estate. And Klinker v. Klinker, 1955, 132 Cal.App.2d 687, 283 P.2d 83, in enforcing support by a husband of a wife divorced in Nevada on grounds of insanity, states: "While the legislatures of many of the states have widened the possibility of divorce by the enactment of statutes authorizing the granting of a divorce on the ground of incurable insanity, * * * no one of such statutes relieves the husband of his obligation to support his former wife. That obligation remains the same after the divorce as it was before and may be enforced in any appropriate proceeding." 132 Cal.App.2d at pages 697–698, 283 P.2d at page 90.

[1] Yet there are limits to the obligation of support in section 108. The term "obligation" is inchoate; the court must give it content. Obviously it is not absolute; the spouse cannot be saddled with an obligation which is beyond his economic capacity. The section itself states that the divorce granted on the ground of insanity shall not "relieve the spouse granted the divorce of any obligation imposed by law as a result of the marriage * * *." The obligation, then, must relate back to that of the married spouse. This obligation obviously cannot reach beyond the extent of the spouse's ability to meet or pay for the support of the partner. Consequently, we conclude, as indeed the parties hereto apparently agree, that the measure of the obligation is fixed in the terms of the spouse's ability to pay.

While no decision squarely makes this test manifest, the cases inferentially accept it and some rest upon it. In re Guardianship of Thrasher, supra, 105 Cal.App.2d 768, 234 P.2d 230, in holding the husband liable for support of the incompetent wife and inhibited from depleting her estate by charging against it the cost of her care, imposed that obligation upon him to the extent of his financial ability, saying: "We believe that the reasonable and proper construction of all of the applicable sections is that the husband of a wife who has been committed to a mental institution is primarily liable for her maintenance there *to the extent of his financial ability to pay for it*; that if she has estate over which a guardian is appointed, he may not draw upon such estate for her maintenance so long as he has the financial ability to pay for same * * *." 105 Cal.App.2d at page 777, 234 P.2d at page 236, italics added. Following Thrasher, the court in Re Estate of Risse, supra, 156 Cal.App.2d 412, 319 P.2d 789, in applying the same principle, alludes to the fact that the husband was *financially able* to meet the charges for the support of the wife and made no showing to the contrary. Thus, "[i]t was pointed out by the Department that the court, in the first instance, had neglected to take any evidence to show that the husband was unable to contribute to his wife's support" (156 Cal.App.2d at page 416, 319 P.2d at page 792); the court further states that "neither is there any contention that he was unable, unassisted, to support and maintain his wife in her illness." (156 Cal.App.2d at page 417, 319 P.2d at page 793). Finally, Klinker v. Klinker, supra, 132 Cal.App.2d 687, 283 P.2d 83, makes reference to the fact that the "affidavit must be read in connection with the allegations of the complaint. Together, they are sufficient to show the needs of the plaintiff and the ability of defendant to pay." 132 Cal.App.2d at page 698, 283 P.2d at page 90.

It is clear, then, that the spouse who obtains a divorce upon the ground of incurable insanity must support the insane spouse to the extent of his ability to pay for such support.

Our next question must be, as above set out, whether the trial court applied this test. Appellant's contention that the trial court rejected the criterion, merging sections 108 and 139, is not sustained by the record. While the court expressed some concern as to the disparity of the rules of the sections, the court expressly related its findings to respondent's ability to pay, saying: "I would be less than honest as far as the record is concerned if I didn't say I was influenced by the argument Mr. Eisler has just made, that if she had been divorced under any other circumstances she would long since now have been cut off from support as far as my philosophy of it is concerned. On the other hand, the statutory admonition is there, * * *. I just don't see the money here, counsel, to support her from this man, to support her the way she should be supported."

[2–4] Our last inquiry goes to the question whether the finding of the trial court as to respondent's ability to pay is supported by competent evidence. We do not here decide de novo whether appellant's contentions should prevail over respondent's. Our detailed task is to search the record to see if the trial court's determination is supported by the testimony and the evidence. In a similar case involving the question of ability to support in a suit involving the incurable insanity of the wife, the court reiterates the basic rule: "However, since the rule of procedure is settled that a finding of the trial court may not be disturbed on appeal when supported by competent evidence, we must hold that the finding that plaintiff's ability to support the defendant was not proved is a finding on a material question of fact which is just as binding as an affirmative finding that a material issue has been proved." Wirz v. Wirz, 96 Cal.App.2d 171, at page 177, 214 P.2d 839, at page 843, 15 A.L.R.2d 1129.

In the instant case, appellant contends that respondent's gross monthly wage was $360 per month; that he admitted his tips amounted to a figure of $2,100 in the year of 1956; that his Federal Income Tax Return shows an investment in vending machines of $8,792.18; that in addition he purchased an automobile for $2,450. She contends that since respondent shows expenses of only $350 per month he could well afford to meet appellant's claim for support of $125 per month.

In substance, the contrary contention of respondent is that his net earnings amount to less than $400 per month; that his expenses reach at least $350 per month; that the investment in vending machines was obtained by a loan; that the car is required for servicing and maintaining the vending machines.

While each of the parties set out in their briefs suggestions of figures and contentions to support their respective positions which are not contained in the record, we cannot consider here such assertions. Newman v. Board of Civil Service Com'rs, 1956, 140 Cal.App.2d 907, 296 P.2d 41. We are confined to the record. The affidavit of respondent concerns itself with his 1956 earnings and expenses; the references to 1957 in the transcript are inconclusive; we therefore look to the record to determine whether the showing as to the 1956 earnings and expenses supports the court's ruling.

There is testimony in the record to sustain the court's findings as to the 1956 income and expenses of respondent. As to income, the income tax return attached to respondent's affidavit shows an adjusted gross income of $5,640.10; the tax on this amount is $868.69, leaving a net of $4,771.41. On a monthly basis, this computes $397.60 per month. Respondent himself, in the "husband's questionnaire" attached to the affidavit of June 24, shows a monthly total income of $396.25. The court's apparent conclusion that respondent's income was in the neighborhood of $400 per month would therefore find substantiation in the evidence.

Likewise, the court's finding that respondent's expenses approximated $350 per month finds support in the record. Respondent testified that his "monthly expenses amount to $350, not counting the $30" paid to his parents. The aforementioned husband's questionnaire totals the expenses at $380.31 per month including "support parents $30." While the obligation to support a needy spouse must take priority over that of support of parents, particularly when there is no showing that the parents are indigent (see 2 Armstrong, California Family Law (1953) 1125, 1145–46), the monthly living expenses of respondent, as submitted to the court, even deducting the parental support in the amount of $30, reach $350 per month. The court could well concur with respondent's counsel's statement that $350 a month for a bachelor is not "out of line these days." The record, then, substantiates the court's ruling that defendant's limit of ability to pay for appellant's support was no more than $50 per month.

While there was some testimony of respondent that he expected his vending machine business to do better in the future and while it is possible that respondent may increase his earnings in wages and tips to an extent which might increase his ability to pay for the support of appellant, these possibilities cannot sustain a ruling of this court that the trial court's finding is unsupported. In any event appellant may make such future application to the trial court regarding respondent's ability to pay as may be justified by change of circumstance.

We therefore affirm the order of the trial court.

BRAY, P. J., and FRED B. WOOD, J., concur.

170 Cal.App.2d 548

E. F. MOORE, Appellant,

v.

MUNICIPAL COURT OF SALINAS JUDICIAL DISTRICT, COUNTY OF MONTEREY, State of California, Respondent.

Civ. 18266.

District Court of Appeal, First District, Division 1, California.

May 22, 1959.

Petitioner brought prohibition proceeding to compel the Municipal Court of the Salinas Judicial District to desist from proceeding in a criminal prosecution against petitioner for alleged violation of rural fire district ordinance. The Superior Court, Monterey County, Stanley Lawson, J., entered an order denying a writ of prohibition, and the petitioner appealed. The District Court of Appeal, Tobriner, J., held that section of the Health and Safety Code giving directors of a rural fire district the power to adopt ordinances providing for rules and regulations is not an unlawful delegation by the Legislature to the directors of the power to fix rules and regulations.

Order affirmed.

1. Prohibition 🔑10(3)

Where Municipal Court determined that it had jurisdiction of prosecution for violation of rural fire district ordinance and was about to proceed to exercise such jurisdiction, and defendant did not have available to him a plain, speedy, and adequate remedy at law, and contention of defendant that ordinance was unconstitutional raised a sufficiently vital question to merit decision, the case was a proper one for remedy of writ of prohibition in Superior Court. West's Ann.Code Civ.Proc. § 1103.

2. Prohibition 🔑10(1)

Fact that lower tribunal has jurisdiction to determine its own jurisdiction does not preclude the remedy of prohibition in Superior Court.

3. Prohibition 🔑3(1)

The availability of a possible habeas corpus proceeding does not preclude issuance of writ of prohibition.

4. Constitutional Law 🔑62

The Legislature may not delegate to a subordinate administrative body the power to promulgate rules and regulations coupled with power to fix penalty for their violation, but so long as the Legislature determines the penalty, it may leave with the administrative body the actual making of multiple rules called for by specific subject matter regulated.

5. Municipal Corporations 🔑603

Section of rural fire district ordinance fixing fines and terms of imprisonment for violation of the ordinance was invalid. West's Ann.Health & Safety Code, §§ 14680, 14681, 14684, 14685, 14688.

6. Municipal Corporations 🔑111(4)

Invalidity of section of rural fire district ordinance fixing fines and terms of imprisonment for violation of the ordinance did not affect the remaining substantive portions of the ordinance, and they were still enforceable, where the invalid section was separable, and the Legislature had enacted a statute making violation of such ordinance a misdemeanor. West's Ann.Health & Safety Code, §§ 14680, 14681, 14684, 14685, 14688.

7. Constitutional Law ⚷63(2)
Municipal Corporations ⚷603

Section of the Health and Safety Code giving directors of a rural fire district the power to adopt ordinances providing for rules and regulations is not an unlawful delegation by the Legislature to the directors of the power to fix rules and regulations. West's Ann.Health & Safety Code, § 14686.

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Louis C. Moore, Salinas, for appellant.

William H. Stoffers, County Counsel, Monterey County, John O. Thornberry, Deputy County Counsel, Salinas, for respondent.

TOBRINER, Justice.

This is an appeal from a denial by the Superior Court of Monterey County of a writ of prohibition, directed to the Municipal Court of the Salinas Judicial District, which would have ordered the municipal court to desist from proceeding in a criminal action on the ground of the unconstitutionality of the involved ordinance.

A criminal complaint charged appellant with violation of section 1(a) of the Salinas Rural Fire District Ordinance No. 1 in that "defendant, within the boundaries of the Salinas Rural Fire District, did willfully burn a fire out of doors for the purpose of burning papers and trash and other inflammable materials in an unapproved incinerator without first having obtained a permit." Appellant demurred on the grounds that the facts stated did not constitute a public offense and that the ordinance was unconstitutional. When the municipal court overruled appellant's demurrer, he petitioned the superior court for a writ of prohibition. The court granted an alternative writ but after hearing ordered the writ discharged, remanded the case to the municipal court for further proceedings, and denied a permanent writ on the dual grounds of the unavailability of the writ and the constitutionality of the regulation. The original charge is still pending in the municipal court, but the parties have stipulated that the trial be postponed until determination of the present appeal from the order of the superior court.

Thus the superior court refused the writ but proceeded to uphold the constitutionality of the questioned ordinance. If the first ruling is to stand, the basis of the second must collapse; the court must have precluded itself from inquiry into the merits by the procedural refusal of the writ. We therefore examine each issue independently.

[1] That this is a proper case, however, for the remedy of a writ of prohibition is demonstrated by these considerations: (1) the lower tribunal has determined that it had jurisdiction of the matter and was about to proceed to exercise it; (2) appellant did not have available to him a plain, speedy and adequate remedy at law; (3) the constitutionality of the questioned ordinance raised a sufficiently vital question to merit decision.

[2] Turning to the threshold question, respondent apparently relies upon the older and conservative decision, Fels v. Justice's Court, 1938, 28 Cal.App.2d 739, 83 P.2d 721, that the writ cannot issue because the lower tribunal's jurisdiction to determine its own jurisdiction is absolute and can be upset only upon appeal. However, the more recent applicable Supreme Court decision, Rescue Army v. Municipal Court, 1946, 28 Cal.2d 460, 171 P.2d 8, recognizes that while the lower tribunal has "jurisdiction" to determine its own jurisdiction this does not preclude the remedy of prohibition, saying: "When, however, the trial court has heard and determined the jurisdictional challenge, and has decided in favor of its own jurisdiction, and then proceeds to *act*, that is, *to try* the cause on its merits, * * * [i]t then may be properly claimed that a court without jurisdiction is purporting to *exercise it*. At this stage, jurisdiction to determine jurisdiction has been exercised, and the higher courts will, in an appropriate case, restrain the lower court from acting in excess of jurisdiction [citations]." 28 Cal.2d at pages 464–465, 171 P.2d at page 11; see also Glasser v. Munic-

ipal Court, 1938, 27 Cal.App.2d 455, 81 P.2d 260; 40 Cal.Jur.2d 132–34.

In the present case when petitioner demurred to the criminal complaint, charging violation of the allegedly unconstitutional ordinance, the municipal court overruled the demurrer. To quote Rescue Army, supra, "it is apparent that the court had decided in favor of its own jurisdiction and [was] proceeding to exercise it." 28 Cal.2d at page 465, 171 P.2d at page 12. The municipal court would have tried the case. It was stopped only by the issuance by the superior court of an alternative writ. The underlying condition of Rescue Army for issuance of the writ was fulfilled.

The second issue poses the question whether petitioner had available to him a plain, speedy and adequate remedy at law. Code Civ.Proc. § 1103. It is true that appellant could have appealed to the appellate department of the superior court and that, historically, the older cases have held that such relief in itself precluded the issuance of the writ. See Powelson v. Lockwood, 82 Cal. 613, 23 P. 143; Simpson v. Police Court of City of Riverside, 160 Cal. 530, 117 P. 553. The most recent cases recognize that the requirement that a defendant in a criminal case stand trial by a court which acts without or in excess of its jurisdiction is an imposition of personal hardship upon the defendant and a futile expense to the public. (See the excellent analysis in 3 Witkin, California Procedure, 2513–14.) The burden becomes particularly acute in a situation in which the defendant must appeal to the appellate department of the superior court and he has no remedy of certiorari. See Rescue Army v. Municipal Court, supra, 28 Cal.2d 460, 465–466, 171 P.2d 8; Hampton v. Superior Court, 38 Cal.2d 652, 656, 242 P.2d 1; Hill v. Superior Court, 16 Cal.2d 527, 529, 106 P.2d 876; Carter v. Superior Court, 96 Cal. App.2d 388, 393, 215 P.2d 491; 40 Cal.Jur. 2d 138–39.

[3] Nor does the availability of a possible habeas corpus proceeding preclude the issuance of the writ. Two recent decisions compose the reasons why the court may entertain the issuance of the writ. In Alves v. Justice's Court, 148 Cal.App.2d 419, 306 P.2d 601, when petitioner was charged with a violation of a municipal curfew regulation he moved for dismissal on the ground of its unconstitutionality. The motion was denied; petitioner sought a writ of prohibition in the superior court which likewise was denied. Holding the ordinance unconstitutional, the District Court of Appeal stated as to the issue of prohibition: "We know of no rule which would compel appellant to stand trial upon a complaint based on a void statute with the possibility of conviction of contributing to the delinquency of a minor and a fine of $1,000 or imprisonment in the county jail for two years, or both, and not be able to raise a question as to the constitutionality of ordinances under which he was compelled to go to trial until after his conviction." 148 Cal.App.2d at page 425, 306 P.2d at page 609. While Dickenson v. Municipal Court, 1958, 162 Cal.App.2d 85, 328 P.2d 32, seemingly reaches an opposite conclusion in that the appellate court upholds the superior court in denying the writ on the ground of adequacy of remedy, the court proceeds to point out: "It may also be reasonably inferred that where, as here, there are several complaints and charges, *questions of fact* may be involved and the defense of unconstitutionality of one section of the ordinance may be available as to some of the charges and not as to the others. These matters can be considered and decided during a trial or on an appeal." Italics added; 162 Cal.App.2d at page 89, 328 P.2d at page 34. The instant case raises no questions of fact.

Following the more modern rule of Rescue Army, the Supreme Court in Hunter v. Justice's Court, 1950, 36 Cal.2d 315, 223 P.2d 465, approved the use of the remedy. Charged with violation of certain sections of the Public Resources Code, petitioner moved to dismiss the complaint upon the ground of their unconstitutionality. The justice's court denied the motion. Although the Supreme Court sustained the validity of the regulation, it held that submission to trial and appeal from an adverse judgment would not be an adequate remedy. While respondent attempts to distinguish Hunter upon the ground that denial of a motion to dismiss on the merits is not an appealable order, the overruling of the demurrer in the instant case is likewise not an appealable order (see Pen.Code, § 1466), and the decision applies.

Finally, the issuance of the writ is surely affected by the social vitality of the issue involved. Appellant properly points out that "California is literally blanketed with districts of one kind and another, all concerned with the administration of this state's complex affairs, and requiring effective means of enforcing the rules and regulations promulgated by their boards of directors." The issue as to whether the Salinas Rural Fire District and similar entities may enact and enforce rules and regulations carrying the sanction of misdemeanors is a question of such importance that it should be decided by an appellate court. Indeed, if the fire district may not enforce such regulations, there may ensue the "multiplicity of void proceedings" which, according to Rescue Army, should be prevented. Supra, 28 Cal.2d 460, 467, 171 P.2d 8. On the other hand, if the fire district may properly enact such regulations the writ may simply be denied on the merits. See Gorbacheff v. Justice's Court, 31 Cal.2d 178, 187 P.2d 407.

The three considerations set out above, and particularly the third, combine to make this case a proper one for the remedy of the writ of prohibition: the lower tribunal had determined it had, and was about to exercise, jurisdiction; no plain, speedy and adequate remedy at law was available to petitioner; and the question of the constitutionality of the ordinance constituted an issue of wide social importance.

We proceed, then, to the question of the constitutionality of the legislation. Appellant raises three points which echo the classic attack made in this type of case: (1) the legislation cannot stand under Article XI, section 11, of the Constitution; (2) the legislation unlawfully delegates power to impose a penalty, and in this respect section 8 of the ordinance is obviously invalid; and (3) the legislation unlawfully delegates the power to promulgate rules and regulations of the fire district.

These objections must be analyzed in the light of the legislative enactment. The Legislature here has authorized the creation of fire protection districts pursuant to its inherent power (11 Cal.Jur.2d 499) to contain the awesome, destructive power of fire. See 22 Cal.Jur.2d 138. Sections 14001 to 14921 of the Health and Safety Code authorize the creation of such districts, providing for their establishment in four types of areas: in unincorporated areas (§ 14001 et seq.); in metropolitan areas (§ 14325 et seq.); in counties (§ 14400 et seq.); and in areas in one or more counties (§ 14600 et seq.). The Salinas Rural Fire Protection District was created under the latter section providing for fire protection districts in one or more counties.

The legislation provides that "[t]he directors shall manage and conduct the business and affairs of the district" (§ 14680); that "[t]hey shall make and enforce all rules and regulations necessary for the administration and government of the district and for the furnishing of fire protection to it" (§ 14681); that they shall remove fire hazards and to that end may clear highways and lands (§ 14684); that "[t]he directors shall perform all other acts necessary, proper and convenient to accomplish the purposes of this chapter" (§ 14685). Section 14688 provides that "[e]very person who violates any of the provisions of an ordinance of the directors is guilty of a misdemeanor."

Pursuant to the code provisions, the Salinas Fire Protection District set up regulations in the first seven sections of its ordinance for controlling fire and burning as well as associated matters within the district. Section 8, however, declares that "[a]ny person, * * * who shall violate any of the provisions of this ordinance * * * shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than Five ($5.00) Dollars, nor more than Three Hundred ($300.00) Dollars, or by imprisonment in the County Jail of Monterey County, California, not exceeding 90 days, or by both such fine and imprisonment * * *."

As we have said above, appellant's first complaint is that the legislation cannot stand under Article XI, section 11, of the Constitution, since that section describes the exclusive political entities which have the power to enact penal ordinances. It is true the Constitution states that "[a]ny county, city, town, or township may make and enforce within its limits all local, police, sanitary and other regulations as are not in conflict with general laws." Cal.Const., art. XI, § 11. It is likewise true that this section does not include fire districts.

On the other hand, respondent contends that the constitutional provisions are enabling rather than restrictive and that the Legislature may properly delegate to such bodies the power to make administrative regulations. Consequently, the issue actually devolves into the answers to the second and third points raised by appellant as to unlawful delegation.

[4] Turning, accordingly, to the contention that we treat here an unlawful delegation of a power to fix a penalty, we recognize that the Legislature may not delegate to a subordinate administrative body the power to promulgate rules and regulations coupled with the power to fix the penalty for their violation. The power to fix the penalty cannot be fragmentized without the danger that multiple administrative agencies may impose different sanctions for the same violation. The Legislature must retain the prerogative of the definition of the penalty because its distribution to various agencies could cause disparate and inequitable punishment for identical offenses. But so long as the Legislature determines the penalty it may leave with the administrative body the actual making of the multiple rules called for by the specific subject matter regulated.

The Legislature in this instance did enact a statute which provides that the violation of any of the provisions of an ordinance issued pursuant to it would constitute a misdemeanor. In essence the violation of any provision of the ordinance is tantamount to a violation of the legislation itself. See Davis, Administrative Law (1951) 69–70. The Legislature fixed the penalty; it did not transgress the principle that it not turn over to others this important function.

The decisions expostulate this principle; the Supreme Court case of United States v. Grimaud, 1910, 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563, serves as a leading exponent. Reciting that its purpose was the protection of forest reserves "'against destruction by fire and depredations * * *.'" the Congress gave the Secretary of Agriculture authority to issue rules as to the use and occupation of such forests and provided further that the violation of such rules constituted a criminal act. 220 U.S. at page 509, 31 S.Ct. at page 481. Upholding the legislation, the U. S. Supreme Court pointed out that "[t]he Secretary did not exercise the legislative power of *declaring the penalty* or *fixing the punishment* for grazing sheep without a permit, but the punishment is imposed by the act itself." Italics added; 220 U.S. at page 523, 31 S.Ct. at page 485.

This principle has long been accepted in California. It finds an early expression, predating Grimaud, in Board of Harbor Com'rs of the Port of Eureka v. Excelsior Redwood Co., 1891, 88 Cal. 491, 26 P. 375. Rejecting the attempt of the Harbor Commissioners to impose their own penalty for violation of one of their rules, the court intimated that the vice of the legislation lay in the fact that the Legislature "not only delegated the power * * * to make the rules and regulations, but * * * the power * * * to punish for the violation of such rules * * *." 88 Cal. at page 495, 26 P. at page 376. The court points out that the "penalty for the violation of such rules * * * is a matter purely in the hands of the legislature." 88 Cal. at page 493, 26 P. at page 375. The later case of In re Potter, 1913, 164 Cal. 735, 130 P. 721, approves Grimaud. Gilgert v. Stockton Port District, 1936, 7 Cal.2d 384, 60 P.2d 847, reiterates the principle by invalidating the creation of the Stockton Port District because the Legislature "intended to bestow upon such agencies the power to declare penalties for the violation of the many and varied rules and ordinances they may see fit to enact." 7 Cal.2d at pages 390–391, 60 P.2d at page 850.

These decisions dispose of the early case of Ex parte Cox, 1883, 63 Cal. 21, which apparently held that "[t]he legislature had not authority to confer upon the officer or board the power of declaring what acts should constitute a misdemeanor," and the parallel dicta in In re Peppers, 1922, 189 Cal. 682, 209 P. 896. In any event In re Lasswell, 1 Cal.App.2d 183, 36 P.2d 678, distinguished In re Peppers on the grounds of the inadequacy of the primary standards of the legislation and the failure of the Legislature to prescribe the violation of the rules as a criminal offense.

[5] In the light of the cases, the validity of the legislative creation and implementation of the fire district contrasts with the invalidity of the attempt of the district in section 8 to declare the amount and nature of the penalty. As we have pointed out supra, section 8 of the ordinance sought to fix the fines and term of imprisonment for violation of the ordinance. Its obvious invalidity is conceded by respondent.

[6] The abortive penalty clause of the ordinance, however, does not condemn it in its entirety. The offending section is separable. It does not affect the remaining substantive portions of the ordinance which are still enforceable as misdemeanors designated as such by the Legislature. The two lower courts properly upheld the validity of the remainder of the ordinance. See In re Weisberg, 215 Cal. 624, 632, 12 P.2d 446; People v. Lewis, 13 Cal.2d 280, 89 P.2d 388; Looff v. City of Long Beach, 153 Cal.App.2d 174, 186, 314 P.2d 518; 11 Cal.Jur.2d 424 et seq.

[7] If, then, we conclude that the Legislature has not unlawfully delegated the power to impose a penalty, and that the sections of the ordinance, which do not describe penalties, may stand, we must finally examine appellant's third contention that the legislation attempts an unlawful delegation of power to fix rules and regulations. Appellant particularly attacks section 14686 because it endows the directors with the power to adopt ordinances providing for such rules and regulations. But the day has long since passed when it may be successfully argued that the Legislature may not delegate to administrative boards powers properly contained within primary standards (Nelson v. Dean, 27 Cal.2d 873, 881, 168 P.2d 16, 168 A.L.R. 467; First Industrial Loan Co. of California v. Daugherty, 26 Cal.2d 545, 549, 159 P.2d 921; Wotton v. Bush, 41 Cal.2d 460, 469, 261 P.2d 256) as well as authority to adopt rules and regulations to accomplish the general purposes of the legislation (see Fillmore Union High School Dist. v. Cobb, 5 Cal.2d 26, 33, 53 P.2d 349). Indeed, the very complexity of modern government necessitates this kind of delegation.

Appellant's subsidiary argument that the directors could conceivably adopt arbitrary regulations under the ordinance falls before the requirement that the rules must pertain to the objectives of the legislation and accord with the primary standards. See Pacific Tel. & Tel. Co. v. Public Utilities Com., 34 Cal.2d 822, 215 P.2d 441; California State Automobile Ass'n Inter-Insurance Bureau v. Downey, 96 Cal.App.2d 876, 216 P.2d 882; 10 Op.Atty.Gen. 47; 2 Cal.Jur.2d 148.

We conclude that this is a proper case for the remedy of the writ of prohibition. We conclude, further, that the ordinance which petitioner was charged to have violated is a constitutional ordinance. The order is affirmed.

BRAY, P. J., and FRED B. WOOD, J., concur.

170 Cal.App.2d 596

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Seth BLAKEMAN, Defendant and Appellant.

Cr. 3551.

District Court of Appeal, First District,
Division 1, California.

May 25, 1959.

Proceeding wherein the Superior Court, County of Contra Costa, Hugh H. Donovan, J., rendered an order revoking probation, and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held, inter alia, that since provision of probation order banishing defendant from county as condition to probation was void, revocation of probation on sole ground of violation of such provision was illegal.

Reversed.

1. Criminal Law ⚷982.5(2)

It was beyond power of court to impose banishment from county as condition for probation.

2. Criminal Law ⚷982.9(1)

As provision of probation order banishing defendant from county as condition to probation was void, revocation of probation on sole ground of violation of such provision was illegal.

3. Criminal Law ⚷982.5(2)

Defendant did not waive right to urge invalidity of provision of probation order banishing him from county by suggesting banishment and receiving benefit of such provision in probation order which was conditioned thereupon. West's Ann.Civ. Code, § 3513.

4. Criminal Law ⚷982.7

Where no period of probation was specified in order granting it, six months' maximum period of punishment for offense became period of probation and trial court's action in imposing sentence of one year, which was excessive by six months, and immediately suspending sentence could not be taken as indication that it intended to impose year's probation. West's Ann. Pen.Code, § 243; West's Ann.Welfare & Inst.Code, § 702.

5. Criminal Law ⚷982.9(3)

Where trial court failed to specify period of probation in order granting probation, as statutory six months' maximum period of punishment for offense became period of probation, after expiration of six months' period, court lost jurisdiction to revoke probation. West's Ann.Pen. Code, §§ 243, 1203.3.

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Carlson, Collins, Gordon & Bold, Robert Collins, John Ormasa, Richmond, for appellant.

Stanley Mosk, Atty. Gen., Clarence Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Upon an information charging violation of section 702, Welfare and Institutions Code, defendant pleaded guilty to the lesser charge of assault and battery and proposed that as part of any sentence he would leave the community. It was adjudged that he pay a fine of $500 and be imprisoned one year in the county jail, providing that the imposing of the jail sentence be suspended upon the condition that he absent himself from the county.

Ten months later, after a hearing, the trial court found that the defendant had violated said condition and, for that reason, revoked probation by terminating the suspension of sentence.

In support of his appeal, defendant says the order revoking probation was void because (1) the condition imposing banishment was void and (2) the order of revocation was made after the probationary period had expired.

(1) *Was it error to revoke probation on the ground that defendant violated the condition of probation that defendant absent himself from the county? Yes.*

[1, 2] It was beyond the power of the court to impose banishment as a condition

of probation. The provision therefor was a void and separable part of the order granting probation. Revocation of probation upon the sole ground of violation of such a void provision was without authority in law and should be reversed.

In In re Scarborough, 76 Cal.App.2d 648, 173 P.2d 825, an order suspending sentence on condition of banishment for two years was deemed the granting of probation upon a void condition. It was void because there was no statutory authority for it and banishment is proscribed by the fundamental policy of not permitting one political division to dump undesirable persons upon another. Said the court: "The same principle which prohibits the banishment of a criminal from a state or from the United States applies with equal force to a county or city. The old Roman custom of ostracizing a citizen has not been adopted in the United States. The so-called 'floating sentence', too frequently resorted to in some inferior courts, falls in the same category. There is no statute in California authorizing such judgments." 76 Cal.App.2d at page 650, 173 P.2d at page 827. See also the authorities cited on page 649 of 76 Cal.App.2d, on page 826 of 173 P.2d, and 15 Am.Jur. 112, Crim.Law, § 453. This void condition was deemed separable from other provisions of the order. Accordingly, defendant was entitled to his freedom upon probation until revocation of probation for lawful reasons.

Counsel for plaintiff contends that the policy against banishment is not as sweeping and unqualified as expressed by the court in the Scarborough case. He says that in the case now before us another public policy, that of rehabilitating the defendant by removing him for a time from the temptations to which he was subjected in his old habitat, comes into play and modifies or qualifies the policy against banishment. We find in the reasoning which supports the latter policy and the decisions expounding it no basis for any such qualifying or modifying factors. The question whether the Legislature could modify this policy is not before us, for it has not undertaken to do so.

[3] Plaintiff further contends that defendant waived the right to urge the invalidity of the banishment clause by suggesting banishment and receiving the benefit of the probation which was conditioned upon banishment. The fallacy of this argument is that we are not dealing with a right or privilege conferred by law upon the litigant for his sole personal benefit. We are concerned with a principle of fundamental public policy. The law can not suffer the state's interest and concern in the observance and enforcement of this policy to be thwarted through the guise of waiver of a personal right by an individual. "Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." Civ.Code, § 3513. "Although a defendant may waive rights which exist for his own benefit, he may not waive those which belong also to the public generally." People v. Werwee, 112 Cal.App.2d 494, 500, 246 P.2d 704, 708. A defendant may waive formalities established for his protection but not that which is essential to a valid judgment. People v. Titus, 85 Cal. App. 413, 416, 259 P. 465. Lack of jurisdiction may not be waived, nor may jurisdiction be stipulated. In re Garrity, 97 Cal.App. 372, 376, 275 P. 480. See also 14 Am.Jur. 917–918, Crim.Law, § 214; 7 Cal. Jur. 897, Crim.Law, § 45.

In re Martin, 82 Cal.App.2d 16, 185 P. 2d 645, invoked by plaintiff in support of its waiver theory, is inapplicable for a number of reasons. There, probation had been erroneously granted. Because of several prior convictions defendant was not entitled to probation. Later, probation was revoked because of violation of the terms and conditions upon which probation had been granted. The reviewing court held it proper to revoke whether for those reasons or because erroneously granted in the first place. The defendant then contended it was now too late to impose sentence because the time prescribed therefor by section 1191 of the Penal Code had gone by. But that time had not gone by. It was tolled by statute during the pendency of probation proceedings. Also, the time limited by section 1191 was deemed not jurisdictional. See at pages 18 and 19 of 82 Cal.App.2d, at pages 646–647 of 185 P.2d. The court did additionally say that by seeking, obtaining and enjoying the benefits of probation, the petitioner estopped himself from questioning, for the first time on habeas corpus, the delayed imposition of sentence which resulted. The holdings in the Martin case obviously have no bearing upon the questions now before us for determination.

(2) *Did the court lose jurisdiction to revoke probation after the six months' probationary period had expired? Yes.*

[4, 5] Here, no period of probation was specified in the order granting it. Accordingly, the six months' maximum period of punishment (Pen.Code, § 243) became the period of probation. In re Herron, 217 Cal. 400, 405, 19 P.2d 4; In re Goetz, 46 Cal.App.2d 848, 851, 117 P.2d 47; People v. Sheeley, 159 Cal.App.2d 578, 581, 324 P.2d 65. Plaintiff argues that when the court imposed a sentence of one year (excessive by six months) and immediately suspended it, the court indicated an intent to give probation for one year. We are not persuaded, particularly in view of the established principle that when the probationary period is not specified it is deemed to be for the maximum possible period of imprisonment.

The court had authority "at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence." Pen.Code, § 1203.3. "Revocation of probation or modification of an order suspending execution of sentence must be exercised within the term of probation. (Penal Code, § 1203.3; People v. Williams, 24 Cal.2d 848, 852, 151 P.2d 244; People v. McClean, 130 Cal.App.2d 439, 444, 279 P.2d 87). * * *" Fayad v. Superior Court, 153 Cal.App.2d 79, 81, 313 P.2d 669, 670.

In this case the order of revocation, made four months after the expiration of the probationary period, came too late to be effective.

The order appealed from is reversed.

TOBRINER, J., and HANSON, J. pro tem., concur.

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170 Cal.App.2d 502

PEOPLE of the State of California, Plaintiff and Respondent,
v.
James E. BIAS, Defendant and Appellant.

Cr. 3549.

District Court of Appeal, First District,
Division 1, California.

May 20, 1959.

Rehearing Denied June 16, 1959.
Hearing Denied July 15, 1959.

Defendant was convicted of sex perversion and burglary and from a judgment of the Superior Court, County of Alameda, James R. Agee, J., the defendant appeals. The District Court of Appeal, Bray, J., held that the prosecutrix was not an "accomplice" whose testimony was required to be corroborated; that the evidence was sufficient to sustain conviction; that rulings on instructions and admissibility of evidence were either not erroneous or not prejudicial and that defendant received a fair trial.

Judgment affirmed.

1. Criminal Law 🔑507(7)

Anyone who participates in an act of sex perversion because of threats and in fear of great bodily harm is not an "accomplice" and such person's testimony need not be corroborated. West's Ann.Pen. Code, § 288a.

See publication Words and Phrases, for other judicial constructions and definitions of "Accomplice".

2. Criminal Law 🔑742(2)

Whether one is accomplice is a question of fact.

3. Criminal Law 🔑507½

In prosecution for sex perversion, evidence established that the victim was not an "accomplice" whose testimony was required to be corroborated. West's Ann. Pen.Code, § 288a.

4. Burglary 🔑41(1)
Sodomy 🔑6

Evidence supported conviction of burglary and sex perversion. West's Ann. Pen.Code, §§ 288a, 459.

5. Burglary 🔑2

Entry into a home with intent to violate the sex perversion statute is burglary under the statute relating thereto. West's Ann.Pen.Code, §§ 288a, 459.

6. Criminal Law 🔑1159(5)

In prosecution for sex perversion and burglary, when the evidence is sufficient to justify a reasonable inference that the intent existed, the verdict of the jury may not be disturbed. West's Ann.Pen.Code, §§ 288a, 459.

7. Criminal Law 🔑1144(15)

In prosecution for burglary and sex perversion, alleged fact that jury had to be reinstructed on law of assault as charged in the third count after reaching verdict on the first and second counts did not establish that the jury violated the instructions on the law of accomplices and corroboration, since it could be presumed, where jury returned the verdict of guilty in view of the court's full instructions on the subject, that the jury determined, under the facts, that the victim of the sex perversion was not an accomplice. West's Ann.Pen.Code, §§ 288a, 459.

8. Criminal Law 🔑778(8)

Where under the language of an instruction on alibi defendant need only create a reasonable doubt as to his presence in order to be entitled to acquittal, the instruction was proper as against defendant's claim that the burden of alibi was equated with the prosecution's burden of the proof of guilt and that the defendant must prove his alibi beyond a reasonable doubt.

9. Criminal Law 🔑815(1)

An instruction that the applicability of some of the instructions would depend upon conclusions the jury reached as to what the facts were, but if the instruction applied only to a state of facts which the jury found did not exist, the jury would disregard the instructions was not erroneous as preventing the jury from considering the charge in its entirety.

10. Criminal Law 🔑810

Instructions respecting corroboration of testimony of an accomplice and that it must be viewed with distrust were not inconsistent.

11. Criminal Law 🔑768(1)

Instruction that jury must consider the evidence applicable to each alleged offense as though it were the only accusation and must find as to each count uninfluenced by its verdict as to any other count was proper.

12. Criminal Law 🔑770(1)

In prosecution for burglary and sex perversion, where the act of sex perversion could have been committed without necessarily committing a burglary, each count constituted a separate offense and the jury was not required to be charged that it could not find the defendant guilty under both the first and second counts. West's Ann.Pen.Code, § 288a.

13. Indictment and Information 🔑191

The test of a necessarily included offense is that where an offense cannot be committed without necessarily committing another offense, the latter is necessarily an "included offense".

See publication Words and Phrases, for other judicial constructions and definitions of "Included Offense".

14. Criminal Law 🔑1209

Where counts for burglary and sex perversion charged separate offenses, defendant convicted under both counts was not subjected to double punishment for one criminal act. West's Ann.Pen.Code, § 288a.

15. Criminal Law 🔑419(11), 1169(2)

Testimony of a police officer as to a conversation with a witness was hearsay and should not have been admitted but did not require a reversal where it was merely cumulative.

16. Witnesses 🔑395

Ordinarily, prior consistent statements cannot be introduced to rebut impeaching evidence, but exception to the rule is admissibility of prior consistent statements in answer to an express or implied charge that the trial testimony was recently fabricated.

17. Criminal Law 🔑1170½(1)
Witnesses 🔑395

In prosecution for sex perversion, where testimony of a victim was vital to prosecution, and defendant sought to impeach her by proving a statement at preliminary examination contrary to that made at the trial constituting in effect a charge of recent fabrication, permitting an officer to corroborate testimony of victim as to what she told officer that defendant had said to her was proper and in any event was not prejudicial where it was not reasonable to assume that without the rehabilitation testimony the verdict of the jury would have been different.

18. Criminal Law 🔑407(1)

A defendant's responses to accusatory statements may be received under the exception to the hearsay rule.

19. Criminal Law 🔑698(1)

Where evidence is not objected to nor a motion to strike made, any claim of error is waived.

20. Criminal Law 🔑706

Where officer testified on rebuttal as to evasive replies given by defendant and on cross-examination defendant brought out that the defendant had flatly denied being at the scene of the crime, defendant was not deprived of a fair trial because of the act of the prosecutor in bringing out only those portions of the statements to which defendant gave ambiguous answers.

Edward J. Rice, Jr., Oakland, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

BRAY, Presiding Justice.

Defendant was charged with three felony counts: (1) burglary; (2) violation of section 288a, Penal Code; (3) assault with a deadly weapon. A jury found him not guilty of count (3) but guilty of counts (1) and (2). From the judgment entered on the latter, defendant appeals.

Questions Presented.

1. Was the prosecutrix an accomplice as a matter of law?
2. Sufficiency of the evidence.
3. Alleged errors in instructions.
4. Admissibility of certain evidence.
5. Did defendant receive a fair trial?

Evidence.

Mary Ellen, 16 years of age, married and about five months pregnant, lived in apartment 25 of the Neptune Court Apartments in Alameda. Her husband was in San Diego on duty with the Navy. About 9:30 p. m. a friend, Laurie Baker, whom she had been visiting, drove her to her apartment. Laurie left about 9:45 p. m. Shortly thereafter Mary Ellen heard a knock at the door. She asked who it was and a voice said "Jim." She opened the door and saw defendant who asked if he could come in. Refusing him, she closed the door. About half an hour later, she heard another knock at the door. On opening she again saw defendant. She started to close the door, but defendant said, "Do you want to get this in your stomach?" Feeling a knife stick her, she backed up. Defendant entered the room and ordered her to "strip." She hesitated, asked him to leave, but he shook his head and kept waving the knife. She disrobed and at his order laid upon the bed. Defendant then went around to the other side of the double bed and laid down opposite her. She asked him to lay down the knife. He shook his head, forced her head down toward his penis and said "Blow it." Defendant then had an emission in her mouth. Mary Ellen got sick, went into the kitchen and vomited. She heard the door slam. She dressed, went to a neighbor's to stay for the evening. She merely told the neighbor that a man had broken into her apartment. The next day she asked the landlady for another apartment because someone had tried to break in. The same day she informed the police, and identified defendant, also clothing belonging to him as similar to that worn by him at the time of the attack. Defendant had lived in apartment 32 for a period of approximately two and a half months some seven months previously.

Mrs. Hinderliter, who occupied apartment 32, testified that on the night in question, she was alone with her baby. About 10 o'clock someone who said he was "Jim" knocked on her door. Looking through the glass door she saw defendant with a gun in his hand. She then went out the back way to a neighbor's. Upon returning defendant was gone. She identified defendant at the police station as well as the clothing shown to Mary Ellen. This clothing had been obtained by the police the next day at defendant's apartment and was in a very wet condition. It was raining the night of the attack.

Defendant denied being at the Neptune apartments that night. He testified that about 5 p. m. he left his apartment and went to the DeLux Bar in Oakland where he stayed about two hours. He met a girl there who went with him to Jensen's Bar in Alameda. About two hours later they went to Al's Club. After a few minutes they went to Horgan's Bar, remaining there about two hours, when they went to his apartment. The girl left about 11:30 p. m. or 12. He did not know where the girl lived or worked, but only that her name was Marie or Carol. He remained alone in the apartment for the rest of the night. He admitted that the clothing obtained by the police at his apartment was that worn by him on the night in question.

Mary Dreon, owner of Horgan's Club, testified that defendant and a woman left there between 7 and 9. (Defendant claimed to have been there between 9 and 11 approximately.)

Inspector Hopper testified that the second day after his arrest defendant stated that he was not at the Neptune Court that night, "not to my knowledge," and that between 9:30 and 10:30 he guessed that he was home or might have been in a bar. Upon being accused of the offense, defendant said, "I don't think I did it." In other portions of the statement he denied any participation in the offenses.

1. Accomplice.

[1–3] Defendant contends that Mary Ellen was an accomplice as a matter of law, hence required corroboration, and that there was no corroboration. It is well settled that anyone who participates in an act of sex perversion because of threats and is in fear of great bodily harm is not an accomplice and such victim's testimony need not be corroborated. People v. Willis, 1954, 129 Cal.App.2d 330, 276 P.2d 853. Whether one is an accomplice is a question of fact. Idem, 129 Cal.App.2d at page 334, 276 P.2d at page 855; People v. Walker, 1948, 88 Cal.App.2d 265, 268, 198 P.2d 534. The jury could reasonably have inferred (and undoubtedly did) from Mary Ellen's testimony that she complied with defendant's demands because she reasonably feared her life would be endangered if she refused. He forced his way into her apartment at knife-point. While there he continued to wave the knife, which she thought had a blade 4–5 inches long. Defendant contends that Mary Ellen had a chance to flee while defendant was walking around the bed, and her failure to do so implies a willing consent. That she could have fled is a conclusion which the jury apparently refused to draw and that refusal is reasonable. The fact that she did not attempt to flee is not inconsistent with a reasonable fear that her life was in danger.

Defendant contends that since the jury acquitted him of the charge of assault with a deadly weapon the jury must have concluded that defendant was unarmed and therefore could not have induced fear. The verdict on the assault count did not necessarily constitute a determination that defendant did not have a knife. After reaching verdicts on the first two counts the jury requested that the court read the law on assault with a deadly weapon. The court then reinstructed that "An assault with a deadly weapon is an unlawful attempt coupled with a present ability to commit a violent injury upon the person of another with a deadly weapon." A juror asked if it would be necessary to produce a weapon and was told no. In response to other questions, the court told the jury that if they found defendant had no intent to use the weapon as such, defendant should be found not guilty and that defendant could be found guilty on the first two counts, but not on the third. A jury then inquired as to the existence of evidence that defendant threatened to cut Mary Ellen. It is apparent that, from the discussion between the court and the jury and from the nature of the assault charged and as defined in the instructions, the jury could have reached their verdict on the basis of the lack of any intent to inflict an injury upon Mary Ellen. The jury may have so determined notwithstanding the fact defendant possessed a knife.

There is no evidence from which it could be held that as a matter of law Mary Ellen was a willing participant and hence an accomplice. It must be remembered that defendant denied being at the apartment at all. It is not a situation where admitting the act, the defendant claims that the woman participated willingly. Even in such case the question would not be one of law, but of fact for the jury. The jury was instructed properly that if it found her to be a willing participant, then she would be an accomplice and her testimony would have to be corroborated.

2. Sufficiency of Evidence.

[4–7] Defendant's main contention on this subject is that Mary Ellen was an accomplice and her testimony was not corroborated. We have already answered this contention adversely to defendant. The evidence is sufficient to support the convictions on both the first and second counts. Entry into a home with intent to violate section 288a, Penal Code, is burglary under section 459, Penal Code. People v. Denningham, 1947, 82 Cal.App.2d 117, 185 P.2d 614. The element of intent must usually be inferred from the evidence, and when the evidence is sufficient to justify a reasonable inference that such intent existed the verdict may not be disturbed. People v. Henderson, 1956, 138 Cal.App.2d 505, 509, 292 P.2d 267. Defendant first attempted to talk his way into the apartment, then forced his way in at knife-point. These facts coupled with what he immediately proceeded to do is ample evidence that he entered the apartment for the purpose of committing a felony, to wit, violation of section 288a, Penal Code. The fact that the jury asked to be reinstructed on the law of assault after reaching verdicts on the first and second counts does not lead to the conclusion, as contended by defendant, that the jury violated the instructions on the law of accomplices and corroboration. It may be presumed in view of the court's full instructions on the subject that the jury determined under the facts that Mary Ellen was not an accomplice. See People v. Mastrantuono, 1948, 88 Cal.App.2d 178, 183, 198 P.2d 574; People v. Walker, supra, 88 Cal.App.2d 265, 268, 198 P.2d 534.

On the sex perversion count, if the jury believed the testimony of Mary Ellen (and it undoubtedly did) the evidence was sufficient to convict. See People v. Stewart, 1952, 109 Cal.App.2d 334, 240 P.2d 704, and People v. Peterman, 1951, 103 Cal.App.2d

322, 229 P.2d 444. It should be borne in mind on both counts, that Mrs. Hinderliter placed defendant at the Neptune Court at the crucial time, and that defendant denied being there.

3. Instructions.

[8] Defendant has gone over the instructions with a fine tooth comb and in most instances read into them something which is not there. Practically all the instructions are ones that have clearly been held to be proper. In one of the instructions given on alibi, defendant contends that the burden of proving the alibi was equated with the prosecution's burden of proof of guilt, that is, that defendant must prove his alibi beyond a reasonable doubt. There is nothing in the instruction to support this contention. It is taken from CALJIC No. 31, which was approved in People v. Chambers, 1951, 102 Cal.App.2d 696, 699, 228 P.2d 93. By the language of the instruction a defendant need only create a reasonable doubt as to his presence in order to be entitled to an acquittal. There is no statement that defendant must prove his alibi beyond a reasonable doubt.

[9] The court gave CALJIC No. 8 that "The applicability of some of these instructions will depend upon the conclusions you reach as to what the facts are * * *. If an instruction applies only to a state of facts which you find does not exist, you will disregard the instruction." Defendant contends that this instruction prevented the jury from considering the charge in its entirety. This argument was rejected in People v. Chessman, 1951, 38 Cal.2d 166, 184, 238 P.2d 1001. The court does not know in advance what the jury will find the facts to be, for example, whether or not the jury would find Mary Ellen to have been a willing participant. Therefore, of necessity the court must instruct on legal principles, some of which may be inapplicable, depending upon what the facts are found to be. See also People v. Casey, 1926, 79 Cal.App. 295, 302, 249 P. 525.

[10] Instructions were given based on CALJIC No. 821 (testimony of accomplice must be corroborated) and No. 829 (testimony of accomplice must be viewed with distrust). Defendant contends that these instructions are inconsistent. There is no inconsistency. If the jury found that Mary Ellen was an accomplice it must view her testimony with distrust, even though corroborated, giving her testimony "the weight to which you find it to be entitled * *." Considered together these instructions are an explanation of the potentially applicable law.

[11–14] The court gave CALJIC No. 112 to the effect that the jury must consider the evidence applicable to each alleged offense as though it were the only accusation, and must find as to each count uninfluenced by its verdict as to any other count. This instruction is a correct statement of the law. Defendant's first contention is that thereby the jury was instructed in dealing with the first two counts to disregard the fact that the jury found on the third count that defendant did not have a knife. As we have heretofore pointed out, this was not necessarily the jury's finding on the third count. Moreover, the instruction does not tell the jury to disregard its findings on the facts as regards any count in determining any other count in which those facts are relevant. It merely tells the jury that if based on those findings it finds that the crime charged in a particular count was or was not committed, such finding should not influence the jury in determining whether or not the facts so found proved the other crimes charged. Defendant contends further that as to the first two counts a single offense is charged and that the second offense is necessarily included in the first offense, and that the jury should have been charged that it could not find defendant guilty under both the first and second counts. In People v. Greer, 1947, 30 Cal.2d 589, 184 P.2d 512, the court said: "The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense." 30 Cal.2d at page 596, 184 P.2d at page 516. The offenses charged were burglary, involving an entry with felonious intent, and an act of sex perversion. The actual commission of the felony constitutes no part of the burglary. See People v. Morlock, 1956, 46 Cal.2d 141, 292 P.2d 897; People v. Goodman, 1958, 159 Cal.App.2d 54, 323 P.2d 536; People v. Stone, 1957, 155 Cal.App.2d 259, 318 P.2d 25. The act of sex perversion could have been committed without necessarily committing a burglary, and the act of burglary without necessarily committing the act of perversion. Burglary was committed the moment defendant entered with the intent to commit the felony, regardless of whether he committed it after he entered. Each offense is separately defined and made punishable by the Penal Code. Defendant's contention that he is being subjected to double punishment for one criminal act also must be rejected in light of the above authority, since two distinct offenses were charged.

4. Admission of Evidence.

[15] Mrs. Dreon, coowner of Horgan's Bar who testified as to the time when defendant and a woman were in the bar, testified without objection that she had given Police Lieutenant Nordling over the phone the same time she testified to at the trial. Over defendant's objection Lieutenant Nordling was permitted to testify to this conversation with Mrs. Dreon. The conversation was hearsay and should not have been admitted. However, it was merely cumulative and was not prejudicial in view of the fact that defendant permitted Mrs. Dreon to testify to the same matter.

On cross-examination Mary Ellen, who testified at the trial that defendant said "Blow it," was asked if at the preliminary examination she had said that defendant did not say anything while on her bed. Admitting this, Mary Ellen stated that she "didn't want to say it before." On redirect the prosecution asked her if the day after the affair she told Officer Showalter that defendant had said something to her. She then said that she had told the officer that defendant had said the exact words she used on her direct testimony. Officer Showalter, over objection, corroborated Mary Ellen's testimony.

[16, 17] Ordinarily, prior consistent statements cannot be introduced to rebut impeaching evidence. However, one exception to this rule is the admissibility of prior consistent statements in answer to an express or implied charge that the trial testimony was recently fabricated. People v. Carter, 1957, 48 Cal.2d 737, 749, 312 P.2d 665; People v. Hardenbrook, 1957, 48 Cal.2d 345, 351, 309 P.2d 424; Davis v. Tanner, 1927, 88 Cal.App. 67, 73, 262 P. 1106; Bickford v. Mauser, 1942, 53 Cal.App.2d 680, 684, 128 P.2d 79; People v. Kynette, 1940, 15 Cal.2d 731, 104 P.2d 794; People v. Weatherford, 1947, 78 Cal.App.2d 669, 696, 178 P.2d 816. The dissenting opinion in Bickford v. Mauser, supra, 53 Cal.App.2d at page 689, 128 P.2d at page 84, stated that the exception to the rule of admissibility is limited to meeting a charge of recent fabrication and that in that case there was no such charge made; there was simply a situation of impeachment by evidence of prior inconsistent statements. While there is no case which flatly considers the question raised by the dissent in the Bickford case, a recent Supreme Court case appears to indicate that the exception may apply without any direct charge of fabrication. In People v. Hardenbrook, supra, 48 Cal.2d 345, 351, 309 P.2d 424, testimony of a prior statement was admitted for the limited purpose of rehabilitation. A witness testified to a conversation with the defendant which the defendant denied. The prosecution offered a witness who testified as to prior statements of the first witness concerning the conversation. No charge of recent fabrication was made yet the prior statements were held admissible. In People v. Carter, supra, 48 Cal.2d 737, 312 P.2d 665, it was held error to exclude testimony of prior statements offered by the defendant to rehabilitate impeaching testimony. The opinion stated that the defendant had a

right to introduce this testimony "to rebut the prosecution's charge that his story was a recent fabrication." 48 Cal.2d at page 749, 312 P.2d at page 672. Just how this charge was made does not appear in the record. In our case Mary Ellen's testimony was vital to the prosecution. The very fact that defendant sought to impeach her on an important circumstance of the crime, proving a statement at the preliminary examination contrary to that made at the trial, is in effect a charge of recent fabrication. We see no error in the court's ruling. In any event, there was no prejudice in the admission of the testimony. The inconsistent statement as to what defendant said to Mary Ellen was explained by her on cross-examination when she admitted the inconsistency stating that she did not want to relate what defendant said to her. The explanation is plausible under the circumstances. The weight to be given to it was a matter for the jury. However, it is not reasonable to assume that without the rehabilitation testimony the verdicts of the jury would have been different.

5. Fair Trial.

[18–20] Inspector Hopper testified on rebuttal for the prosecution as to evasive replies given him by defendant the second day after the affair. No objection was made to this testimony. On cross-examination defendant brought out that in addition to the evasive replies defendant flatly denied being at the Neptune Court or committing the crimes charged. Defendant contends that the prosecutor deprived him of a fair trial in bringing out only those portions of the statements to which defendant gave ambiguous answers. A defendant's responses to accusatory statements may be received under the admission exception to the hearsay rule. People v. Davis, 1954, 43 Cal.2d 661, 670, 276 P.2d 801; People v. Simmons, 1946, 28 Cal.2d 699, 712, 172 P.2d 18. Defendant made the first reference to the statement and did not object to the prosecution offering only portions of it. Where evidence is not objected to nor a motion to strike made, any claim of error is deemed waived. People v. Coontz, 1953, 119 Cal.App.2d 276, 280, 259 P.2d 694; People v. McMonigle, 1947, 29 Cal.2d 730, 743, 177 P.2d 745. We find nothing to indicate that defendant did not get a fair trial.

The judgment is affirmed.

FRED B. WOOD and TOBRINER, JJ., concur.

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170 Cal.App.2d 457

Maria E. MEREY, a minor, by and through Imre G. Merey, her Guardian ad litem, and Imre G. Merey, Individually, Plaintiffs and Respondents,

v.

LOS ANGELES TRANSIT LINES, a Corporation, and Earl Cross, Defendants and Appellants.

Civ. 23540.

District Court of Appeal, Second District, Division 1, California.

May 19, 1959.

Rehearing Denied June 15, 1959.

Hearing Denied July 15, 1959.

Action for personal injuries sustained by minor pedestrian, and consequential damages sustained by her father when pedestrian was struck at an intersection by a bus owned by corporate defendant, and driven by individual defendant. The Superior Court, Los Angeles County, Kurtz Kauffman, J., entered judgment for plaintiffs and defendants appealed from the judgment and from verdict for plaintiffs. The District Court of Appeal, Fourt, J., held that evidence presented a question for the jury as to whether pedestrian was guilty of contributory negligence in starting to cross an intersection in a crosswalk with a traffic light in her favor, without looking to her right or left for approaching traffic.

Attempt to appeal from verdict dismissed, judgment affirmed.

1. Automobiles ⚷245(74)

In action for personal injuries sustained by minor pedestrian, and consequential damages sustained by her father, when pedestrian was struck at an intersection by a bus owned by corporate defendant, and driven by individual defendant, evidence presented a question for the jury as to whether pedestrian was guilty of contributory negligence in starting to cross an intersection in a crosswalk with a traffic light in her favor, without looking to her right or left for approaching traffic.

2. Appeal and Error ⚷1039(13)

Where during course of trial of action for injuries to a minor, and consequential damages to father, a document entitled "Supplemental to Complaint" was filed alleging that minor plaintiff lost earnings to her damage in the sum of over $1,000, but correct instructions were given by the court to reflect that earnings of minor plaintiff belonged to her parents, variation between allegations of damage and proof presented with respect to issue of loss of earnings would not be deemed material. West's Ann.Code Civ.Proc. §§ 469, 470.

3. Automobiles ⚷246(51, 60)
Trial ⚷296(3)

In action for injuries sustained by minor pedestrian, and consequential damages sustained by her father when pedestrian was struck at an intersection by a bus owned by corporate defendant, and driven by individual defendant, trial court did not err in instructing jury with respect to duty of a vehicle driver about to enter intersection on "Go" signal, and in instructing the jury as to law pertaining to vehicular and pedestrian movement when traffic signals are red, and as to presumption of negligence which might arise from a violation thereof, in view of testimony from which it might have been inferred that bus driver entered the intersection against the red light, and in view of further instructions.

David S. Smith, Los Angeles, for appellants.

Jarrett & Morgan, by William Marshall Morgan, Los Angeles, for respondents.

FOURT, Justice.

This is an appeal from a verdict and judgment wherein the minor plaintiff, Maria E. Merey (hereinafter referred to as Maria), was awarded damages in the sum of $18,500.00, and Imre G. Merey (hereinafter referred to as "father") was awarded damages in the sum of $4,236.16.

A résumé of the facts is as follows: The collision occurred at approximately 8:42 a. m., on December 5, 1956, in the east-west crosswalk paralleling the northerly curb of Adams Boulevard at the intersection of South Broadway and Adams Boulevard in the city of Los Angeles. At the intersection in question, Broadway is sixty feet wide and Adams Boulevard is fifty-two feet wide. The intersection had traffic control trilights in operation, the time interval being twenty-seven seconds for "go" or green, three seconds for yellow or "caution" and thirty seconds for red or "stop." There were marked crosswalks, each of which was seventeen feet wide.

Maria, at the time of the collision, was an eighteen year-old high school girl, and was on her way to school. She had been a passenger on a bus northbound on South Broadway, and had alighted at the bus stop located south of the southeast corner of the intersection. She had walked northerly to the intersection where the signal was green, and as she walked northerly across Adams Boulevard, the light changed to yellow when she was about four to five feet from the curb at the northeast corner of the intersection. She testified in effect that she stood on the sidewalk on the northeast corner of the intersection because the light was red for her and waited, but not very long, until the light on the northwest corner of the intersection changed to green for her, and then she commenced walking westerly across South Broadway. She also testified, among other things, as follows: "I looked straight ahead to see if the light was for me, to go;" "* * * I was looking at the light;" "The light changed to green, so, as I say, the green is for the pedestrian to cross, so I crossed the street." Somewhere in the crosswalk approximately five to ten feet west from the easterly curb of South Broadway, she was struck by a bus travelling northward on South Broadway. She did not hear any noise like the sound of a horn, nor did she see the bus prior to the impact, and the next thing she remembered she was lying in the street, and her foot was all red, and later she was taken in an ambulance to Georgia Street Hospital.

The bus was thirty-five feet long and eight feet wide, and had a seating capacity of forty-eight passengers. According to the testimony of the bus driver Earl Cross, there were a few passengers standing in the bus when he stopped at the bus stop south of the southeast corner of the intersection; the light on the northeast corner of the intersection was green, and he discharged one passenger from the rear door of the bus and one passenger got on at the front door. The bus stop was about five feet south of the southerly curb of Adams Boulevard. Cross also testified that he first noticed Maria walking in the north-south crosswalk approximately five to ten feet from the edge of the northerly curb of Adams Boulevard, at which time his bus was travelling between five and ten miles per hour in the curb lane proceeding in a northerly direction on South Broadway, that the front of his bus was approximately in the middle of the intersection, and that at approximately the same time he saw the signal change to yellow. He then took his eye off Maria, continued straight ahead and accelerated his speed to approximately ten miles per hour. When he again noticed Maria she was walking straight ahead in the north-south crosswalk and was just a step or two from the northeast corner of the intersection, at which time the bus was approaching or was at the edge of the southerly boundary of the east-west crosswalk paralleling the north curb of Adams Boulevard, and that at this time he saw the color of the signal change to red. He stated that there was a spot between the windshield of the bus and the doorway where he couldn't see and that he caught a glimpse of Maria through the door and when he saw her turn in the street to go across South Broadway, he swerved the bus, and when he struck Maria she was approximately seven feet north of the extension of the Adams Boulevard northerly curb line and approximately ten feet west of the South Broadway easterly curb line. When he brought the bus to a stop, it was approximately in the middle lane at about the northerly line of the east-west crosswalk. When he got out of the bus, Maria was lying in the street alongside the bus. He did not recall what he told the police officer at the scene of the accident.

The accident was investigated by a patrol officer of the Los Angeles Police Department, John Joseph Kramer, who, at the time of the accident, was on duty one block away at the intersection of Main Street and Adams Boulevard. He testified that he tried to determine the point of impact and that he did so by locating flesh and blood and red coloring from Maria's shoe which was ground into the cement at a point ten feet west of the east curb line of South Broadway and seven feet north of the north curb line of Adams Boulevard. He found nine feet of one-wheel skidmarks leading from the point of impact in a northerly direction and ending at one of the front wheels of the bus, the front end of the bus being a few feet north of the northerly line of the east-west crosswalk paralleling Adams Boulevard. He testified that he spoke to Maria, that her left foot was crushed and that she said "I looked at the light and it was green for me, and I thought it was all right, and I started crossing the street." He further stated that he talked to Cross, who told him the light changed to yellow as he was entering the intersection and that it changed to stop when he was half-way through the intersection, and that Cross had indicated a point in the street which he had measured off to be twenty-three feet south of the point of impact, as the place where Cross was when he saw that Maria was going to cross the street in a westerly direction.

There was also testimony by a retired police officer (Benton) from which an inference could be drawn that when the bus entered the intersection from the south, the traffic signal was red.

On direct examination Maria was asked what she did prior to the accident in the nature of activity that she was no longer able to do, and she answered, "I was working all the time during summers, and after school, ever day * * *." She testified further that she worked steadily full-time during vacations and part-time when she was in school from June of 1954 to the date of the accident when objection to such testimony was made on the basis that it was immaterial in that there was no request in the complaint for loss of wages. It was then stated that an amendment to conform to proof would be offered. Counsel approached the bench and argued the point (out of the hearing of the jury), after which it was ruled that the evidence would be allowed, and that the amendment to conform to proof would be allowed. No motion was made by the defendant for a postponement or continuance on the basis of surprise or hardship in meeting the new issue, and testimony was then adduced to the effect that Maria's average earnings for after school work and Saturday work were about $15.00 to $18.00 per week. Bills were introduced indicating medical, hospital and other related expenses were incurred in the total sum of $2,436.16.

A motion was made by the defendants outside of the presence and hearing of the jury for a directed verdict on the basis that the facts inescapably showed contributory negligence. The motion was submitted without argument and denied. The jury returned a unanimous verdict for the plaintiff Maria E. Merey and assessed her damages in the sum of $18,500.00, and for the plaintiff Imre G. Merey and assessed his damages in the sum of $4,236.16.

Subsequently a motion was made by the defendants for judgment notwithstanding the verdict, and in the alternative for a new trial. The motion for judgment notwithstanding the verdict was denied. The motion for a new trial was taken under submission and later denied. This appeal has been taken from the verdict and the judgment.

On appeal, the following contentions are made:

(1) that plaintiff Maria E. Merey was negligent as a matter of law, and that negligence caused her injuries and barred recovery by her and her father;

(2) that prejudicial error occurred concerning admission of evidence, over objection, on earnings of the minor plaintiff, which error was compounded and cumulated with instructions dealing with the subject;

(3) that prejudicial error occurred in the giving of four jury instructions; and

(4) that prejudicial error occurred in the refusal to give an instruction.

[1] Appellant relies heavily upon the testimony which was elicited from Maria on cross-examination to establish that she was guilty of contributory negligence as a matter of law. On direct examination, she was asked the specific question: "Did you see this bus before it struck you?", and answered "No, I did not." On cross-examination, she was asked, "Miss Merey, did you at any time see this bus before the accident?", and she answered, "I know I got off a bus and I crossed the street. But when the accident was, I did not hear or I did not see a bus." She was also asked if she recalled saying, as the police officer had testified she told him at the scene of the accident, "the light was green for you and you started to walk across the street, in the crosswalk, and did not see the bus and knew the light was green and you thought it was all right?", to which she answered, "Yes."

The bus driver testified at the trial that the signal was green when he entered the intersection, however he also testified that it was green when he stopped at the bus stop. The police officer testified that at the scene of the accident he was told by the bus driver as follows: "He told me he started up from a stop. The light was green. *As he was entering the intersection the light changed to yellow* and when he was halfway through the intersection the light changed to stop, 'and the girl started walking across the street without looking in my direction.'" (Emphasis added.)

Appellants have cited the case of Lazzarotto v. Atchison, T. & S. F. Ry. Co., 157 Cal.App.2d 455, 321 P.2d 29, in which a substantial verdict was awarded to a motorist who drove into the side of a freight train. A motion for judgment notwithstanding the verdict and a motion for a new trial was granted, and the motorist appealed. Appellants assert that the cited case is decisive here. The appellate court carefully reviewed the particular factual situation involved, specifically mentioning that the motorist was thoroughly familiar with the location of the railroad tracks, that he had been without sleep for twenty hours, that he had been drinking beer and playing poker, that he applied his brakes about two hundred and fifty feet from the railroad tracks, that he laid down skid marks for one hundred and eight feet, and that he struck the *seventeenth* or *eighteenth* car of a thirty-eight car freight train. It was then stated (157 Cal.App.2d at page 460, 321 P.2d at page 32), "There is little to be gained in a comparison of the reasonableness of the conduct of the parties in the case that is under review with the actions of the parties in a myriad of cases involving negligence, since there are in every case important facts peculiar to that case alone. We have merely to decide whether there was evidence that plaintiff Lazzarotto *took any precautions whatsoever* which would have been taken by one of ordinary prudence to save himself from injury. We have been *unable to discover that his conduct in any respect was that of a reasonably prudent person.*" (Emphasis added.)

In view of the conflicting testimony in the present case as set forth hereinabove, we think it was properly left to the jury to determine as a question of fact whether plaintiff was free from contributory negligence.

We have carefully reviewed the cases cited by appellants in support of their position. Several of the cases (namely, Edgar v. Citraro, 112 Cal.App. 163, 297 P. 645; Berlin v. Violett, 129 Cal.App. 337, 18 P.2d 737, and Flannery v. Koch, 103 Cal.App.2d 55, 228 P.2d 580) involve actions for damages resulting from personal injuries sustained by guest passengers in automobiles or for the wrongful death of such guest passengers. These cases will not be reviewed herein because the factual situations as well as the applicable standards of care are very different from the instant case. In another case cited by the defendants, Hall v. Osell, 102 Cal.App.2d 849, 228 P.2d 293, the finding by the appellate court that the defendant bailor was negligent was predicated in large measure upon the nature of the obligation assumed by a bailor when specific instructions were given as to the use of bailed property. In this case there is no question of bailment.

The case of Miller v. Schell, 149 Cal.App.2d 346, 308 P.2d 445, also cited by defendants, involved an action for injuries sustained in an automatic push-button elevator. This case is cited by appellants as clearly stating "that a duty rests on a plaintiff to look where she is going, and to see that which is in plain sight, and *it is negligence as a matter of law not to so use her faculties.*" However, in a reading of the opinion, the following language appears (149 Cal.App.2d at page 351, 308 P.2d at page 448): "Under the circumstances whether plaintiff was negligent in not looking or if she looked but did not look carefully enough *was a question of fact to be determined by the jury.* The instruction charged the jury as a matter of law 'that it was negligence on her part not to use her faculties.' It gave the jury no opportunity to determine whether or not the plaintiff was justified in light of the evidence in looking in the manner in which she testifies she did or in not seeing the position of the bottom of the elevator with reference to the floor level." (Emphasis added.)

In another of the defendants' cited cases, Huetter v. Andrews, 91 Cal.App.2d 142, 204 P.2d 655, the court did hold that the operation of defendant's car with obvious disregard for ordinary care constituted negligence as a matter of law. In that case defendant was driving an automobile, and the court stressed that the operator of an automobile is bound to anticipate that he may meet persons or vehicles at any point in the street and that all drivers of vehicles on a public highway are required to keep a vigilant lookout ahead.

Appellants state in support of their position, "'All drivers of vehicles on a public highway are required by law to keep a vigilant lookout ahead so as to avoid, if reasonably possible, a collision with any other vehicle or person lawfully upon such highway. Failure to keep such lookout, or failure to see that which may be readily seen, if the driver is looking, would constitute *negligence* as a matter of law.' (Emphasis added.)," citing Holibaugh v. Ito, 21 Cal.App.2d 480, 485, 69 P.2d 871, 873, as authority therefor. From a reading of the case, we have noted that the court merely commented that such an instruction had met with the approval of the court, citing Berlin v. Violett, supra, which latter case, as was indicated hereinabove, involved a suit filed by a guest passenger. In commenting on the instructions which were given in Holibaugh v. Ito, supra, the court stated (21 Cal.App.2d at page 484, 69 P.2d at page 873), "the instruction did not charge the jury that for one to look and fail to see that which is in sight constitutes negligence as a matter of law, but merely told the jury that it was as negligent *to fail to observe* that which could be plainly seen *as not to look at all.*" It should further be noted that in Holibaugh v. Ito, supra, both plaintiff and defendant were operating motor vehicles in an intersection, and the court pointed out that each was required to use exactly the same degree of care to avoid the accident.

It was appropriately stated in Perry v. First Corporation, 167 Cal.App.2d 359, 334 P.2d 299, 302:

"The test to be applied in such a case as this we find well expressed in Anthony v. Hobbie, 25 Cal.2d 814, 818, 155 P.2d 826, 829: '* * * contributory negligence is not established as a matter of law unless the only reasonable hyphothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion. [Citations.]'"

As heretofore indicated, we are of the opinion that the plaintiff was not guilty of contributory negligence as a matter of law in the present case.

[2] Appellants' next contention is that prejudicial error occurred concerning admission of evidence, over objection, on the earnings of the minor plaintiff. When this testimony was presented, in order to prepare to meet it a continuance could have been requested, but no such request was made. 2 Witkin, California Procedure, pp. 1622, 1752. The amendment of the pleadings which was allowed, did not change the cause of action, but merely stated facts to support an additional legal theory of recovery. Appellants assert that "The Pleadings were not amended to include loss of earnings." However, a document entitled "Supplemental to Complaint" was filed during the trial which does allege that "plaintiff has lost earnings and has not worked since the happening of the accident; that plaintiff is informed and believes and upon such information and belief alleges that she will continue for a long time in the future to be unable to fully pursue her employment, all to her damage in the sum of $1,020.00 to date."

Correct instructions were given by the court to the effect that the earnings of the unemancipated minor Maria belonged to her parents. Appellants contend, however, that the loss of earnings was an item of special damage to the father and should have been specially pleaded; that the pleading of general damages to the daughter was not an allegation of special damage to the father, and that the admission of evidence on loss of earnings without an allegation of special damages was prejudicially erroneous. In view of the instruction given with respect to the measure of parents' damage, we have concluded that the variance between the allegation of damage in the "Supplemental to Complaint" and the proof presented with respect to the issues of loss of earnings and loss of earning power, should not be deemed to be material (Code Civ.Proc. §§ 469, 470), under the circumstances of this case. No one was misled by the amendment, nor by the course of events which followed. The end result in all probability would have been the same whether the plaintiffs had set forth the matter of loss of wages in the original complaint, or as they did. There was no bad faith upon the part of the plaintiffs, and there was no miscarriage of justice.

[3] Appellants next contend that it was error to instruct the jury with respect to the duty of a vehicle driver about to enter an intersection on a "Go" signal, contending there was no evidence that any cross-traffic on the prior Go signal had failed to clear; that it was error to instruct the jury with respect to dangers apparent to the driver of the bus because of violation by another of the cross-traffic signal, contending there was no evidence that any driver or pedestrian had entered or was about to enter the intersection against a Stop signal; and that it was error to instruct the jury as to justification, by reason of emergency, of signal violation, contending there was no evidence of any emergency causing a violation of traffic control lights.

Appellants further contend that it was error to instruct the jury as to the law pertaining to vehicular and pedestrian movement when the signal was red or "stop;" and as to the presumption of negligence which may arise from a violation thereof, contending that such instructions, read together, misled the jury by suggesting that a signal violation occurred and that such violation was negligence. There was evidence from which it might have been inferred that the bus driver did enter the intersection against the red light. A retired police officer, Hollis B. Benton, testified that he was approximately at 25th Street and South Broadway when the accident happened, that he was traveling in a southerly direction on South Broadway, and that the signal was green for him when he passed through the intersection of South Broadway and Adams Boulevard immediately after the accident. However, it should be noted that the instruction, given by the court, included the following statement: "In giving you this instruction, I do not mean to imply, nor to suggest that any party, involved in the accident in question, did enter the intersection that is under our consideration against a stop signal, or that any party made a negligent approach to the intersection. *Whether or not either of those things was done is a question of fact that you must decide.*" (Emphasis added.)

Appellants further contend that prejudicial error was committed by the refusal of the trial court to instruct the jury to the effect that Maria was negligent in failing to make reasonable observations to determine that it was reasonably safe to attempt the crossing before attempting to cross the street. We have heretofore determined that contributory negligence as a matter of law was not shown to exist in the instant case.

In the light of the testimony in this case, we have carefully reviewed the instructions which were given as a whole. We have read the entire record and have determined that no instruction or combination of instructions was prejudicial to the appellants, and further, that the case was fairly tried and that there was no prejudicial error.

The attempted appeal from the "verdict" is dismissed.

The judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur.

170 Cal.App.2d 656

Maud O. VOLANDRI, Plaintiff and Respondent,

v.

J. S. J. HLOBIL, Defendant and Appellant.

Civ. 18320.

District Court of Appeal, First District, Division 2, California.

May 26, 1959.

Action of promissory note signed by defendant and another who was defendant's agent. The Superior Court, City and County of San Francisco, H. A. van der Zee, J., entered judgment for payee and defendant appealed. The District Court of Appeal, Kaufman, P. J., held that where promissory note was signed by defendant who also, without defendant's knowledge, signed defendant's name thereto, and defendant had knowledge that payee had a promissory note purportedly signed by him but did not deny authenticity of his signature to such note until sometime later, there was no valid reason of public policy against holding defendant civilly liable to payee.

Affirmed.

1. Principal and Agent ⚷169(2)

Where defendant's agents signed agent's name to promissory note and without defendant's knowledge also signed defendant's name thereto, and upon payee's inquiry regarding payment of note defendant did not deny execution thereof and in fact acknowledged that payee owned interest in claim which was assigned to payee in return for money advanced as evidenced by promissory note, defendant's acknowledgment of payee's interest in claim and failure to make inquiry regarding execution of note constituted ratification of entire agreement with payee including execution of note. West's Ann.Civ.Code, § 2311.

2. Principal and Agent ⚷172

Ratification of a part of the transaction constitutes ratification of the entire transaction. West's Ann.Civ.Code, § 2311.

3. Principal and Agent ⚷166(1)

While ordinarily law requires principal be apprised of all facts surrounding transaction before he will be held to have ratified the unauthorized acts of an agent, where ignorance of facts arises from principal's own failure to investigate and circumstances are such as to put the reasonable man on inquiry he may be held to have ratified despite lack of full knowledge.

4. Principal and Agent ⚷175(1)

Where defendant's agent in order to secure advance from third party agreed to assign a certain interest in defendant's claim and executed a promissory note to payee, and allegedly without defendant's knowledge signed defendant's name thereto, and defendant upon inquiry by payee respecting payment of note failed to deny validity of his signature and acknowledged fact that payee had an interest in defendant's claim, there was no valid public policy reason why defendant should not be held civilly liable to payee for amount of note. West's Ann.Civ.Code, § 3100.

◆

Royal M. Galvin, Walter R. Baranger, Beverly Hills, Hugh C. Calaway, San Francisco, for appellant.

Joseph L. Alioto, Walter F. Calcagno, San Francisco, for respondent.

KAUFMAN, Presiding Justice.

Defendant, J. S. J. Hlobil, appeals from a judgment in favor of the plaintiff-payee in an action on a promissory note signed by defendant and one T. O. Toon. He argues on appeal that: 1) the facts do not support the trial court's finding that the defense of forgery was not available; and 2) no recovery can be had on a forged signature under the Negotiable Instrument Law, as such recovery is against public policy.

The undisputed facts are as follows: In July 1955, defendant Hlobil was the owner of a 50% interest in a certain patent which he claimed was being infringed by Boeing Aircraft Corporation under contract with the U. S. Air Force. By a letter dated

July 20, 1955, defendant Hlobil gave T. O. Toon complete authority to act as his agent to negotiate a settlement claim with officials of the U. S. Government. Defendant did not have sufficient funds for the expenses of negotiating such settlement. Defendant in writing authorized Toon to sell up to 7% of his interest in the infringement claim. The proceeds of such sales were to be used to pay Toon's expenses in attempting to settle the claim. On July 26, 1955, plaintiff Maud Volandri gave to Toon $3,000 in return for a contract assigning to her 3% of Hlobil's interest in the claim, and the following promissory note:

> "$3,000.00 July 26, 1955
>
> "One year after date, without grace we promise to pay to the order of M. O. Volandri Three Thousand Dollars For value received with interest from date at the rate of 5% per cent per annum until paid principal and interest payable in lawful money of the United States at 2427 Larkin Street, San Francisco, California and in case suit is instituted to collect this note or any portion *there* we promise to pay such additional sum as the Court may adjudge reasonable as Attorneys fees in said suit.
>
> "S/ T. O. Toon
> "S/ J. S. J. Hlobil
>
> "No. Due July 26, 1956"

The signature of defendant Hlobil on this note was unknown to the plaintiff, executed by T. O. Toon and not the defendant Hlobil. The $3,000 obtained by Toon from the plaintiff was used to pay various expenses in an attempted settlement of the infringement claim.

Plaintiff sought payment of the note from Toon, on July 26, 1956, the due date. When this failed, plaintiff, on January 8, 1957, January 23, 1957 and February 4, 1957, wrote to the defendant, stating she held a promissory note signed by him and demanding payment. Defendant Hlobil replied to these letters and asked plaintiff to be patient while the final settlement was concluded. In his replies, defendant did not deny that he had executed the promissory note. In April 1957, plaintiff called the defendant on the telephone and asked that the note be paid. Again, defendant did not deny his execution of the instrument. On May 7, 1957, defendant again wrote to the plaintiff and asked her to be patient. Defendant orally and in writing acknowledged that plaintiff owned a 3% interest in his infringement claim. In the summer of 1957, plaintiff learned from her attorney that defendant had denied execution of the note. This action was filed on September 17, 1957.

Defendant's first argument on appeal is that the evidence does not support the judgment, as it was impossible for him to ratify Toon's act of signing the note with his name, since he did not have full knowledge of the transaction. However, plaintiff's letters were clear and unequivocal and on receipt of the first letter, defendant knew that the plaintiff held a note purporting to have been signed by him, and that he had not, in fact, signed such a note. Defendant found out about the note from Toon after plaintiff's first letter, and never denied execution to the plaintiff in his subsequent correspondence. Defendant failed to make further inquiries of the plaintiff and Toon, and in his further correspondence with the plaintiff asked her to be patient.

[1, 2] Defendant orally and in writing acknowledged that the plaintiff owned a 3% interest in his claim, solely because she had given $3,000 to Toon. The agreement giving plaintiff the 3% interest referred to the note. The note is a part of the agreement which defendant ratified. Ratification of a part of the transaction constitutes ratification of the entire transaction. Civil Code, § 2311.

[3] Ordinarily, the law requires that a principal be apprised of all the facts surrounding a transaction before he will be held to have ratified the unauthorized acts of an agent. However, where ignorance of the facts arises from the principal's own failure to investigate and the circumstances are such as to put a reasonable man upon inquiry, he may be held to have ratified

despite lack of full knowledge. Hutchinson Co. v. Gould, 180 Cal. 356, 181 P. 651.

It is patently clear from the above that there is absolutely no merit in defendant's first argument. His second argument raises the question of whether a forgery is subject to ratification. In other jurisdictions there is a split of authority on this question. 2 Am.Jur.Agency, § 219. The rule in other jurisdictions which prohibits the ratification of a forgery is based on considerations of public policy which prohibit the exemption from prohibition of the forger by the principal's consent to be bound on the forged instrument. 2 C.J.S. Agency § 37e, p. 1076. However, these considerations do not necessarily prevent the civil liability of the principal. In Kadota Fig Ass'n of Producers v. Case-Swayne Co., 73 Cal.App.2d 815, 167 P.2d 523, it was held that a party may adopt his signature written by another person, as valid and binding by subsequent approval or ratification, even though the signature was originally forged.

It has also been held in this state that the mere fact that the agent's act is a crime does not prevent ratification by the principal if the act is done for his benefit. Sullivan v. People's Ice Corp., 92 Cal.App. 740, 268 P. 934. At 17 C.J.S. Contracts § 62c, p. 413, it is said that a party may be bound by an agreement where his signature has been affixed pursuant to due and prior authorization, or has been adopted or ratified, or where he is estopped to deny a signature. Moore v. Hoar, 27 Cal.App.2d 269, 81 P.2d 226 is to the same effect.

[4] On the basis of these authorities, there is here no valid reason of public policy against holding defendant civilly liable to the plaintiff. This is not an ordinary case of forgery where the forger neither pretends nor intends to act in behalf of the proposed ratifier. Jones v. Bank of America, 49 Cal.App.2d 115, 121 P.2d 94. Toon had written authority to act on behalf of defendant and acted in his capacity as defendant's agent. Defendant had ample notice of Toon's act of signing his name to the note, and accepted the benefits of the agreement and note. Toon's authority to sign a negotiable instrument was not questioned by the defendant in the face of repeated demands for payment. As no particular form of such authority is required by Civil Code, section 3100, defendant's ratification need not take a certain form.

In view of the foregoing, the judgment must be affirmed.

Judgment affirmed.

DOOLING and DRAPER, JJ., concur.

170 Cal.App.2d 533

Matter of the ESTATE of Doris Bradley STONE, also known as D. B. Stone and Doris Bradley Foote, Deceased.

Byron F. STONE, Jr., Appellant

v.

Willis S. SLUSSER, Executor of the Last Will and Testament of Doris Bradley Stone, Respondent.

No. 18175.

District Court of Appeal, First District, Division 1, California.

May 21, 1959.

Proceedings on surviving husband's petition to determine heirship and community interest. The Superior Court, Contra Costa County, Harold Jacoby, J., entered order striking the petition, and an appeal was taken. The District Court of Appeal, Bray, P. J., held that surviving husband's statutory share of community property forms no part of his deceased wife's "estate," for purposes of Probate Code section authorizing any person claiming to be entitled to distribution of any part of "estate" to file petition setting forth his claim and praying that court determine who are entitled to distribution of estate.

Affirmed.

1. Courts ⚷198

Although a court of general jurisdiction, Superior Court is, when sitting as a probate court, a court of special and limited jurisdiction, in that its jurisdiction is circumscribed in probate proceedings by provisions of statute conferring such jurisdiction and it may not competently proceed in manner essentially different from that provided.

2. Courts ⚷200½

Superior Court, while sitting in probate, is without power to decide a claim between an estate and stranger thereto.

3. Courts ⚷200½

An executor or administrator of wife's estate cannot litigate with surviving husband in probate proceeding question of whether property in husband's possession is community or separate estate. West's Ann.Prob.Code, § 202.

4. Courts ⚷200½

An heirship proceeding is not a proper one in which to litigate surviving husband's claims to his share of community property. West's Ann.Prob.Code, §§ 201, 202.

5. Courts ⚷200½

Since her share of community property comes to her through probate, surviving wife is in "privity" with her deceased husband's estate, and probate court has power to go into question of community property; but surviving husband's claim to community property is adverse to that of his deceased wife's estate and he is not in "privity" with her estate but is a "stranger" within purview of general rule depriving probate court of power to decide claims between estate and stranger. West's Ann. Prob.Code, § 202.

See publication Words and Phrases, for other judicial constructions and definitions of "Privity" and "Stranger".

6. Husband and Wife ⚷276(8)

Surviving husband's statutory share of community property forms no part of his deceased wife's "estate", for purposes of Probate Code section authorizing any person claiming to be entitled to distribution of any part of "estate" to file petition setting forth his claim and praying that court determine who are entitled to distribution of estate. West's Ann.Prob.Code, §§ 201, 202, 1080.

See publication Words and Phrases, for other judicial constructions and definitions of "Estate".

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William T. Eckhoff, William Berger, San Francisco, for appellant.

Thelen, Marrin, Johnson & Bridges, San Francisco, for respondent.

BRAY, Presiding Justice.

Appeal by husband of decedent from an order striking his petition to determine heirship and community interest.

Question Presented.

Has the superior court, sitting in probate, jurisdiction to hear a petition by a surviving husband to determine community interest?

Record.

The will of Doris Stone was duly admitted to probate and respondent appointed executor thereof. The will disposed of decedent's entire estate to her daughter, Nancy Lee Slusser, and disinherited appellant husband. After the filing of the inventory, appellant filed a petition to determine heirship and community interest. The petition alleged that appellant and decedent were married August 22, 1947, and lived together until November, 1954 (decedent died May 22, 1956). At the time of marriage decedent owned certain real property as her separate property. During the 1947–1954 period decedent received income for personal services. $4,000 of these earnings were disbursed for the benefit of the property, and appellant claimed to be entitled to one-half of that sum as being community funds disbursed for the benefit of the wife's separate property, and asked the court to determine the amount of the community funds disbursed, adjudge him the owner of and entitled to one-half thereof on distribution. The executor filed a demurrer and motion to strike on the grounds of lack of jurisdiction.[1] Nancy Lee filed a statement of claim of interest in the estate, alleging that as sole legatee she was entitled to all property listed in the inventory, all of which was separate property. A report of the executor revealed that the estate consists primarily of $11,000, proceeds of the sale of the real property by the executor. Nancy Lee also filed a motion to strike, on the ground of lack of jurisdiction. This motion was granted.

Jurisdiction of Probate Court.

[1] The superior court, although a court of general jurisdiction, when sitting as a probate court is a court of special and limited jurisdiction in that its jurisdiction is circumscribed in probate proceedings by the provisions of the statute conferring such jurisdiction and it may not competently proceed in a manner essentially different from that provided. Estate of Quinn, 1955, 43 Cal.2d 785, 787, 278 P.2d 692; McPike v. Superior Court, 1934, 220 Cal. 254, 258, 30 P.2d 17; 20 Cal.Jur.2d p. 53, § 24.

[2] One application of this doctrine is that the superior court, while sitting in probate, is without power to decide a claim between an estate and a stranger thereto. Central Bank v. Superior Court, 1955, 45 Cal.2d 10, 14, 285 P.2d 906; Estate of Dabney, 1951, 37 Cal.2d 672, 676, 234 P.2d 962; Bauer v. Bauer, 1927, 201 Cal. 267, 271, 256 P. 820.

Probate Code, section 1080 provides in part that "the executor or administrator, or any person claiming to be an heir of the decedent or entitled to distribution of the estate or any part thereof may file a petition setting forth his claim or reason and praying that the court determine who are entitled to distribution of the estate." Appellant contends that the probate court has jurisdiction here since he is entitled to distribution of part of the estate; namely, his portion of the community property.

[3–6] The question then is whether a surviving husband's statutory share of community property (Prob.Code, § 201) forms part of his wife's estate. Probate Code, section 202 provides: "Community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to his debts and to administration and disposal under the provisions of Division III of this code; but in the event of such testamentary disposition by the wife, the husband, pending administration, shall retain the same power to sell, manage and deal with the community personal property as he had in her lifetime; and his possession and control of the community property shall not be transferred to the personal representative of the wife except to the extent necessary to carry her will into effect."

The California Supreme Court has recognized a distinction in the power of the probate court to go into the question of community property between a husband's estate and a wife's estate. Central Bank v. Superior Court, supra, 45 Cal.2d 10, 285 P.2d 906, discussed the general rule that the probate court is without power to decide claims between an estate and a stranger, and then states that if one is not a stranger or is in "privity" with the estate the controversy is within the probate court's jurisdiction. Two types of privity are recognized, one, that between the estate and the executor or administrator acting in his personal capacity (for example, if in this case the husband was also the executor of his wife's estate). This area does not include a surviving husband who is not the executor or administrator. 45 Cal.2d at page 17, 285 P.2d at page 910. The second type of privity involves a claimant who has acquired or seeks to acquire property in the course of the probate proceeding. This privity is based on the nature of the claim. A surviving wife's claim to her community interest is in privity, for her share comes to her through probate. Prob.Code, § 202. But the husband's claim to community property is adverse to the estate, is not subject to administration and does not pass through the probate proceeding. An executor or administrator of a wife's estate cannot litigate with the surviving husband in a probate proceeding the question of whether property in the husband's possession is community or separate estate. Wilson v. Superior Court, 1951, 101 Cal.App.2d 592, 225 P.2d 1002. An heirship proceeding is not a proper one in which to litigate the husband's claims to his share of the community property. In re Rowland, 1888, 74 Cal. 523, 16 P. 315; In re Estate of Kurt, 1948, 83 Cal.App.2d 681, 683, 189 P.2d 528. Probate Code, sections 201 and 202 make it clear that the husband's portion of the community property is not subject to administration on the wife's death testate. Only the portion so passing from his control (all when he dies, or half which a decedent wife disposes of by will) is subject to his debts and to administration. If the wife dies, section 202 provides that his possession and control need be transferred to her personal representative only to the extent necessary to carry her will into effect. But the wife cannot dispose of his half and it cannot become a part of her estate.

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[1] Apparently no action was taken on this demurrer and motion.

"It is stated that the surviving husband's claim to his share of community property is adverse to the estate as it is not subject to administration and does not pass through probate proceedings. Makeig v. United Security Bank & Trust Co., 112 Cal.App. 138, 296 P. 673. As such he is not claiming in privity with the estate but adversely to it since his community interest does not pass through the probate proceedings and his claim cannot be litigated therein if objection be made. Estate of Klumpke, supra, 167 Cal. 415, 421, 139 P. 1062; In re Estate of Kurt, supra, 83 Cal.App.2d 681, 683, 189 P.2d 528; see also Estate of King, supra, 199 Cal. 113, 117–118, 248 P. 519. But a surviving wife's claim to her share of the community property is said to come to her through probate, Prob.Code, § 202, so that her claim is in privity with the estate and should be litigated therein. In re Burdick, supra, 112 Cal. 387, 44 P. 734; Estate of Kurt, supra, 83 Cal.App.2d 681, 684, 189 P.2d 528; Colden v. Costello, 50 Cal.App.2d 363, 122 P.2d 959." Central Bank v. Superior Court, supra, 45 Cal.2d at page 17, 285 P.2d at page 910.

In re Estate of Kurt, supra, 83 Cal.App. 2d 681, 189 P.2d 528, cited in the above quotation from Central Bank v. Superior Court, the court held that the claim of community property made by the surviving husband who was not the personal representative of the estate could not be determined in a proceeding to determine heirship. "* * * any claim that he is making is adverse to the estate and not in privity with it. It has always been and still is the rule that the surviving husband's interest in the community property vests in him *without administration.*" 83 Cal. App.2d at page 683, 189 P.2d at page 530.

Appellant cites Woods v. Security-First Nat. Bank, 1956, 46 Cal.2d 697, 299 P.2d 657, as overruling the Kurt case and as authority for the proposition that the probate court has power to determine if property is separate or community. There the surviving husband brought an action to recover property from the wife's executor on the ground of an oral agreement converting the wife's separate property to community. The husband appealed from an adverse judgment on the grounds (1) that the evidence was insufficient to support the findings and (2) that an earlier order of the probate court finding that the property was community property was res judicata. Judgment was reversed on both grounds. Concerning the second plea it appeared that the husband had filed a petition to determine heirship, alleging that he was the heir of the decedent as her surviving spouse, since he was named in decedent's will, but excluded in a codicil, both executed prior to marriage. The court found that the husband claiming as heir properly invoked the jurisdiction of the probate court under section 1080, Probate Code. In asserting himself as heir he was claiming through and not adversely to the estate. Hence the probate court had the power to decide the question of heirship, and it did not matter whether the property was found to be separate or community. "The fact that the petition also sought to have the entire estate declared to be community property did not oust the court sitting in probate of jurisdiction to determine the question of heirship. Anything in In re Estate of Kurt * * * inconsistent with the conclusion herein is disapproved." 46 Cal.2d at page 704, 299 P.2d at page 661.

The only language in the Kurt case that is inconsistent appears at 83 Cal.App.2d 684, 189 P.2d 530, where the court said: "The only cases where the husband's claim against the wife's estate that property was community has been held to be within the probate court's jurisdiction are cases where the husband was the personal representative * * *." The Woods case qualifies this general statement by carving out another situation where the probate court may decide whether property is community. But the holding of Kurt remains undisturbed as does the doctrine re-enunciated in the Central Bank case that where the situation merely presents a husband claiming a community interest, that claim is adverse to the wife's estate and beyond probate jurisdiction. But the surviving wife claiming a community interest is in privity with the estate since under Probate Code, section 202 her share of community property comes to her through probate. See Colden v. Costello, 50 Cal.App.2d 363, 369, 122 P.2d 959. See In re Estate of Hartnett, 1957, 155 Cal.App.2d 280, 318 P.2d 81, which referred to the discussion in the Central Bank case, supra, as between a husband's claim and a wife's claim, and then held: "* * * petitioner's claim as surviving wife to community property rights was in privity with the estate and should have been litigated therein." 155 Cal.App.2d at page 283, 318 P.2d at page 84. The Woods case did not nor does any case abrogate the distinction as to whether it is a surviving husband or wife who petitions.

Parsley v. Superior Court, 40 Cal.App.2d 446, 104 P.2d 1073, is in nowise opposed to the rule herein set forth. It clearly appears that the husband there was not claiming adversely to his wife's estate, but through it.

Appellant claims that the holding in In re Estate of Radovich, 48 Cal.2d 116, 120, 308 P.2d 14, 17, that an heirship proceeding in the probate court is a proceeding in rem and conclusive against all persons somehow is a holding that supports his contention that the probate court has jurisdiction in the proceeding commenced by him to determine his right to the property which he is claiming adversely to the estate. He overlooks the fact that the binding effect of a judgment in that type of proceeding is stated as follows: "'* * * it settles "the rights of all persons claiming as *heirs* of the decedent * * *."'" (Emphasis added.) Appellant does not claim as an heir of decedent. In his "Petition to Determine Heirship and Community Interest" appellant expressly refrained from stating that he is an heir, and asked that he be adjudged the owner of one-half of the community funds which he alleged was disbursed in connection with the real property.

Appellant cites a number of cases as authority for the proposition that the probate court may determine the community character of property. None of them are in point. They divide themselves into three classes: (1) Involving surviving wives, such cases as In re Estate of Roberts, 1945, 27 Cal.2d 70, 162 P.2d 461; In re Estate of Nash, 1955, 132 Cal.App.2d 233, 282 P.2d 184; Colden v. Costello, supra, 50 Cal.App.2d 363, 369, 122 P.2d 959. As we have shown, surviving wives are uniformly held in privity under Probate Code, section 202. (2) Where the petitioner is claiming as an heir whose right to inherit depended upon the character of the property, such cases as In re Estate of Morgan, 1928, 203 Cal. 569, 265 P. 241. (3) Where the claim is by a representative of the estate in his individual capacity, such cases as In re Estate of

Kelpsch, 1928, 203 Cal. 613, 265 P. 214. In such a case, privity is recognized, as we have pointed out.

The order is affirmed.

FRED B. WOOD and TOBRINER, JJ., concur.

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170 Cal.App.2d 412

FIREMAN'S FUND INDEMNITY COMPANY, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State of California, George L. Ries, California Casualty Indemnity Exchange and Occidental Life Insurance Company, an inter-insurance exchange, Respondents.

FIREMAN'S FUND INDEMNITY COMPANY, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State of California, Earl E. Huyck, and Pacific Employers Insurance Company, a corporation, Respondents.

Nos. 23695, 23684.

District Court of Appeal, Second District, Division 1, California.

May 18, 1959.

As Modified May 19, 1959.

Workmen's compensation cases wherein unemployment disability carrier sought to impress liens for amounts paid claimant. The Industrial Accident Commission made awards granting unemployment compensation disability carrier smaller liens than sought, and it petitioned for review. The District Court of Appeal, Nourse, J. pro tem., held, inter alia, that where total amount of award as compensation for temporary disability was less than sum of amounts paid to applicant as unemployment disability benefits and amount awarded by Commission to claimant's attorneys, Commission had no power to give attorneys' lien for fees priority over lien for unemployment compensation benefits and that unemployment disability carrier was entitled to no lien for amounts paid as hospitalization benefits.

Decision annulled and case remanded with directions.

1. Workmen's Compensation 🔑1846

Party to proceeding before Industrial Accident Commission, by failing to raise question of constitutionality of statutory amendment before Commission, waived its right to question constitutionality on petition for writ of review.

2. Social Security and Public Welfare 🔑721

Unemployment disability insurance carrier which had paid compensation to employee after he left his employment because of disability, was interested party entitled to prosecute application for award of temporary disability compensation to which its lien would attach, and had right to contract with its own attorneys to do so. West's Ann.Unempl.Ins.Code, §§ 2629, 2801, 3251 et. seq.; West's Ann.Labor Code, §§ 4903, 4904.

3. Workmen's Compensation 🔑1984

Industrial Accident Commission has right to fix fees payable under any contract made by a claimant for compensation and to make such fees payable out of award of compensation made to claimant, but has no jurisdiction to determine legality of contract made, except in so far as it may attempt to fix fee to be paid or, by its award, to, in effect, obligate some other person than claimant to pay fees which it fixs as reasonable. West's Ann.Labor Code, §§ 4900, 4903, 4904.

4. Workmen's Compensation 🔑1985

Where total amount awarded as workmen's compensation for temporary disability was less than sum of amounts paid to claimant as unemployment disability benefits and amount awarded by Commission to claimant's attorneys, Commission had no power to give lien for attorneys' fees priority over lien for unemployment compensation benefits. West's Ann.Labor Code, §§ 4900, 4903, 4904, 5501; West's Ann.Unempl.Ins.Code, §§ 2625 et seq., 2626, 2627, 2629, 2800 et seq., 2801, 3251.

5. Workmen's Compensation ⚷1004

In workmen's compensation proceeding wherein unemployment disability carrier sought to impress lien for amounts which it had paid to claimant, Commission should have made finding as to whether unemployment disability carrier had, when it wrote letter purportedly agreeing to reduce its claim, assertedly only in an effort to arrive at a compromise settlement, actually reduced its lien. West's Ann.Labor Code, §§ 4900, 4903, 4904, 5501; West's Ann.Unempl.Ins. Code, §§ 2625 et seq., 2626, 2627, 2629, 2800 et seq., 2801, 3251 et seq.

6. Workmen's Compensation ⚷1004

Hospital benefits paid to disabled workman by unemployment disability insurer, whether pursuant to obligation under voluntary plan or as loan or gift, were not "medical and hospital expenses" within meaning of provision of Labor Code specifying allowable liens on workmen's compensation awards, and unemployment disability carrier was entitled to no lien on compensation award for amounts paid to claimant on account of hospitalization. West's Ann.Unempl.Ins.Code, §§ 2625 et seq., 2626, 2627, 2800 et seq., 2801, 3251 et seq.; West's Ann.Labor Code, §§ 4900, 4903, 4904.

See publication Words and Phrases, for other judicial constructions and definitions of "Medical and Hospital Expenses".

7. Social Security and Public Welfare ⚷242

Payments made by unemployment disability insurer for hospitalization, pursuant to obligation of voluntary plan, constitute payments of indemnity of the same nature as payments under policy of disability insurance, as defined in Insurance Code. West's Ann.Unempl.Ins.Code, §§ 2801, 2804; West's Ann.Insurance Code, § 106.

8. Workmen's Compensation ⚷1004

As claim for workmen's compensation is not assignable, and as Industrial Accident Commission has no power to adjudicate rights of insurer and employee under a contract not connected with the right of employee to recover compensation, even if unemployment disability policy specifically gave insurer right of subrogation for amounts paid, Industrial Accident Commission could not grant unemployment insurance disability carrier right to claim, as subrogee of injured employee, compensation award for amounts which it had paid on account of hospitalization for employee. West's Ann.Unempl.Ins.Code, §§ 2625 et seq., 2626, 2627, 2800 et seq., 2801, 3251; West's Ann.Labor Code, §§ 4900, 4903, 4904.

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Herlihy & Herlihy and Richard C. Mallery, Los Angeles, for petitioners.

Everett A. Corten, San Francisco, and Edward A. Sarkisian, Los Angeles, for respondent Commission.

NOURSE, Justice pro tem.

In each of the above matters we have before us for review an award by the respondent commission by which petitioner, Fireman's Fund Indemnity Company, hereinafter called "Fireman's," was denied a lien for the full amount paid by it to the injured employee as unemployment insurance benefits.

The parties have stipulated that the judgment rendered in the matter first designated in the caption (in which Ries is the claimant) shall govern insofar as applicable, the decision in the second matter designated and that judgment shall be entered in that case accordingly.

George L. Ries, Claimant.	2nd Civil Number 23695.

The facts: Ries was an employee of the Madison Iron and Sheet Metal Company; respondent California Casualty Indemnity Exchange, hereinafter called "Indemnity Exchange," was the compensation insurance carrier for that company. Petitioner, Fireman's, had issued a policy of insurance under a voluntary plan adopted by the employer and its employees pursuant to the provisions of the Unemployment Insurance Code (Div. 1, pt. 2, ch. 6).

Ries asserted a claim against his employer alleging that he had on December 3, 1956, while in the scope and course of his employment, sustained a disabling injury. Indemnity Exchange denied Ries' right to compensation on the ground that any disability from which he was suffering was not the result of an accident occurring in the scope and course of his employment. Ries' right to compensation being questioned petitioner as the unemployment compensation carrier for Ries' employer paid to him the sum of $40 per week for the period commencing December 19, 1956, to and including June 19. 1957. During that period Ries was hospitalized for 11 days and petitioner paid to him an additional sum of $110 pursuant to the terms of its policy and section 2801 of the Unemployment Insurance Code which entitled Ries to the sum of $10 per day for each day not in excess of 12 days, during which he should be confined in the hospital during any disability benefit period. Ries was the beneficiary under a policy of group accident and health insurance issued by Occidental Life Insurance Company of California, hereinafter called "Occidental," to the union of which he was a member. Under this policy Occidental either paid directly or reimbursed applicant for payments made by him for medical care, these payments being in the sum of $573.14.

On March 27, 1957, Ries filed an application for hearing upon his claim for compensation. Thereafter both petitioner and Occidental gave notice of a claim of lien upon any award of compensation made to Ries. Petitioner's claim of lien was in the sum of $1,150 and Occidental's was in the sum of $573.14.

Issue having been joined, hearings upon Ries' application were had. Petitioner, through its counsel, participated in all the hearings.

Findings and award: After reopening the cause the referee found (1) that Ries had sustained an injury arising out of and occurring in the course of his employment, (2) that this injury temporarily aggravated a pre-existing physical impairment, (3) that the injury had not caused any permanent disability but (4) had temporarily totally disabled the applicant for 23⁵⁄₇ weeks for which he was entitled to compensation in the sum of $948.57 and had further partially disabled him for one week for which he was entitled to compensation in the sum of $23.15 making a total sum for which he was entitled to temporary disability of $971.72, (5) that Indemnity Exchange failed to furnish medical treatment after notice of need therefor and that applicant had incurred medical expenses and of the expenses so incurred $573.14 had been paid by Occidental and that it was entitled to a lien therefor, (6) that petitioner had filed an amended claim of lien for unemployment compensation disability benefits reducing its claim to the sum of $850; that Fireman's lien should be reduced to $746.72 in order to provide funds for the payment of the fees of applicant's attorneys; that applicant's attorneys were entitled to a lien against the award in favor of Ries for temporary disability for the reasonable value of their services in the sum of $225.

Based upon these findings the referee awarded (1) the applicant $971.72 for temporary disability (2) of which amount it directed $746.72 be paid directly to petitioner in satisfaction of its lien and the sum of $225 paid directly to the attorneys for the claimant, (3) the sum of $573.14 to applicant as reimbursement for self-procured medical treatment, (4) that that amount be paid directly to Occidental and (5) the award denied Fireman's lien for the hospital benefits paid by it.

Fireman's petitioned the commission for reconsideration of the findings and award of the referee. In this petition it asserted that it was entitled to have paid directly to it in satisfaction of its lien the full amount of the award for temporary disability; that it could not be compelled to prorate its claim with that of the attorneys for the claimant and that the findings and award of the referee did not in fact constitute a proration of the attorneys' fees but an imposition of the full amount of them upon

Fireman's; it further asserted that it had not reduced its claim of the lien to $850 but that the letter written by it to the referee agreeing to reduce its claim to $850 was for the purpose of aiding Ries and Indemnity Exchange in arriving at a compromise but that said compromise had not been consummated; that it was entitled to have awarded to it the sum of $110, the hospital indemnity paid by it, as against the award to Ries for his self-incurred medical expense and that Occidental was not entitled to a lien for the payments made by it under its accident policy whether those payments were made to applicant or directly to persons or institutions to whom applicant had incurred liability on account of medical and hospital care given him.

The commission denied Fireman's petition for reconsideration and affirmed the findings and award of the referee but in so doing refused to pass upon the question as to whether Fireman's had in fact reduced its claim of lien from $1,150 to $850 upon the grounds that that question was immaterial to its decision inasmuch as the lien of the attorneys was entitled to priority and as the amount awarded for disability compensation was less than the sum of the attorneys' fees awarded plus $850, with the result that irrespective of the amount for which it might be entitled to a lien it could in no event recover more than the amount awarded.

The questions presented here are: Where the total amount awarded as compensation for temporary disability is less than the sum of the amounts paid to the applicant as unemployment disability benefits and the amount awarded by the commission to the claimant's attorneys, does the commission have the power to give the lien for attorneys' fees priority over the lien for unemployment compensation benefits and reduce the award to the unemployment disability lien claimant?[1]

The second question: Is an insurer under a voluntary plan adopted under the Unemployment Insurance Code for the payment of disability benefits, entitled to a lien for the amounts paid by it as benefits on account of hospitalization of an employee?

[1] The commission's power to determine and allow liens against awards of compensation is set forth in sections 4903 and 4904 of the Labor Code as amended in 1957.[2] Section 4903, so far as pertinent here reads: "The commission may determine, and allow as a lien against any amount to be paid as compensation:

"(a) A reasonable attorney's fee for legal services pertaining to any claim for compensation either before the commission or before any of the appellate courts, and the reasonable disbursements in connection therewith. * * *

"(f) The amount of unemployment compensation *disability benefits* which have been paid under or pursuant to the Unemployment Insurance Code in those cases where, pending a determination under Division 4 of this code, there was uncertainty whether such benefits were payable under the Unemployment Insurance Code or payable hereunder; provided, however, that any lien under this subdivision shall be allowed and paid as provided in Section 4904." (Emphasis added.)

Section 4904 so far as material provides: "* * * In determining the amount of lien to be allowed for unemployment compensation *disability benefits* under subdivision (f) of Section 4903 the commission *shall allow such lien* in the amount of benefits which it finds were paid for the same day or days of disability for which an award of compensation for temporary disability indemnity is made." (Emphasis added.)

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[1] This question is common to both cases that are under consideration here, the remaining question is not.

[2] All of the payments made by Fireman's were made and its claim of lien was filed prior to the effective date of the amendments to these sections. The right to a lien was complete upon the filing of its lien. Lab.Code, § 4904. It was thus a vested right and the Legislature could not by amending the statutes deprive Fireman's of any amount to which it was entitled to reimbursement under its lien rights at the time the amendments became effective. Cal.Const., art. I, §§ 13, 16. Fireman's, however, did not raise the question of the constitutionality of the amendments before the commission and has in its briefs here asserted rights under the amendments; it has, therefore, waived its rights to question the constitutionality of the amendments as applied to its claim of lien.

These provisions of the Labor Code must be read in the light of the provisions of section 2629 of the Unemployment Insurance Code which provides in substance that a workman is not entitled to disability benefits for any period of unemployment pursuant to the provisions of the Unemployment Insurance Code if he is for said period and on account of such disability entitled to receive workmen's compensation benefits (Unem.Ins.Code, § 2629).

The Supreme Court of this state in decisions construing the statutes in question has established the following principles which must govern us here: That a workman is not entitled to disability benefits under both the Workmen's Compensation and Unemployment Insurance Acts; that both statutes are remedial and that section 4903 of the Labor Code should be so applied as to induce prompt payments of disability benefits to an injured workman and to insure, to the entity making such payments, reimbursement for payments made by it if it eventually be found by the Industrial Accident Commission that the workman was entitled to temporary disability compensation duplicating the payments made under the Unemployment Insurance Act. Aetna Life Ins. Co. v. Industrial Acc. Com., 38 Cal.2d 599, 241 P.2d 530; Garcia v. Industrial Accident Com., 41 Cal.2d 689, 263 P.2d 8; Bryant v. Industrial Acc. Com., 37 Cal.2d 215, 231 P.2d 32.

It seems to us evident that the legislative purpose of assuring the entity making voluntary payments of unemployment compensation benefits reimbursement will be defeated if it is charged with the contract liabilities of the workman to whom it has made advances and the amount awarded it is correspondingly diminished. That is exactly the result of the award here under attack. In the present case Fireman's paid to Ries disability benefits at the rate of $40 per week for a total of 26 weeks or a total of $1,040. These unemployment disability payments were made for the period commencing December 19, 1956, to and including June 19, 1957. The commission found that Ries' injuries arose out of and occurred in the course of his employment and that said injuries caused temporary disability for the period from December 4, 1956, to and including the 11th day of that month and for the period beginning December 19, 1956, to and including May 9, 1957, and again for the period beginning May 25, 1957, to and including June 9th of that year. It further found that he suffered temporary partial disability for the week beginning December 12, 1956, and by reason thereof suffered a wage loss of $23.15 and made him a total award for temporary disability, both permanent and partial of $971.72.

If we assume that Fireman's lien had not been reduced to the sum of $850 it was entitled to reimbursement in the sum of $908.58.[3] If, however, its claim of lien was reduced, then it would be entitled to be reimbursed in the sum of $850. The commission, however, awarded Fireman's only the sum of $746.72. It arrived at this amount by charging against the $971.72 awarded as compensation, the sum of $225 which it found to be the reasonable value of the services performed by applicant's attorneys. It thus charged Fireman's with $161.86 of the contractual obligation incurred by Ries for attorneys' fees.

Respondent commission contends that Fireman's received the benefit of the services performed by the attorneys employed by the claimant and that it, therefore, had a right to make the fees fixed by it a prior lien on the award for disability benefits and thus cast the burden of them upon Fireman's. We see no merit in this contention. To uphold it would destroy the incentive of the entity charged with the payment of disability compensation insurance benefits to commence immediate payment of benefits and defeat the purpose of the statutory scheme.[4]

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[3] Under section 4904 of the Labor Code Fireman's was only entitled to reimbursement for the amounts paid out by it as unemployment disability benefits for the same weeks or days as claimant was awarded temporary disability benefits by the commission. It made payments to Ries during 2/7 weeks for which the commission made no award of disability compensation, but made no payment covering the first week of that disability.

[2] Ries was not entitled to receive both workmen's compensation benefits and unemployment disability benefits. Having received from Fireman's the total amount of the compensation to which he was entitled for the periods during which the commission found he was disabled, he no longer had any interest in prosecuting an application for temporary compensation and was under no compulsion so to do. If he desired to prosecute an application for compensation in order to obtain an award for permanent disability to which Fireman's lien would not attach (Lab.Code, § 4904) he was at liberty to employ an attorney to prosecute such an application on his behalf but could not contract for the payment of such fees by Fireman's. Fireman's was an interested party entitled to prosecute an application for an award to the applicant of temporary disability compensation to which its lien would attach and had the right to contract with its own attorneys so to do. Independence Indemnity Co. by Mitchell v. Industrial Acc. Com., 2 Cal.2d 397, 41 P.2d 320; Lab.Code, § 5501. It did so contract and its attorneys participated in all of the hearings before the commission.

[3–5] It is true that the commission has the right to fix the fees payable under any contract made by a claimant for compensation and to make such fees payable out of the award of compensation made to the applicant but it has no jurisdiction to determine the legality of a contract made (except insofar as the contract may attempt to fix the fee to be paid) or, by its award, to in effect obligate some other person than the claimant to pay the fees which it fixes as reasonable. Schilling v. Industrial Acc. Com., 47 Cal.App. 190, 190 P. 373. We, therefore, hold that Fireman's was entitled to an award reimbursing it for the amounts paid by it on account of unemployment insurance benefits for the period during which the commission found that the applicant was entitled to workmen's compensation benefits, not exceeding the amount of of the lien claimed by it. We further hold that it was the duty of the commission in passing upon Fireman's petition for reconsideration to determine whether Fireman's had in fact reduced its lien as set forth in its claim of lien filed June 21, 1957, and the commission is directed to determine that question and to make its award accordingly.

[6] We are of the opinion that the commission correctly denied Fireman's a lien for the amounts paid by it as hospital benefits against the award to the claimant for self-incurred hospital and medical expense.

Under section 4903(f) the commission may only allow a lien for "unemployment compensation *disability benefits* which have been paid under or pursuant to the Unemployment Insurance Code." (Emphasis added.) Under section 4904 the amount of the lien so allowed is limited to the amount which the commission awards as compensation "for *temporary disability indemnity*" for the same period of time. (Emphasis added.) It is thus clear that the only payments made under the Unemployment Insurance Code for which a lien may be allowed are payments of disability benefits and that the lien allowed may only attach to an award, made to the claimant, of compensation for temporary disability indemnity.

The Unemployment Insurance Code clearly distinguishes between the provisions for weekly disability benefits which are given to compensate for the loss of wages and the hospital benefits provided for by section 2801. The disability benefits are covered by chapter 2 of division 1, part 2, of that code and are defined in sections 2626 and 2627 of that code. The chapter is entitled "Disability Benefits." Hospital benefits are provided for by chapter 3 under the heading "Additional Benefits" and are payable despite any remuneration received from the employer. The distinction between the two classes of benefits is emphasized by the provisions of section 3251 of the Unemployment Insurance Code. Under this section in any voluntary plan adopted, any indemnification for loss of wages must be separately stated and designated "unemployment compensation disability benefits." It is difficult to see how the Legislature could have more clearly shown its intent that the hospital benefits provided for by section 2801 or by any voluntary plan were not disability benefits within the meaning of either the Labor Code or the Unemployment Insurance Code.

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[4] If Fireman's had not made the advances to Ries, Ries' net recovery in the proceedings before the commission would have been the sum of $746.72. Under the commission's award he retained the full amount of $971.72 awarded by the commission as temporary disability compensation.

Inasmuch as Ries was, under the workmen's compensation provision of the Labor Code, entitled to be furnished the hospitalization for which he incurred liability, he was not, under the express provisions of section 2804 of the Unemployment Insurance Code, entitled to the benefits payable under section 2801 of that code.

We are not advised as to whether under the voluntary plan under which Fireman's was the indemnitor of the employer, Ries was entitled to these hospital benefits irrespective of his rights to compensation or whether that plan only gave him the benefits provided for by section 2801.

[7] If the payments made to Ries were made pursuant to an obligation of the voluntary plan, they constituted payments of indemnity of the same nature as payments under a policy of disability insurance as such policies are defined by section 106 of the Insurance Code, and as such were the proceeds of an investment made by him. Anheuser-Busch v. Starley, 28 Cal.2d 347, 349, 355, 170 P.2d 448, 166 A.L.R. 198; Sayles v. Lofflane Bros. Co. et al, 17 Cal. Comp.Cases, 103.[5] If they were not made under an obligation so to do they constituted either a voluntary gift to Ries or a loan to him but in neither case did they constitute reasonable expenses incurred by Fireman's on behalf of Ries within the meaning of paragraph (b) of section 4903 of the Labor Code.

[8] The liability for hospital care was incurred by the claimant and he satisfied that liability out of his own funds and it is immaterial whether the source of those funds was his savings, indemnity paid to him by some disability insurance carrier or by Fireman's either under its policy or as a gift or loan. Inasmuch as the statute does not authorize the commission to grant a lien to a person making such payments or advances the commission was without power to award a lien to Fireman's on account of such payments. It was intimated at oral argument that Fireman's having paid indemnity was subrogated to the rights of the claimant Ries, and because of such subrogation was entitled to an award for the hospital indemnity paid by it. There is no merit in this contention even though it be assumed that the policy expressly provided for such subrogation. This is true for two reasons. In the first place, a claim for compensation is not assignable. (Lab. Code, § 4900);[6] and in the second place, the commission being a tribunal of limited jurisdiction, it is without power to adjudicate the rights of the insurer and the employee under a contract not connected with

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[5] It may be noted that an employee might procure a number of disability policies each of which would indemnify him in stated amounts against expenses incurred for hospital and medical care and he would be entitled to the indemnity provided for by each policy even though he might be fully reimbursed by the payments made by one insurer.

[6] Subrogation is an equitable assignment. Offer v. Superior Court, 194 Cal. 114, 228 P. 11.

the right of the employee to recover compensation, and is without power to enforce an insurer's subrogation rights. State Compensation Ins. Fund v. Industrial Accident Comm., 20 Cal.2d 264, 267–269, 125 P. 2d 42.

Fireman's asserts that the commission exceeded its powers in granting a lien to Occidental. While it may be true that Occidental was no more entitled to a lien than Fireman's, Fireman's is not affected by the award to Occidental and as the applicant does not complain thereof that award does not fall within the purview of this review.

Earl E. Huyck, Claimant. 2nd Civil Number 23684.

In this matter the applicant Huyck left his employment on April 12, 1957, claiming a disability arising out of and in the scope of his employment. His employer's compensation carrier disputed his claim. Fireman's was the unemployment compensation disability insurance carrier of the employer and paid unemployment compensation disability insurance to Huyck, the claimant, for the period commencing April 18th and to and including September 4, 1957, at the rate of $40 per week, or a total sum of $794.29. The commission found that Huyck had not sustained any permanent disability but had sustained total temporary disability for the period beginning April 12, 1957, to and including September 4, 1957, and was entitled during said period to the sum of $40 per week or a total amount of temporary disability compensation of $834.-29. It fixed the reasonable value for services rendered by Huyck's attorney at $150, ordered this amount paid directly to the attorney and the sum of $684.29 paid to Fireman's in satisfaction of its right to reimbursement. It thus charged to Fireman's $110 of the fees of plaintiff's attorney. This, for the reasons stated in the companion case, it was without power to do.

The award in case Number 23695 is annulled with directions to the commission to determine as a fact whether Fireman's did reduce its lien for disability compensation payments made to the claimant to the sum of $850 and to enter an award in favor of Fireman's in accordance with its findings as to the amount of that lien, without any reduction thereof because of attorney's fees fixed for claimant's attorneys, not exceeding, however, the sum of $908.58.

The award in proceeding Number 23684 is annulled with directions to the respondent commission to award Fireman's the sum of $794.29.

WHITE, P. J., and LILLIE, J., concur.

* * *

170 Cal.App.2d 513

Harry DEVENCENZI and William H. Wattenburg, Plaintiffs and Appellants,

v.

Michael DONKONICS, Edward McCracken and Lawrence Le Febre, Defendants and Respondents.

Civ. 9543.

District Court of Appeal, Third District, California.

May 20, 1959.

Action to recover for breach of agreement to buy Christmas trees from plaintiffs. The Superior Court, Plumas County, Bertram D. James, J., rendered judgment for defendants, and plaintiffs appealed. The Third District Court of Appeal, Warne, J. pro tem., held that, properly construed, letter apparently confirming conversation concerning purchase of Christmas trees, reciting that buyer would pay cash upon loading of trees in boxcars, and requesting that signed copy of letter be returned to buyer if seller found arrangement agreeable, constituted an offer of purchase unburdened by absolute condition as to manner of acceptance; and held that such offer ripened into contract upon acceptance by sellers, without regard to whether acceptance was made by returning signed copy of letter or by separate acceptance in writing.

Judgment reversed with directions.

1. Frauds, Statute of ⚷106(1)

Written offer, stating number of Christmas trees, price, average height and quality and stating that cash would be paid upon loading in boxcars, constituted a sufficient memorandum of contract to satisfy statute of frauds. West's Ann.Civ. Code, § 1624a.

2. Sales ⚷23(3)

Properly construed, letter, confirming conversation concerning purchase of Christmas trees, reciting that buyer would pay cash upon loading of trees in boxcars, and requesting that signed copy of letter be returned to buyer if seller found arrangement agreeable, constituted an offer of purchase unburdened by absolute condition as to manner of acceptance; and offer ripened into contract upon acceptance by sellers, without regard to whether acceptance was made by returning signed copy of letter or by separate acceptance in writing.

3. Names ⚷10

In action for breach of contract to buy Christmas trees from plaintiff, complaint was not demurrable for noncompliance with fictitious name statute, where there was nothing in complaint showing that plaintiffs were transacting business in state under fictitious name or that they were partners doing business under fictitious name or designation not showing names of persons interested in such partnership business. West's Ann.Civ.Code, §§ 1582, 2466.

◆

Charles Reagh and Elizabeth Craig, San Francisco, for appellants.

Francis W. Collins, Crockett, and Charles L. Hemmings, Martinez, for respondents.

WARNE, Justice pro tem.

This is an appeal from a judgment in favor of the defendants entered after appellants declined to amend their amended complaint after the sustaining of a demurrer thereto.

The complaint as amended was in two counts. The first alleged that the defendants were indebted to the plaintiffs in the amount of $4,000 for merchandise sold to defendants pursuant to an oral agreement. The second alleged that appellants were engaged in a joint enterprise of cutting and selling Christmas trees at wholesale; that respondents were engaged in a joint enterprise of selling Christmas trees at retail, and that the respondent Donkonics on behalf of himself and the other respondents made the following offer to appellant Wattenberg:

> "Agreement
> "November 13, 1956
>
> "Dear Sir:
>
> "This is in regard to our conversation on the 10th of November referring to 1600 to 2000 Christmas Trees at $2.00 each, running 6′ average each, and a selection of good marketable trees. I will pay cash upon loading in box cars.
>
> "If this is agreeable to you please sign the two copies. Keep one for your files and return the other copy to me as soon as possible.
>
> "Hoping this finds you satisfactory,
>
> "Sincerely,
> "/s/ Michael Donkonics
> "Michael Donkonics
> "Pinole Salvage Company
> "Pinole, California
>
> "Mr. Wolburg
> "Box 25
> "Greenville, California"

The amended complaint further alleged that appellant Wattenburg, on behalf of himself and the other appellants, accepted the foregoing offer in writing and mailed said acceptance to respondent Donkonics, but that thereafter respondent repudiated the agreement and refused to accept or pay for the 2,000 Christmas trees, which were available for delivery to them. The prayer was for damages in the amount of $4,000.

A demurrer to the amended complaint was sustained "upon the ground that the Complaint alleges an oral agreement, apparently within the Statute of Fraud, without alleging facts, if they exist, sufficient to remove the bar of the statute. It appears that the Court would not be entitled to indulge the presumption that the contract is in writing, where it appears upon the face of the complaint itself that plaintiffs rely, at least in part, upon the oral contract."

[1] Unquestionably, the first count of the amended complaint was vulnerable to the attack by demurrer as it alleged an oral contract for the sale of goods of a value in excess of $500, but did not allege delivery, part payment, or any written note or memorandum of the contract so as to take it without the statute of frauds. However, as to the second count the written offer quoted above constituted a sufficient note or memorandum of the contract under section 1624a of the Civil Code, which provides that:

> "(1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upward shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract of sale be signed by the party to be charged or his agent that behalf."

Respondents argue that the written offer signed by respondent Donkonics is similar to the note or memorandum held to be too uncertain to be enforceable in Re Guardianship of Carlon's Estate, 43 Cal.App.2d 204, 206, 209, 110 P.2d 488, 489. The written memorandum there considered was as follows:

> "July 2nd
>
> "Tim agrees to sell cattle to me for $30.00 per head approximate number 1700 exact count to be determined when they come out of the mountains.
>
> "Also I am to rent all grazing land in Mariposa and Toulumne Co. for 10,000 per year & Mrs Ferratti is to be allowed to run her cattle on the range as in the past and Tim will graze his horses on range land at no cost.
>
> "This does not include any river bottom land.
>
> "I can depend on Tim for advise any time.
>
> "Tim reserves 50 best steers to be sold off clover next season, he to pick them.
>
> "(Signed) T. H. Carlon
> "(Signed) Clyde D. Booth"

There the memorandum failed, as pointed out by this court, to describe the land so that it may be definitely located, and it failed to specify the duration of the proposed lease or its material terms. We do not have a comparable situation in the instant case. Here the offer states the number of Christmas trees, the price, the average height and the quality and states that cash will be paid upon loading in box cars. We see nothing uncertain in that language. It apparently was a written confirmation of the conversation which took place on the 10th of November between Donkonics and Wattenburg concerning the purchase and sale of Christmas trees. Further, its terms are far more certain, definite and explicit than those of the telegram which was held could be construed as an offer to sell in Gibson v. De La Salle Institute, 66 Cal.App.2d 609, 611, 625–626, 152 P.2d 774, 776. The telegram in that case reads as follows:

> "Find it necessary to ask for following prices 275,000 gallons Sherry .85 Stop 80,000 gallons Muscatel .90 Stop 45,000 gallons Port .85 Stop 50,000 gallons Dry Red .50 Stop 50,000 gallons

Dry White .70 Stop Or an average price of .80 per gallon on the above 500,000 gallons terms cash but can supply warehouse receipts on 250,000 gallons Stop Please write today if interested and samples and sales contract will go forward."

Likewise, in Guerrieri v. Severini, 132 Cal.App.2d 269, 271–272, 281 P.2d 879, 881, the following writing was held to be a sufficient memorandum of the sale to satisfy the requirements of section 1624a of the Civil Code:

"Instructions to Severini Winery & Distillery
Madera, Calif.
Sold To Santa Fe Vintage Co
1700 N. Spring St
Los Angeles, Cal.
Ship Via As Instructed When——————
Invoice No. 1733
Date March 27, 1953
Lewis G
Buyer's Order No. ——————
Terms Cash for entire
amount immediately.

Packages Commodity

Approx. 200,000 Gals Sweet Wines, Assorted as Follows: Finished
60,000 Gals 100% pure muscat
60,000 " Port
30,000 " Angelica
50,000 " Sherry
.36 Gal
In bond, fob truck or
cars, Winery, Madera, Cal.
All of the above Wine to be out
by August 1, 1953.
Accepted: Severini Winery & Distillery
by Phil J. Severini (Signed)
Commission
.01¢ Gal From Severini Winery
Fritz Kyer
1115 South Fifth Street
Alhambra, California
By——————————"

[2] We are satisfied that respondent Donkonics' letter of November 13th was an offer of purchase and ripened into a contract upon acceptance by plaintiffs.

Respondents' further contention is that the allegation that appellants "accepted such offer in writing" is insufficient and not in accordance with the condition of signing respondent Donkonics' letter. The answer to this contention is two-fold. First, it cannot be determined from the face of the pleading whether appellants "accepted such offer in writing" by signing the letter or otherwise. Second, we do not believe that signing of the letter was a "condition" or only "mode" of acceptance within the meaning of section 1582 of the Civil Code, which provides:

> "If a proposal prescribes any conditions concerning the communication of its acceptance, the proposer is not bound unless they are conformed to; but in other cases any reasonable and usual mode may be adopted."

Looking beyond the literal meaning of the language used, we feel that respondents' offer was not burdened with, nor did it impose, an absolute condition as to the manner of acceptance, but only suggested a method which would be satisfactory to appellant. Consequently, it would be immaterial if such acceptance were made by signing respondent Donkonics' letter, or by a separate acceptance in writing, if such is the fact, since no possible prejudice could have been suffered by respondents in the latter event.

[3] Respondents also contend that their special demurrer to the second cause of action was properly sustained on the ground of noncompliance with section 2466 of the Civil Code (the fictitious name statute). We do not agree. There is nothing in the complaint showing that the appellants were transacting business in this state under a fictitious name, or that they were partners doing business under a fictitious name or designation not showing the name of the persons interested in such partnership business.

We conclude that the trial court erred in sustaining respondents' demurrer to the second count in the amended complaint.

The judgment is reversed, and the trial court is directed to overrule the demurrer to the second count of the amended com plaint.

VAN DYKE, P. J., and PEEK, J., concur.

170 Cal.App.2d 661

Lola E. ROBERTS, Plaintiff and Appellant,
v.
Josephine E. PATTERSON, Oliver A. Fox, Maurice Hammond, Louis Hammond and Joyce Hammond, Defendants and Respondents.

Civ. 18344.

District Court of Appeal, First District, Division 2, California.
May 26, 1959.

Action for injuries sustained by the plaintiff tenant who tripped over a rug in the common hallway of an apartment of the defendants. Judgment for the defendants in the Superior Court, County of Contra Costa, Thomas F. Fraga, J., and the tenant appeals. The District Court of Appeal, Kaufman, P. J., held that evidence to show the state of mind and knowledge of the defendants in creating a dangerous condition was properly excluded but that an instruction which created a rebuttable presumption of the knowledge of the danger by the tenant because of the position of the rug on the floor required a reversal.

Judgment reversed.

1. Evidence 🔑474½

Whenever the question to be determined is a result of common experiences of all men of ordinary education or is to be inferred from particular facts, the inference is to be drawn by the jury and not by the witness.

2. Evidence 🔑269(1)

In action for injuries sustained by tenant who tripped over a rug in hallway of an apartment based on alleged negligence of defendants in maintaining a defective condition, where only issue to be determined by jury was whether in placing rug, defendants had violated their duty to plaintiff to refrain from active negligence to exercise ordinary care to keep premises in a condition reasonably safe for an invitee, excluding testimony to show state of mind and knowledge of defendants in creating dangerous condition was proper. West's Ann.Code Civ.Proc. § 2055.

3. Landlord and Tenant 🔑169(10)

Where tenant's action was based on theory that in placing the rug over which tenant tripped at a threshold, the defendants had created a dangerous condition which proximately caused tenant's fall and injuries, instructions which threw into the scale on the side of defendants a rebuttable presumption of knowledge by the tenant of the danger because the position of the rug on the floor was plainly visible, were error.

4. Municipal Corporations 🔑806(1)

A pedestrian is not bound to anticipate and be on guard against dangers in walking over an area designed for pedestrian use.

5. Landlord and Tenant 🔑169(10)

In action by tenant for injuries sustained when she tripped over a rug placed in the threshold of a hallway in an apartment, an instruction was erroneous because of the addition of the words "or did not look".

6. Trial 🔑423

Where plaintiff objected to an instruction and after trial court indicated that he would give the instruction as proposed with the addition of suggested words, the plaintiff withdrew all objections, the plaintiff waived the error as if she had requested an instruction involving the same error.

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Russell F. King, Richmond, for appellant.

Joseph F. Rankin, Robert L. Anderson, Oakland, for respondents.

KAUFMAN, Presiding Justice.

This is an appeal from a judgment in favor of the defendants, rendered on a jury verdict in an action for personal injuries sustained by a tenant, plaintiff Lola Roberts, who tripped over a rug in the common hallway of an apartment house owned and operated by the defendants. It is argued on appeal that the trial court erroneously withheld certain evidence from the jury and erred in certain of its instructions to the jury.

The appeal is on a settled statement which reveals the following facts: Defendants Josephine E. Patterson[1] and Oliver A. Fox were the owners of the Carlson Apartments located at 138 Carlson Avenue in Richmond. Under an agreement between the owners and defendants, Maurice and Louis Hammond, defendant Joyce Hammond and her husband Louis took over the management of the Carlson Apartments, a T-shaped building containing 40 units, is located on an irregular corner, bounded on the south by Center Street; on the west by Carlson Avenue; and on the north by Ohio Street. The bottom (north) of the perpendicular portion of the T is closest to Ohio Street. The corner formed by Carlson and Ohio Streets is a surfaced parking lot for the tenants of the building. At the junction of the cross-bar and perpendicular portion of the T closest to this parking lot, there is an entrance commonly referred to as the "middle" entrance. On the Carlson side of the parking lot, just a few steps from the middle entrance, there is an incinerator provided for the convenience of the tenants. There are also entrances to the building at Ohio Street, Center Street, and a main entrance facing Carlson Avenue. The floor level of the premises is approximately 18 to 24 inches above ground level. The Ohio Street doorway, where the accident occurred, is reached by climbing three steps to the top of a concrete porch which is approximately the same height as the floor level of the premises.

Plaintiff had been the manager of the apartments for three years before October 6, 1956. At the time of the accident, the plaintiff occupied a ground floor apartment on the straight hallway connecting the Ohio Street entrance to a cross-hallway bisecting the cross-bar of the T. Plaintiff's apartment was close to the middle entrance. About 10 a. m. on the morning of Sunday, October 28, 1956, plaintiff went out the middle entrance with a metal basket to empty some waste paper into the incinerator. While there, she saw a tenant in the parking lot and went over to talk to him. Then she entered the building at the Ohio Street entrance. She opened the door with her left hand, started to walk in and her foot "hit something". She fell forward and threw her hands up violently releasing the empty waste basket. This jerking motion caused her to fall backwards. She fell with her back to the door a few inches from the threshold and then realized she was sitting on a bluish-colored rug which had been folded in front of the door. She stated that the rug was a few inches from the threshold, but she did not know whether it was in this position before she fell.

Plaintiff stated definitely that she had not seen the rug before her fall. The last time she had used the Ohio Street entrance was on the preceding Friday night. In response to a question, plaintiff presumed she had been looking straight down the hallway as she stepped through the doorway and not directly at her feet. She could not describe how many steps she had taken into the hallway or how far from the door she was when she slipped. After she fell, she was about two feet inside the door. One of the other tenants, Mrs. Rathers, heard the noise of the falling waste basket, opened the door of her apartment and looked out. Mrs. Rathers asked the plaintiff what happened. Plaintiff replied: "I tripped over this damn rug", and called Mrs. Rathers' attention to the rug on the floor. Plaintiff further testified that in her three years as manager of the apartment house she became thoroughly familiar with all of the entrances and exits and that during those three years, rugs, floor or door mats had not been used in connection with any of the entrances. It is admitted that plaintiff's status is that of an invitee.

Defendant Joyce Hammond testified that plaintiff had no particular ill-feeling or resentment toward her, and that plaintiff had on request volunteered information and advice about the management of the Carlson Apartments. On a day following a heavy rain, Mrs. Hammond noticed heavy puddles of water and mud inside the Ohio Street entrance. Fearing that people might slip and fall, she placed a rug inside the Ohio Street entrance on both the ground floor and the second floor. The rugs she used were the property of the apartment and obtained from a storage room. The rug at the scene of the accident was a blue and white cotton and wool rug, which had been folded once with the fold placed closest to the threshold of the door. When unfolded, the rug was ⅓ of an inch thick. When folded over, the rug lay flat and there was no perceptible roll or bulge at the point of the fold. After placing the rug inside the entrance, Mrs. Hammond never specifically inspected it.

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[1] As Mrs. Patterson was a resident of Illinois and no personal service was secured, the action was dismissed as to her.

Mrs. Hammond could not remember exactly when the rugs had been placed at the Ohio Street entrance, but was certain that it was on a day following a heavy rain. She was sure it was not less than 10 days but not more than two weeks before the accident, probably some time after October 15, 1956. No witness could remember exactly when it had rained before the accident. Official rainfall records kept at the Richmond City Hall (which is less than one-third of a mile from the scene of the accident) showed that there had been no measurable rainfall on Sunday, October 28. It had rained .01 inches on October 27; .19 inches on October 26 between twelve noon and 4:30 p. m., and .05 inches on October 12th.

There is some conflicting evidence about the height of the threshold. Defendant Fox testified that the threshold was from ½ to ¾ths of an inch higher than the hallway floor and was one inch higher than the outside concrete porch. Plaintiff produced photographs taken concurrently with Mr. Fox's measurements. The photographs indicated that the threshold was badly worn in the area closest to the parking lot and that the height of the threshold varied between ¼ and ½ inches above the level of the hallway.

Plaintiff's first contention on appeal is that the trial court erroneously withheld certain evidence from the jury by sustaining defendant's objection to the following question asked Mrs. Hammond on cross-examination: (Code Civ.Proc. § 2055)

> "Q. Now, Mrs. Hammond, at the time you put this rug down, is it not true that you realized that this rug would be a hazard, or could be a hazard to people coming in or out of that Ohio Street entrance?"

The objection was sustained on the ground that the question invaded the province of the jury as to the issue of whether this was negligence. Then some material from Mrs. Hammond's deposition, including the following, was read to the jury:

> "Question. And as this rug was placed there bent over or rolled over, as you say would the height of the roll itself be higher than the threshold of the door? Answer. No.
>
> "Question. It would be below the level or equal with it, or just where; how would you put it? Answer. It wouldn't be above the threshold. Whether it was below or not, I don't know. I walked over it and made sure; I walked over the fold of the rug to make sure it would be at least even with the threshold.
>
> "Question. I take it, then, that at the time you put this rug out you were conscious of the possibility that somebody might trip or slip over it? Answer. I didn't believe anyone would slip over it."

Plaintiff argues that she was prejudiced by being prevented from showing by direct testimony the state of mind and knowledge of Mrs. Hammond in creating a dangerous condition. Plaintiff cites Cope v. Davison, 30 Cal.2d 193, at page 200, 180 P.2d 873, at page 877, 171 A.L.R. 667, for the rule that the state of mind of a person is a fact to be proved like any other fact when it is relevant to the issue. That case, however, was an action by a guest against the driver of an automobile and involved wilful misconduct. The other authorities cited by the plaintiff, similarly concern situations where knowledge or state of mind were in issue.

Plaintiff's action here is based on the alleged negligence of the defendants in maintaining a dangerous or defective condition in the common hallway of an apartment building, owned and operated by the defendants and where the plaintiff resided. It is conceded that defendant's duties to the plaintiff are those owed to an invitee, and that in placing the rug in the hallway, Mrs. Hammond was acting in the course and scope of her employment as the agent of the other defendants. There are no issues on appeal as to the damage suffered by the plaintiff or the presence of the rug. The only issues to be determined by the jury was whether in placing the rug in the hallway, the defendants had violated their duty to the plaintiff to refrain from active negligence, to exercise ordinary care to keep the premises in a condition reasonably safe for the invitee in the reasonable pursuit of a purpose embraced within the invitation. Laird v. T. W. Mather, Inc., 51 Cal.2d 210, 331 P.2d 617.

[1, 2] The applicable rule here is that "* * * whenever the question to be determined is the result of the common experiences of all men of ordinary education, or is to be inferred from particular facts, the inference is to be drawn by the jury, and not by the witness." Parkin v. Grayson-Owen Co., 157 Cal. 41, 44, 106 P. 210, 212; 19 Cal.Jur.2d § 284, p. 8. See also Kauffman v. Maier, 94 Cal. 269, 29 P. 481, 18 L.R.A. 124, where the asking of a question calling for an opinion as to whether a particular condition was dangerous was held to be error, and Sampson v. Hughes, 147 Cal. 62, 81 P. 292, which held that a question put to the defendant calling for his opinion as to whether or not his acts were negligent, was erroneous and should not be permitted. It follows that the trial court correctly sustained the objection to the question.

Plaintiff's second contention on appeal is that the instructions to the jury on the doctrine "to look is to see" were erroneous and prejudicial. The court first gave a general instruction as follows:

> "There are certain fundamental principles applicable to cases of this nature which the law imposes and which are based on common sense, among which are the following:
>
> "1. One cannot go from a place of safety into a place of danger without using his or her eyes and ears, to see or hear anything that might be a source of danger to such person. If the danger is visible and obvious the law will presume that a person possessing the normal faculties of sight and hearing must have seen and heard that which was within range of his sight and hearing and that he had knowledge of such danger, if any."

[3] The plaintiff's cause of action was based upon the theory that in placing the rug over which plaintiff tripped at the threshold in the manner in which it was placed defendants had created a *dangerous condition* which proximately caused plaintiff's fall and consequent injuries. When the court told the jury without qualification: "One cannot go from a place of safety into a place of danger without using his or her eyes and ears, to see or hear anything that might be a source of danger to such person," as applied to the facts of this case the court said in effect: "The plaintiff could not enter this building where there was a *dangerous rug* without using her eyes to see the *dangerous rug.*" When the court added: "If the danger is visible and obvious the law will presume that a person possessing the normal faculties of sight * * * must have seen * * that which was within range of his sight * * * and that he had knowledge of such danger * * *," the court in effect told the jury: "If the *dangerous rug* was visible and obvious the law will presume that the plaintiff must have seen the dangerous rug and had knowledge of the danger."

The court coupled this with two instructions on the effect of the presumption so declared: 1. "These presumptions are denominated rebuttable or disputable presumptions and are satisfactory evidence if uncontradicted by other satisfactory evidence in the case." 2. "A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence, direct or indirect; but unless so controverted, the jury is bound to find in accordance with the presumption."

The court thus threw into the scale on the side of the defendants a rebuttable presumption of knowledge of the danger since the position of the rug on the floor was admittedly plainly visible. This was an additional error since even if correct otherwise, which it was not as applied to the facts of this case, the facts stated in the instruction would at most justify the jury in drawing an inference of knowledge and would not create a legal presumption. Cucuk v. Payne, 140 Cal.App.2d 881, 890, 296 P.2d 7.

[4] This only aggravated the basic error, however, which lies in the assumption that a pedestrian is bound to anticipate and be on guard against dangers in walking over an area designed for pedestrian use. The rule is just the contrary. In Peters v. City & County of San Francisco, 41 Cal.2d 419, 260 P.2d 55, 59 (a case in which the dangerous condition was an open and extensive depression in the sidewalk to permit entry to a private garage, and hence more obviously dangerous than a rug on a floor) the court said: "It is well settled that, in the absence of notice or knowledge to the contrary, a pedestrian making normal use of the public sidewalk has a right to assume that it is in reasonably safe condition, and while he must use ordinary care for his personal safety and make reasonable use of his faculties to avoid injury to himself, he is not required to keep his eyes fixed on the ground or to be on a constant lookout for danger. [Citing cases.] [41 Cal.2d at page 424, 260 P.2d at page 59.] * * * Whether plaintiff made reasonable use of her faculties and whether she should have observed the condition which caused her injury were questions of fact. [Citing cases.] [41 Cal.2d at page 425, 260 P.2d at page 59.] * * * She obviously cannot be held to examine the sidewalk with the same care which would be required of the city in discharging its duty of inspection. [Citing cases.] [41 Cal.2d at page 427, 260 P.2d at page 60.] * * * On the other hand, as we have seen, in the absence of knowledge to the contrary, a pedestrian is entitled to assume that a sidewalk is reasonably safe and is not required to be on a constant lookout for defective conditions. As stated in Hanson v. City of Anamosa, 177 Iowa 101, 158 N.W. 591, at page 594, 'A pedestrian using the streets is not bound to constitute himself an inspector of walks.'" 41 Cal.2d at page 428, 260 P.2d at page 61.

Erroneously affording defendants the benefit of this presumption may well "have tipped the scale" in their favor. Laird v. T. W. Mather, Inc., 51 Cal.2d 210, 331 P.2d 617, 624.

We are convinced that under the rule announced in the Peters case and the cases cited therein the giving of this instruction under the factual situation existing in this case was misleading, erroneous and prejudicial.

[5, 6] The second instruction attacked by the plaintiff (Defendant's Instruction 11, Reporter's Transcript p. 52) is clearly erroneous because of the addition of the words "or did not look." The record, however, indicates that in chambers, immediately before the argument plaintiff objected to this instruction. After the trial court indicated that he would give the instruction as proposed with the addition of the words "If the jury finds the rug was clearly visible", plaintiff withdrew all objections. By withdrawing all objections, the plaintiff waived the further error just as if she had requested an instruction involving the same error. Colbert v. Borland, 147 Cal.App.2d 704, 306 P.2d 53;

Davidson v. Marin County, 147 Cal.App.2d 54, 304 P.2d 743; Yolo Water & Power Co. v. Hudson, 182 Cal. 48, 186 P. 772.

We conclude that the judgment must be reversed because of the erroneous general instructions.

Judgment reversed.

DOOLING and DRAPER, JJ., concur.

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170 Cal.App.2d 590

Ella Mae BALL and Dennis Lee Ball, an Infant by Ella Mae Ball, his guardian ad litem, Plaintiffs and Appellants,

v.

CITIZENS CASUALTY COMPANY OF NEW YORK, a foreign corporation, authorized to do and doing business in the State of California, Defendant and Respondent.

No. 18181.

District Court of Appeal, First District, Division 1, California.

May 25, 1959.

Action by judgment creditors, who prevailed in an action against employers for wrongful death of an employee who was killed while engaged in crop dusting, to recover under a liability policy issued to employers by defendant insurer. The Superior Court, County of Contra Costa, Harold Jacoby, J., entered judgment for insurer and judgment creditors appealed. The District Court of Appeal, Fred B. Wood, J., held that judgment in favor of judgment creditors in wrongful death action against employers, although res judicata as to failure of employers to have carried workmen's compensation insurance covering an employee while engaged in crop dusting, was not res judicata on issue of whether liability coverage provisions of the policy employers carried extended to an employee engaged in crop dusting, and therefore, judgment against employers did not constitute a bar to action against liability insurer.

Judgment reversed.

Judgment 🔑715(3)

Judgment in favor of judgment creditors in their action against employers for wrongful death of an employee who was killed while crop dusting, although res judicata as to failure of employers to have carried workmen's compensation insurance covering an employee while engaged in crop dusting, was not res judicata on issue of whether liability coverage provisions of the policy employers carried extended to an employee engaged in crop dusting, and therefore, judgment against employers did not constitute a bar to action against liability insurer.

Winters & Winters, Benicia, for appellants.

Edmund D. Leonard, Hanna & Brophy, San Francisco, for respondent.

FRED B. WOOD, Justice.

George E. Ball was killed in an airplane accident while crop dusting. His widow and minor son sued Tom Davis and Gladys Davis in a prior action, alleging that George was their employee, that his death occurred in the course of the employment and as the result of the negligence of the Davises, and that the Davises had no Workmen's Compensation Insurance nor were they self-insured as required by section 3700 of the Labor Code.

The Davises joined issue. They denied that George was an employee of theirs; alleged that he was a copartner with them and others persons; denied the allegation that they had no Workmen's Compensation Insurance and were not self-insured; and alleged that they were not within the purview of section 3700 of the Labor Code at the time of George's death.

The cause was tried before a jury which found that George was an employee and awarded the widow $35,600 and the son $15,000.

A writ of execution for the enforcement of the judgment was returned unsatisfied. The widow and the son then brought the present action against the Citizens Casualty Company of New York upon an Employer's Liability Policy which it had issued to Tom and Gladys Davis. Citizens Casualty interposed a number of defenses, including a plea that the judgment in the action against the Davises is res judicata, a bar to the present action. The cause was tried upon this issue alone, pursuant to section 597 of the Code of Civil Procedure, resulting in a judgment sustaining the plea of res judicata.

"In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" Bernhard v. Bank of America, 19 Cal.2d 807, 813, 122 P.2d 892, 895. The parties are agreed that the second and the third questions must be answered in the affirmative. As to the first question, they are not in agreement. Defendant contends, in effect, that the prior adjudication decided all of the issues here involved. We are not persuaded that such is the case.

The policy sued upon has a dual aspect. It contains a promise to indemnify the employer against loss by reason of the liability imposed upon him by law for damages on account of personal injuries to such of the employees as are legally employed. No action lies against the insurer for any such loss until after the claim has been fixed by final judgment or by agreement of the parties with the written consent of the company. If because of the bankruptcy or insolvency of the employer a writ of execution against the employer is returned unsatisfied in an action brought by an injured employee or other person claiming by, through or under the employee, an action may be maintained by the employee or such other person against the insurer for the amount of the judgment in said action, not exceeding $25,000 for all damages in any one accident.

The policy also contains a promise in respect to personal injuries of employees, to pay promptly to any person entitled thereto, under the Workmen's Compensation Law and in the manner therein provided, the entire amount of any sum due and all installments as they become due, including the proper cost of whatever medical, hospital and similar services are required by the Workmen's Compensation Law. These are the direct obligations of the insurer to the injured employee and his dependents and are enforceable directly against the insurer whether brought against the insurer alone or jointly with the employer.

The parties are agreed that the judgment in the former action necessarily determined that the Davises failed to secure payment of workmen's compensation that might become payable to their employee George Ball as required by section 3700 of the Labor Code. Such failure was the very predicate of the action in which the judgment was rendered and of the jurisdiction of the superior court to render it. Labor Code, § 3706.

It does not follow that the jury necessarily *decided* that the Davises did not have an indemnity policy covering their employee George Ball in the work he was doing at the time of his injury. The two promises (concerning workmen's compensation and employer's liability, respectively) are so obviously separate and distinct undertakings it is impossible to say that a judgment that one of them does not exist is a judicial determination that the other also does not exist. There is no magic in the mere fact that these two wholly different promises were set forth in the same document instead of in separate documents. Neither of them is contingent upon the other. Each is a separate and distinct type of coverage.

Defendant seeks to tie them together through the "declarations" of the policy. Thus runs its argument: (1) the declarations are common to the workmen's compensation and the employer's liability promises. (2) The former judgment determined that there was no workmen's compensation coverage of George Ball in the work (crop dusting) he was doing at the time of his injury. (3) It thereby determined that the declarations do not include crop dusting operations. (4) The conclusion is inescapable that the employer's liability promise, based upon those very declarations, did not cover George Ball's crop dusting work.

This is a tenuous argument when advanced in support of a res judicata plea. It goes considerably beyond the scope of the prior adjudication. This the defendant in effect recognized when (upon the trial of its plea of res judicata) it introduced oral and documentary evidence in support of its contention that the Davises did not want crop dusting coverage (because of its high premium rate), did not apply for it, and did not obtain it.

Moreover, the record before us does not show that the insurance policy was introduced in evidence at the former trial. Indeed, counsel for the defendant insurer, during the hearing of the res judicata plea, told the trial court: "* * * it's my understanding that the policy was not produced in that action, and the only testimony about it was testimony of the Davises in which they were asked by their counsel and by Mr. Winters [counsel for plaintiff in both actions] whether they had any Workmen's Compensation insurance for this crop dusting activity. Mrs. Davies, I believe, testified they did not. Mr. Davis, in his testimony, stated he wasn't sure. He said first be thought they had a policy."

In such a state of the record it would be pure speculation to say that the jury did more than decide that the Davises failed to provide workmen's compensation coverage.

We conclude that by the former judgment it was decided there was no workmen's compensation coverage but we can not say what interpretation, if any, was placed upon the declarations contained in the policy or what view, if any, was taken of the scope of the employer's liability coverage. Accordingly, whether or not the former judgment be res judicata as to some issues, it is not res judicata as to all issues and therefore is not a bar to the present action.

The judgment is reversed.

BRAY, P. J., and HANSON, J. pro tem., concur.

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170 Cal.App.2d 519

Paul K. MEYER, doing business as Bakersfield Welding Supply, Plaintiff, Cross-Defendant and Respondent,

v.

BURDETT OXYGEN COMPANY OF CALIFORNIA, a corporation, Defendant, Cross-Complainant and Appellant.

Civ. 6019.

District Court of Appeal, Fourth District, California.

May 20, 1959.

Action in Kern County by purchaser of industrial gases against seller for declaration of respective rights and duties of each under contract which appeared from evidence to be binding although it contained space for signature of another person, wherein seller filed motion for change of venue on ground that contract had not been made in Kern County but in Los Angeles County which was seller's principal place of business. The Superior Court of Kern County, Norman F. Main, J., entered order denying change of venue, and seller appealed. The District Court of Appeal, Griffin, P. J., held that evidence supported trial court's holding that contract had been made in Kern County.

Affirmed.

1. Corporations 🔑503(3)

Generally, where action is brought against corporation in county other than where its principal place of business is located, burden is on plaintiff, on application for change of venue, to show that contract was made, or was to be performed, or that obligation arose or breach occurred, in county where suit was brought. West's Ann.Civ.Code, § 1626; West's Ann.Const. art. 12, § 16.

2. Corporations 🔑503(3)

In action in Kern County by purchaser of industrial gases against seller for declaration of respective rights and duties of each under contract which appeared from evidence to be binding although it contained space for signature of another person, wherein seller filed motion for change of venue on ground that contract was not made in Kern County but in Los Angeles County which was seller's principal place of business, evidence supported trial court's holding that contract had been made in Kern County. West's Ann.Civ.Code, § 1626; West's Ann.Const. art. 12, § 16.

3. Appeal and Error 🔑912

Where motion for change of venue is made and determined on allegations of verified complaint and affidavits of respective parties, all conflicts must be resolved in favor of prevailing party and all reasonable inferences which are to be drawn must be in support of order.

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Aaron Levinson and Albert E. Marks, by Albert E. Marks, Beverly Hills, for appellant.

Deadrich, Bates & Stewart, and Kenneth H. Bates, Bakersfield, for respondent.

GRIFFIN, Presiding Justice.

Plaintiff, cross-defendant and respondent, an individual doing business as Bakersfield Welding Supply, brought an action for declaratory relief in Kern County, seeking a declaration of the respective rights and duties of plaintiff and defendant, cross-complainant and appellant, the Burdett Oxygen Company of California, a corporation, in respect to a written contract for the purchase and sale of various industrial gases by defendant corporation to plaintiff herein. A copy of the written contract was attached to the complaint. Defendant answered and filed a cross-complaint seeking reformation of the contract in respect to the paragraphs in issue. Defendant also filed a motion for change of venue to Los Angeles County on the grounds that defendant corporation's principal place of business was in that county; and that the contract was made, was to be performed in, and that the obligation or liability thereunder arose in Los Angeles County. The two paragraphs of the written agreement are to the effect that products purchased would not be resold by purchaser and upon the violation of said agreement in this respect, the purchaser agreed to pay seller liquidated damages of 75¢ for each 100 cubic feet of gas which purchaser secured from any other source. It is alleged that plaintiff believes defendant asserts all oxygen and gases required by plaintiff for use on plaintiff's own premises or for resale or retail to other users must be furnished from defendant, and defendant further asserts that if plaintiff purchased gases from any other source for resale to others, plaintiff would become obligated under the liquidated damage provision of the contract. The prayer is that the court declare their respective rights in such a way that plaintiff may purchase such gases from others without such penalty.

In addition, the contract, in substance, provides that defendant company (seller) agrees to sell to plaintiff purchaser certain described gases from August 29, 1956, to August 29, 1961, f. o. b. seller's plant in Huntington Park, Los Angeles County, California. It is signed:

"Purchaser's Signature "Bakersfield Welding Supply Co.	Seller's Signature The Burdett Oxygen Company of California
"By Paul K. Meyer "Title Owner.	By Charles Cotten Accepted by P. Zeedik (Authorized Signature)"

Defendant's answer and cross-complaint alleged that a certain described paragraph in said agreement which might indicate it was not an exclusive purchase agreement, was left in said agreement by mutual mistake of both parties and accordingly it should be stricken. The complaint alleges the above-mentioned agreement was *entered into* at Bakersfield. The answer admits it was entered into on the date alleged but denies other allegations. P. Zeedik, Assistant General Manager of the defendant corporation, filed his affidavit of merits in support of defendant's motion and also stated that defendant corporation's principal place of business was at Huntington Park; and that its articles of incorporation so stated. He averred that the contract attached to the complaint was *made* in Los Angeles County; that it was first signed by plaintiff; that thereafter it was accepted by defendant in Los Angeles County and he, acting for defendant, then and there affixed his signature to it; that said contract was to be and has been performed in Los Angeles County; that deliveries are made f. o. b. Huntington Park, and that payments are made by plaintiff to defendant at this same address; that the obligation and/or liability arises in Los Angeles County and said agreement is still in existence and no breach has occurred.

Plaintiff Meyer's affidavit states he was engaged in business in Bakersfield; that on August 29, 1956, at said place of business, the contract entitled "Service Agreement" was *executed* and *signed* by him as owner and also by P. Zeedik, the agent and representative of defendant corporation, and at the time of the signing and execution thereof said agent was in plaintiff's office in Bakersfield and there was then no suggestion made to him that the contract required any further acceptance or approval. It is therefore argued that the contract was in fact made and executed in Kern County, that the liability for any breach which would impose a penalty of liquidated damages would thereby arise only in Kern County; that accordingly, the obligation under the contract arose in that county and under Article XII, sec. 16 of the California Constitution Kern County is a proper place for the trial of the action.

In reply, Charles Cotten, Sales Manager of defendant corporation, by affidavit stated that the contract was made in Los Angeles County on August 29th, as described by Zeedik, and that he thereafter mailed it to plaintiff, together with a letter stating: "Thank you very much for the industrial gas contract which you recently signed. Your copy of this agreement is enclosed herewith so that you may retain same in your files."

On this appeal defendant argues that the uncontradicted showing is that said corporation has its principal place of business in Los Angeles County; that the contract was signed by the agents of the corporation there, and delivery to plaintiff was made therein by depositing it in the mail in Los Angeles County; and that the contract was to be performed and the obligations thereunder arose in that county and therefore venue was in said county and the court erred in refusing to so hold, citing Rawson v. J. C. Forkner, Fig Gardens, 206 Cal. 4, 272 P. 1057; Civ. Code sec. 1626; Gas Appliance Sales Co. v. W. B. Bastian Mfg. Co., 87 Cal.App. 301, 306, 262 P. 452; and California Constitution art. XII, sec. 16.

Plaintiff contends the evidence, though conflicting, shows the contract was made and executed in Kern County by and between plaintiff and defendant's authorized agent; that since the trial court made a determination of this issue such determination cannot be disturbed on appeal; that the liability for claimed liquidated damages, in case of a breach, arose in and was made payable in Kern County, and accordingly the court's order was proper, citing such authority as Lakeshore Cattle Co. v. Modoc Land & Livestock Co., 108 Cal. 261, 41 P. 472; and Carnation Co. v. El Rey Cheese Co., 88 Cal.App.2d 857, 200 P.2d 19, where the general rule is stated to be that under section 395, subdivision (1) of the Code of Civil Procedure, actions falling within its provisions must generally be tried in the county where defendants or some of them reside at the commencement of the action, but where the action is based on a contract whereby the defendant has contracted to perform an obligation in a particular county, such action may be tried in the county where the obligation is to be performed, the county where the contract was entered into, or the county of defendant's residence, and in the absence of a special contract in writing to the contrary, the county where the obligation was incurred is deemed to be the county where it is to be performed.

Article XII, section 16 of the California Constitution provides:

> "A corporation or association may be sued in the county where the contract is *made* or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." (Italics ours.)

In Marchese Bros. v. A. Lyon & Sons, 123 Cal.App.2d 193, 266 P.2d 556, 559, it was held that Code of Civil Procedure Section 395, subdivision (1), declaring that "when a defendant has contracted to perform an obligation in a particular county" venue of an action for the breach of the obligation may be in that county, does not apply to the obligations of the plaintiff.

[1, 2] The pivotal question is, where was the contract here involved made? The general rule is that where an action is brought against a corporation in a county other than where its principal place of business is located the burden is on the plaintiff, on an application for change of venue, to show that the contract *was made*, or was to be performed, or that the obligation arose or the breach occurred, in the county where the suit was brought. Hammond v. Ocean Shore Development Co., 22 Cal.App. 167, 133 P. 978. If we accept defendant's affidavits as true, in respect to the signing and mailing of the agreement, an order changing the place of trial might be reasonably supported under the authorities cited by it. However, the evidence on the subject of the signing of the contract by the several parties is conflicting, the conflict being as to the county in which the signature of Zeedik was written. For all that appears, he was an agent of defendant corporation duly authorized to *accept* the contract on behalf of it. It was previously signed by plaintiff. Although there was a blank space in said contract for the signature of one other person, it does not appear from the evidence that any additional signature was required in order to bind the defendant corporation. Under the circumstances, the trial court was authorized in holding that the contract was made in Kern County.

[3] Where a motion for change of venue is made and determined on allegations of a verified complaint and affidavits of the respective parties, all conflicts must be resolved in favor of the prevailing party and all reasonable inferences which are to be drawn must be in support of the order. Hale v. Bohannon, 38 Cal.2d 458, 241 P.2d 4. See also Pacific National Bank of San Francisco v. Covington Investment Co., 169 Cal.App.2d 868, 338 P.2d 56; Dawson v. Goff, 43 Cal.2d 310, 273 P.2d 1, and cases cited.

In Shores v. Chip Steak Co., 130 Cal.App.2d 620, 279 P.2d 591, it was held that on a motion for change of venue, a complaint which seeks declaratory exoneration of the plaintiff from liability asserted by defendant must be viewed as if defendant were plaintiff attempting to enforce that obligation.

Order affirmed.

MUSSELL and SHEPARD, JJ., concur.

170 Cal.App.2d 576

Vivian Ann HUNTER, Plaintiff and Appellant,
v.
Hubert W. HUNTER, Defendant and Respondent.
Civ. 23599.

District Court of Appeal, Second District, Division 2, California.
May 22, 1959.

Proceedings on motion to quash writ of execution issued to enforce provisions of interlocutory decree of divorce requiring defendant to make payments for support of child. Walter C. Allen, J., granted the motion, and plaintiff appealed. The District Court of Appeal, Herndon, J., held that mother, having custody of her children, was under duty to support them, and that effect of support order was merely to reimburse her for funds which she would expend in caring for children; and held that since, in attempting to execute on support order, mother was seeking, not funds for current support of children but reimbursement for funds she had already expended for their support, trial court properly quashed writ of execution upon proof that mother had released father from his obligation to pay child support.

Affirmed.

1. Parent and Child 🔑3.1(8)

A child's right to support cannot be barred by property settlement agreement between parents.

2. Divorce 🔑297

Divorce court is not bound by agreement of parents and may award more or less than amount agreed upon by them for child support.

3. Divorce 🔑297

Upon application for award of child support, trial court may order father to pay, notwithstanding existence of agreement by which mother purported to release father from all liability for support of their children.

4. Divorce 🔑308

On application for award of child support, determinative questions before trial court are needs of children and ability of parent to pay.

5. Divorce 🔑311

Judgment of divorce providing for support payments is judgment payable in future installments, and writ of execution will issue as matter of right as amounts become due and unpaid. West's Ann.Code Civ.Proc. §§ 681, 1007.

6. Execution 🔑163

When writ of execution issues, burden is on judgment debtor to establish facts justifying an order quashing writ. West's Ann.Code Civ.Proc. §§ 681, 1007.

7. Divorce 🔑311

Mother, having custody of her children, was under duty to support them, and effect of support order was merely to reimburse her for funds which she would expend in caring for children; and since, in attempting to execute on support order, mother was seeking, not funds for current support of children but reimbursement for funds she had already expended for their support, trial court properly quashed writ of execution upon proof that mother had released father from his obligation to pay child support. West's Ann.Civ.Code, § 196.

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Chandler & Armstrong, Joseph A. Armstrong, Anaheim, for appellant.

Martin J. Munson, Los Angeles, for respondent.

HERNDON, Justice.

Plaintiff appeals from an order quashing a writ of execution issued to enforce provisions of an interlocutory decree of divorce requiring defendant to make payments for support of children.

Chronology.

(1) February 14, 1957: Plaintiff and defendant executed a property settlement agreement providing, among other things, that plaintiff should have custody of two minor daughters, aged 7 years and 15

months, respectively, and that defendant agreed to pay for the support of each of said children the sum of $60 per month, commencing on February 5, 1957, and continuing until said children attained the age of majority, become self-supporting, or until modified by proper order of Court.

(2) March 29, 1957: After a default hearing, plaintiff was granted an interlocutory decree of divorce by the Los Angeles County Superior Court. This decree ordered defendant to make the child support payments as provided in the property settlement agreement. The decree was duly entered on April 1, 1957.

(3) April 26, 1957: (a) At Las Vegas, Nevada, plaintiff executed and delivered to defendant an instrument entitled "Release and Relinquishment" which purported to release defendant from the obligation to pay any support money for the children during the period April 26, 1957, to April 26, 1958. This instrument is quoted in full in the margin.[1] (b) On the same date (April 26, 1957) the District Court for Clark County, Nevada, granted plaintiff a decree of divorce. This decree recites that plaintiff appeared personally and by her attorney, and that defendant appeared by his attorneys. It decrees a dissolution of the marriage, granted the care, custody and control of the children to the plaintiff and approved a property settlement agreement dated February 14, 1957. The property settlement agreement was not incorporated into the decree, either in whole or in part.

(4) January 27, 1958: An ex parte order was made in the Los Angeles action (the instant action) directing the issuance of execution. This order was made upon plaintiff's affidavit stating that nothing had been paid by defendant on account of the support order contained in the interlocutory judgment, and that the sum of $1,200 had accrued thereunder.

(5) April 22, 1958: Final judgment of divorce was entered herein.

(6) June 2, 1958: Defendant filed his notice of motion to quash the writ of execution.

(7) June 9, 1958: The motion to quash writ of execution was granted.

Defendant's affidavit in support of his motion to quash is brief. It alleges in substance: (a) that the interlocutory judgment in the present action was entered on April 1, 1957; (b) that prior to April 1, 1957, plaintiff established residence in the State of Nevada; (c) that on April 26, 1957, plaintiff obtained a decree of divorce in Nevada, a copy of said decree being attached to the affidavit; and (d) that on April 26, 1957, plaintiff by an instrument in writing attached to the affidavit as Exhibit B had released and relinquished any claim against defendant for the payment of money for the support of said minor children during the period April 26, 1957, to April 26, 1958.

Plaintiff's affidavit in opposition to the motion is more lengthy. After referring to the interlocutory judgment of divorce herein, and to its provisions approving the property settlement agreement and ordering the payment of child support, she alleges in substance: that the Nevada decree of divorce was entered less than six weeks after plaintiff went to Nevada following the granting of her interlocutory judgment on March 29, 1957, in Los Angeles; that the minimum residence required by Nevada to establish residence for divorce purposes is six weeks; that immediately upon entry of the Nevada decree plaintiff returned to California where she has resided ever since; that at all times while plaintiff was in Nevada she maintained a home in California where her two daughters were living; that plaintiff, at all times, intended to return to California immediately upon the entry of the Nevada decree; that plaintiff was informed by her Nevada attorney "that the Nevada decree would not interfere with her California divorce but would enable her to marry one Clayton Powell and further, that it would be necessary for [defendant] to appear and defend in Nevada, and relying upon these representations [plaintiff] went through a divorce proceeding in Nevada"; that plaintiff informed defendant "that it was necessary for him to appear and defend in Nevada so that she would be able to marry one Clayton Powell pending the California divorce but that the defendant informed [plaintiff] that he had no objection since the interlocutory decree had been given but that he would do so only if [plaintiff] would agree that said [defendant] would not have to pay child support for his two minor children for a period of one year * * * That [plaintiff] did thus agree for the sole purpose of having the defendant * * * appear in the Nevada court in order that [plaintiff] might be free to marry Clayton Powell; that [defendant] told [plaintiff] that he also wished to be free to marry his present wife, Barbara Hunter, pending the California decree becoming final."

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[1] "April 26, 1957
Release and Relinquishment
"For a good and sufficient consideration, receipt of which is hereby acknowledged, I, Vivian Hunter, hereby release and relinquish every claim against Hubert W. Hunter for the payment to me of money for the support during the period April 26, 1957 to April 26, 1958, of Judy Hunter, aged seven years, and Janet Hunter, aged seventeen months.
"Dated this 26th day of April, 1957, at Las Vegas, Nevada.
"Vivian Hunter
"Vivian Hunter"

Plaintiff first argues that the Nevada court was without jurisdiction either to grant a divorce or to make any order with respect to the children. She premises this argument upon the allegations of her affidavit to the effect that she was never a bona fide resident of Nevada and that the children were never domiciled or physically present in that State. It is unnecessary for us to decide any question with respect to the validity or effect of the Nevada decree. For the purposes of this appeal, we may assume, as plaintiff contends, that the Nevada decree had no adverse effect upon her right to enforce the support order contained in the California interlocutory divorce decree.

Plaintiff's second contention is that the agreement by which she purported to release defendant from his obligation to pay child support for one year cannot be given legal effect. She seeks to invoke the settled law that as a matter of public policy parents will not be permitted to bargain away or abridge the rights of their children to support. Krog v. Krog, 32 Cal.2d 812, 817, 198 P.2d 510; Allen v. Allen, 138 Cal.App.2d 706, 708–709, 292 P.2d 581; see Rosher v. Superior Court, 9 Cal.2d 556, 559, 71 P.2d 918; Chiarodit v. Chiarodit, 218 Cal. 147, 153, 21 P.2d 562; Karlslyst v. Frazier, 213 Cal. 377, 381, 2 P.2d 362; Lewis v. Lewis, 174 Cal. 336, 341, 163 P. 42.

[1–4] A child's right to support cannot be barred by a property settlement agreement between the parents. Krog v. Krog, supra, 32 Cal.2d 812, 817, 198 P.2d 510. The trial court is not bound by the agreement of the parents and may award more or less than the amount agreed upon by them for child support. Beaulac v. Beaulac, 84 Cal.App.2d 649, 650–651, 191 P.2d 478. Upon an application for an award of child support, the trial court may order the father to pay notwithstanding the existence of an agreement by which the mother purported to release the father from all liability for support of their children. Allen v. Allen, supra, 138 Cal.App.2d 706, 708–709, 292 P.2d 581. In such an application the mother is enforcing the children's right to support—a right which cannot be limited or abridged by the agreement of the parents. Allen v. Allen, supra, 138 Cal.App.2d 706, 709, 292 P.2d 581; Metson v. Metson, 56 Cal.App.2d 328, 332, 132 P.2d 513. In such cases the determinative questions before the trial court are the needs of the children and the ability of the parent to pay. Gilbert v. Gilbert, 98 Cal.App.2d 444, 446, 220 P.2d 573; cf. Pencovic v. Pencovic, 45 Cal.2d 97, 100, 287 P.2d 501.

[5, 6] However, these settled principles have no application where, as in the instant case, the mother is attempting *on her own account* to execute on an order for

support contained in a judgment of divorce. An order for support "* * * may be enforced by execution in the same manner as if it were a judgment." (Code Civ. Proc., § 1007; see Code Civ.Proc., § 681.) A judgment of divorce providing for support payments is a judgment payable in future installments (Cochrane v. Cochrane, 57 Cal.App.2d 937, 939, 135 P.2d 714) and a writ of execution will issue as a matter of right as the amounts become due and are unpaid. Lohman v. Lohman, 29 Cal. 2d 144, 150, 173 P.2d 657; see 19 Cal.Jur. 2d 317, § 5. When the writ issues the burden is on the judgment debtor to establish facts justifying an order quashing the writ. Lohman v. Lohman, supra, 29 Cal. 2d 144, 150, 173 P.2d 657; cf. Wolfe v. Wolfe, 30 Cal.2d 1, 5, 180 P.2d 345; Parker v. Parker, 203 Cal. 787, 793–794, 266 P. 283.

As stated in Wilkins v. Wilkins, 95 Cal. App.2d 605, 610–611, 213 P.2d 748, 751: "While the creditor is, as a matter of right, entitled to an execution, the affidavit, order and execution issued thereon are subject to review and the execution is subject to recall, upon motion, timely made, at which time the trial court may exercise its judicial discretion in determining whether the facts set forth in the affidavit are true, and whether there has been a misrepresentation of the facts or wilful suppression of facts which should have been related to the court in the first instance, or whether the husband was or was not under a legal duty to support the children or wife during the period in question. It therefore would appear that the trial court has, under the circumstances here related, the right to recall the execution and allow the enforcement of the judgment, only to the extent of the husband's legal and equitable liability to pay. If the rule were otherwise, a judgment creditor might falsely swear that a certain amount of money was due under the order, accumulated within the five-year period, when in fact the debtor had paid all or nearly all of the sums due prior to her application. It would be an injustice to hold that the execution must issue, as a matter of right, and the court had no power to order the execution withdrawn or to exercise its discretion in determining the truth of the facts related and to order enforcement according to the law and equities involved." See also Bryant v. Bryant, 161 Cal.App.2d 579, 581–582, 326 P.2d 898.

[7] In the case at bar the plaintiff admits the execution of the release and she does not contend that it was unsupported by consideration or that it was induced by the fraud of defendant. Her position throughout these proceedings is that the agreement was not a bar to *her* execution on the judgment because the *children's* right to support from defendant could not be extinguished by the agreement of the parents. Cf. Plumer v. Superior Court, 50 Cal.2d 631, 637, 328 P.2d 193; Puckett v. Puckett, 21 Cal.2d 833, 843, 136 P.2d 1; see 16 Cal.Jur.2d 571, § 277. However, the recognized power of the court to protect the interests of the children does not automatically relieve plaintiff of the obligations into which she has entered. Under the terms of Civil Code section 196 plaintiff, having custody of the children, was under a duty to support them. The effect of the support order was to reimburse plaintiff for the funds which she would expend in caring for the children. Cf. Di Corpo v. Di Corpo, 33 Cal.2d 195, 200, 200 P.2d 529; Saunders v. Simms, 183 Cal. 167, 171, 190 P. 806. And in attempting to execute on the order "* * * she is seeking not funds for the current support of the children but reimbursement for funds she has already expended for their support." Di Corpo v. Di Corpo, supra, 33 Cal.2d 195, 200, 200 P.2d 529, 532.

The parents by their agreement subsequent to the interlocutory decree could not have limited or abridged the rights of the children, but between themselves the agreement was binding. Allen v. Allen, supra, 138 Cal.App.2d 706, 708, 292 P.2d 581; cf. Puckett v. Puckett, 21 Cal.2d 833, 843, 136 P.2d 1; see Civil Code sections 159, 160. And on proof of an agreement between the parents by which the judgment debtor's obligation was satisfied, the trial court may quash the writ of execution which issued as a matter of right. Colby v. Colby, 127 Cal.App.2d 602, 605–606, 274 P.2d 417; Millard v. Millard, 102 Cal.App.2d 249, 227 P.2d 477.

It should be observed that at no point has plaintiff contended that the children were in need or were inadequately cared for during the period in question as a result of the agreement into which she entered. Cf. White v. White, 71 Cal.App.2d 390, 163 P.2d 89. Nor are the children's rights prejudiced. By appropriate proceedings the support order is subject to modification notwithstanding the rights and liabilities of the parents *inter se* under their agreements. Allen v. Allen, supra, 138 Cal.App.2d 706, 292 P.2d 581; see 16 Cal.Jur.2d 575, § 280.

Affirmed.

FOX, P. J., and ASHBURN, J., concur.

Maude P. BREWER, Edith Abigail B. Johnson, also known as Edith Abigail Brewer, June B. Allender, Ross P. Brewer and Harry P. Brewer, Plaintiffs, Respondents, and Cross-Appellants,

v.

Abigail Parkhurst SIMPSON, also known as Abigail Parkhurst Brown, E. Ross Simpson and Ellis P. Brewer, Defendants, Abigail Parkhurst Simpson and E. Ross Simpson, Appellants and Respondents.*

Civ. 22500.

District Court of Appeal, Second District, Division 3, California.

May 15, 1959.

Hearing Granted July 9, 1959.

Action by beneficiaries under mutual wills against wife who had, subsequent to her first husband's death, remarried and transferred to her second husband joint tenancy interest in property which she had allegedly agreed (with her first husband) should pass under provisions of mutual wills. The Superior Court of Los Angeles County, William J. Palmer, J., rendered judgment impressing trust in favor of plaintiffs on all property of defendant and her husband, and cross-appeals were taken. The District Court of Appeal, Vallée, J., held that burden was on plaintiffs to overcome statutory presumption of undue influence exercised by first husband in procuring wife's consent to agreement to make irrevocable mutual wills; and held that, on record presented, such burden was not sustained.

Reversed.

1. Appeal and Error 🔑842(7)

Determination of question whether finding of fact is supported by substantial evidence presents question of law.

2. Appeal and Error 🔑1010(1)

It is duty of reviewing court to analyze record for purpose of determining whether there is any substantial evidence which reasonably supports trial court's findings.

3. Wills 🔑58(1)

Ordinary requirements of contract law govern validity and enforcement of agreement to make irrevocable mutual wills. West's Ann.Prob.Code, § 23; West's Ann. Civ.Code, § 1567.

4. Contracts 🔑96

An apparent consent is not real or free when obtained through undue influence, and in such case injured party may avoid contract by rescission or may defend against its enforcement. West's Ann. Prob.Code, § 23; West's Ann.Civ.Code, § 1567.

5. Wills 🔑58(1)

Wife's consent to an agreement with her husband to make irrevocable mutual wills must be an actual one, based on intelligent knowledge of his property and effect of her consent, as distinguished from one merely formal.

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* Opinion vacated 2 Cal.Rptr. 609, 349 P.2d 289.

6. Wills 🔑58(1)

The power to control the devolution of one's property has value and importance as a resource, and when wife made oral agreement binding herself to leave her estate to her husband and, in event of his predeceasing her, to other named beneficiaries, she was deprived of power to dispose of her half of community property to parties of her own choosing and husband was benefited, and he thereby obtained an "advantage" for himself within purview of statute creating presumption of undue influence if transaction between trustee and beneficiary results in advantage to trustee. West's Ann.Civ.Code, §§ 158, 2235.

See publication Words and Phrases, for other judicial constructions and definitions of "Advantage".

7. Husband and Wife 🔑36

Statute creating presumption of undue influence where transaction between trustee and beneficiary results in advantage to trustee does not require that advantage to husband in transaction with wife be an "unfair" advantage in order for presumption to arise. West's Ann.Prob.Code, § 201; West's Ann.Civ.Code, § 2235.

8. Trusts 🔑262

Presumption of undue influence created by statute where transaction between trustee and beneficiary results in advantage to trustee is rebuttable and may be overcome by proof of full and fair disclosure of all that beneficiary should know, for her benefit and protection, concerning nature and effect of transaction.

9. Wills 🔑58(2)

In action by beneficiaries under mutual wills against wife who had, subsequent to her first husband's death, remarried and transferred to her second husband joint tenancy interest in property which she had allegedly agreed (with her first husband) should pass under provisions of mutual wills, burden was on plaintiffs to overcome statutory presumption of undue influence exercised by first husband in procuring wife's consent to agreement to make irrevocable mutual wills; and, on record presented, such burden was not sustained. West's Ann.Prob.Code, § 201; West's Ann.Civ.Code, § 2235.

10. Evidence 🔑77(6)

When attorneys, who had acted as defendant's attorneys in probate of her first husband's will and in administration of his estate and who were plaintiffs' witnesses and available to contradict defendant's testimony, did not contradict it, inference arose that their testimony would have confirmed her testimony that they had not told her that she had obligations under agreement to make mutual wills which would be confirmed by her accepting benefits under her first husband's will. West's Ann.Civ.Code, § 1589.

11. Evidence 🔑87

In action by beneficiaries under mutual wills against wife who had, subsequent to her first husband's death, remarried and transferred to her second husband joint tenancy interest in property which she had allegedly agreed (with her first husband) should pass under provisions of mutual wills, disbelief of defendant's testimony that attorneys who represented her in probate of her first husband's will and not called as witnesses had not discussed with her rights or obligations which she might have under agreement to make mutual wills, would not supply affirmative evidence that she had had advice as to her rights.

12. Cancellation of Instruments 🔑17

A "confirmation" necessarily supposes a knowledge of thing ratified; the term implying a deliberate act intended to renew and ratify transaction known to be voidable.

See publication Words and Phrases, for other judicial constructions and definitions of "Confirmation".

13. Estoppel 🔑54

There can be no estoppel where party against whom it is invoked did not know full truth of facts to which its conduct related; and such knowledge must be actual, not merely presumptive.

14. Appeal and Error 🔑1010(1)

No finding of fact is binding on reviewing court if it is not supported by substantial evidence.

George I. Devor and Paul P. Selvin, Los Angeles, for appellant and respondent Abigail Parkhurst Simpson.

Irving M. Walker, Mark Mullin, Los Angeles and Robert A. Schlesinger, Palm Springs, for appellant and respondent E. Ross Simpson.

Edmond Gattone and Clifford A. Hemmerling, Los Angeles, for cross-appellants and respondents.

VALLÉE, Justice.

Cross-appeals from a judgment which impresses a trust in favor of plaintiffs on all property of defendant Abigail Parkhurst Simpson and her husband and codefendant, E. Ross Simpson.

Abigail Parkhurst Simpson, called Abigail, married George Stanley Brown, called George, about December 21, 1910. On July 21, 1936, when George was 72 years old and Abigail was 67, they executed mutual wills. Each will recited it was "made in consideration of a mutual Will on the part of" the other, and "in pursuance to an agreement between myself and my said [husband or wife] for the making of these mutual Wills on the part of each of us, and it is understood that should I be the survivor as between myself and my said [husband or wife] and should I deem it advisable to appoint other executors in the place of those named herein, I reserve the right to do so and my said [husband or wife] shall have the like privilege so long as one of the co-executors is appointed from my family and one from the family of my said [husband or wife]." Each will bequeathed and devised all property of the decedent to the other; and in the event the other predecease the maker, bequeathed and devised half of the property to George's kindred and half to Abigail's kindred "as hereinafter directed." There followed bequests and devises to specified relatives of George and to specified relatives of Abigail.[1]

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[1] Abigail's will was lost or destroyed. The pertinent parts of Abigail's will, as reconstructed by the attorney who prepared it, read:

"Last Will and Testament of Abigail Parkhurst Brown

"I, Abigail Parkhurst Brown, being of sound and deposing mind and memory and not acting under fraud, duress or undue influence of any person, do make, publish and declare this my Last Will and Testament, and I do hereby further declare that this Last Will and Testament is made in consideration of a mutual Will on the part of my husband, George Stanley Brown, of even date herewith and in pursuance to an agreement between myself and my said husband, George Stanley Brown, for the making of these mutual Wills on the part of each of us, and it is understood that should I be the survivor as between myself and my said husband and should I deem it advisable to appoint other executors in the place of those named herein, I reserve the right to do so and my said husband shall have the like privilege so long as one of the co-executors is appointed from my family and one from the family of my said husband, George Stanley Brown, as follows, to-wit:

"First: [revocation clause]

"Second: [payment of debts, etc.]

"Third: In the event my said husband, George Stanley Brown, shall survive me, I hereby give, devise and bequeath to my husband, George Stanley Brown, all of my estate, real, personal and mixed, whatsoever nature and kind and wheresoever situated.

"Fourth: If my husband, George Stanley Brown, be deceased at the time of my demise then and in that event I hereby give, devise and bequeath my entire estate including any and all property or estate that I may have received from my said husband, George Stanley Brown, one-half (1/2) to my kindred and one-half (1/2) to the kindred of my said husband, as hereinafter directed.

"Fifth" to "Ninth" inclusive: [bequests and devises to kindred of George]

On October 27, 1936 George and Abigail executed identical codicils changing one of the bequests to Abigail's sister, Mrs. Ellis.

George died on March 31, 1937. Abigail caused his will and codicil to be probated and was appointed executrix thereof. George's estate was distributed to Abigail. The decree of distribution was recorded on December 21, 1937.

In the latter part of 1940 Abigail met E. Ross Simpson, called Ross. Abigail and Ross were married on February 7, 1945. Both prior to and after they married, they orally agreed to merge their entire estates by transferring title to substantially all their real and personal property to themselves as joint tenants. They did so shortly after they married.

On October 19, 1948 one of George's kindred commenced a proceeding in the superior court for the examination of Abigail, Ross, and William Crandall, an attorney, to perpetuate testimony. The application for the order of examination alleged the petitioner expected to be a party to an action against Abigail and Ross to determine his rights under a *written* contract to make mutual wills, entered into by Abigail and George; that by the written contract George and Abigail agreed they would execute mutual wills, each devise his or her entire estate to the other, and "the survivor shall bequeath and devise the entire combined estates" half to designated kindred of George and half to designated kindred of Abigail. In a proceeding in mandate to compel the superior court to order the witnesses to testify, a writ was granted by the Supreme Court. Brown v. Superior Court, 34 Cal.2d 559, 212 P.2d 878. After the writ issued, Abigail and Ross settled the controversy with George's kindred.

On September 4, 1953 plaintiffs commenced this action. They are a niece and her children, grandnephews and grandnieces of Abigail, excepting one grandnephew.[2] They alleged they are named in the wills to receive half of the combined estates of George and Abigail; George and Abigail agreed orally or in writing that each would leave his or her property to the other and that upon the death of the survivor half of the combined property would go to certain named relatives of George and half to certain named relatives of Abigail; in performance of this agreement they executed mutual wills; George predeceased Abigail, who was the executrix of his will and inherited his property; all of Abigail's property has been transferred to Ross in joint tenancy without consideration and for the purpose of defrauding plaintiffs; at the time of the transfer Ross had full knowledge of the agreement between George and Abigail; Abigail has repudiated her obligations under the agreement with George and has breached that agreement. The answers put in issue all of the substantive allegations of the pleadings of plaintiffs except the execution of George's will, the distribution of his estate to Abigail, and the transfer of Abigail's property into joint tenancy. In addition to other defenses, the answers pleaded that if Abigail had entered into the alleged agreement with George she had done so under the undue influence of George and without understanding the legal effect of such agreement.

The court found that prior to the time the wills were made George and Abigail orally agreed to make mutual wills containing the provisions they did contain; the wills are a true memorandum of the original agreement; they were irrevocable after the death of one of them; the survivor could have, during his or her lifetime, the reasonable use and enjoyment of their combined estates; on the death of the survivor, they both desired the property

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"Tenth: [provision re lapsed legacies] "Eleventh" to "Fourteenth" inclusive: [bequests and devises to kindred of Abigail] * * *."

[2] One grandnephew refused to be a plaintiff and is joined as a defendant.

to pass to the persons named in their mutual wills and not otherwise. Defendants challenge the sufficiency of the evidence to support these findings. While there appears to be merit in the contention, since the judgment must be reversed on other grounds it will not be necessary to decide the point. In general, other findings followed the allegations of the complaint. The judgment impressed a trust on all the property of Abigail and Ross for the benefit of plaintiffs. All parties have appealed.

The court in finding XI found: "At the time the oral agreement to make mutual wills was made and during the negotiations leading to the same, and at the time the wills and codicils were executed and during the drafting thereof, Abigail and George were each represented and fully and independently advised by Ralph E. Wallace and William M. Crandall, attorneys at law. Said mutual wills and codicils were freely and voluntarily executed in accord with the formalities required by law by both Abigail and George, in each other's presence and with full knowledge and understanding of the contents and consequences thereof. At said times, Abigail was not in any respect imposed upon"; and in finding XVI, that Abigail's "conduct in offering George's will for probate and in accepting benefits thereunder was free, voluntary and with full knowledge and understanding of the terms of said agreement, wills and codicils, and was not under any undue influence, mistake or fraud. Abigail elected to take under George's will and to abide by the terms of their agreement and after George's death ratified and affirmed the same." Defendants challenge these findings and assert they are not only without support in the evidence but are contrary to the uncontradicted evidence. We agree. Our conclusion requires an extended statement of the evidence bearing on the question.

Three persons testified to conversations which took place during the drafting and execution of the wills: Mr. Wallace and Mr. Crandall of Wallace & Crandall, a former firm of attorneys at law, and Abigail.

Wallace testified: he prepared the wills; prior to and at the time the wills were executed, Wallace & Crandall were George's attorneys; he had known George since about 1926; beginning early in 1930, he had been employed by George several times in legal matters and his professional relations with George "extended over a period of several years"; he was employed by George to prepare his will of July 21, 1936; prior to the discussions with reference to the will, he had not acted in any legal matters for Abigail; Abigail had been in his office with George but not in his private office, she had remained in the reception room; the first professional contact he had with Abigail was in connection with the preparation of her will of July 21, 1936; in all consultations he had with Abigail in connection with the preparation of her will, George was present; the first conference took place a week or two before July 21, 1936, in his office; there were present George, Abigail, and himself; George opened the conversation by saying *he* wanted him (Wallace) to prepare wills for them; George gave him a memorandum of the legatees on both sides of the family; George told him they had agreed "on a general plan"; George said they thought there should be no division of their property for distribution outside of the couple, that the survivor should have the money and property and the use of it for the life of the survivor, and that at the death of the survivor they wanted it to go to the designated heirs on "this memorandum"; he asked them if they wanted a noncontest clause and George said, "Make it tight"; George brought up the subject of advances to legatees.

After the first conference Wallace assembled notes "in the general scheme of a will rather than a finished document." A second conference was then held. Wallace testified that only George, Abigail, and he were present; a trust arrangement for Mrs. Ellis, Abigail's sister, was discussed; George said "he had no confidence in her ability to handle money, and that was the reason for the trust arrangement"; the provision with respect to lapsed legacies was discussed; he *"believes"* he told them the wills could be changed by mutual consent during the lifetime of both of them, and could be changed by the survivor after the death of one of them only as to the appointment of executors or executrixes; he pointed out to them that it was binding and conclusive on the survivor following the death of the first of them; he asked them if that was what they wanted and they said it was; "The Court: Do you remember who first used the term of 'mutual wills'?[3] Did one of them bring up that subject, or did you advise a mutual will on the basis of the information they gave you? The Witness: As to the use of that word, it would be difficult for me to answer. Possibly in the course of the conversation I asked them if they meant a joint and mutual will, or something to that effect. It might have arisen that way. At any rate, it was after—I believe your question, your Honor was directed to the initial thought? The Court: Yes. The Witness: I don't know that I can answer that directly, but the minute it was suggested, whether they did it or whether I did it, they took it up, and that was what they wanted. The use of those words I do not remember"; in one of the conversations George told him "they carried their property separately, that he had his property in his name, he had part of the property in his name and she had part of it in hers, and he carried the so-called 'cats and dogs' and so-called troublesome property, while she carried the 'blue chips.'"

On the day the wills were executed George and Abigail were present at all times; Wallace gave George a copy of his will and Abigail a copy of her will. He read through the one he was reading from and asked them to follow him, and if there was any question they wanted to ask or anything they wanted to suggest to interrupt him; and they were gone through that way completely. Wallace testified he did not believe he read both wills to them. It was stipulated the wills were duly executed. They were witnessed by Wallace and his secretary. When asked whether George or Abigail executed his or her will first, Wallace replied: "A. I rather think Mr. Brown did. Q. But you are not too certain? A. Well, I am as certain as I can be after 20 years." Wallace had no notes or memoranda with which to refresh his memory as to what occurred at the conferences other than George's will. He testified: "There was not a signed writing, of my knowledge. There was a memorandum, however, brought in *my* them initially setting forth the names of the beneficiaries on each side of the family"; as far as he knew, Abigail did not consult with Crandall at the time her will was being drafted; and as far as he knew, she did not consult with any other attorney.

Wallace also testified: "Q. Now, as I understand your testimony, there are two things that were said during the course of the conversations that you had with Mr. and Mrs. Brown, up to and including the time when they executed their wills, that you remember in your memory as specific statements that were made by one or the other of these parties, Mr. and Mrs. Brown; one was the statement by Mr. Brown when you were discussing the matter of a no-contest clause, and in which he used the words, 'Make it tight'? A. That's right. Q. Another was the statement by Mr. Brown in the course of the discussions to the effect—and I understand these are the words he used—that he had the 'cats and dogs,' referring to the properties which stood in his name, and that Mrs. Brown had the 'blue chips'; is that correct? A. That is right. I believe he used those two expressions, 'cats and dogs' and 'blue chips.'" He also remembered that each party declared that the will he or she executed was his or her will and requested the witnesses to sign. Wallace testified he was alone with George and Abigail during all conversations with respect to the wills except during the formalities of executing them.

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[3] There had been no testimony by Wallace that anyone had used the term "mutual wills."

The codicils were prepared by Crandall. They were executed on October 27, 1936. Wallace, Crandall, George, and Abigail were present at the time. They were witnessed by Wallace and Crandall. The only thing Wallace could recall with respect to their execution was that he asked Abigail if she was a member of P.E.O., and she said she was.

Crandall testified: he knew George since prior to March 1, 1930; the firm of Wallace & Crandall handled "very many matters" for George; prior to the death of George he did not personally handle any legal matters for Abigail; he was present at all conferences with George and Abigail; he and Wallace were consulted jointly with respect to the drawing of the wills; at the first conference George and Abigail stated they wanted to have their wills drawn and had come to them for that purpose, they wanted to will on the part of each of them to the survivor, but if the other spouse did survive, the will of the surviving spouse was to specify the heirs of George would have half of the "remaining estate," and the heirs of Abigail would have the other half, naming the heirs they said were to be taken into account; he did not recall a memorandum; George stated with respect to their properties that the "blue chips" were in Abigail's name and the "cats and dogs" were in his name; there was a second conference for the purpose of having them read over the wills and execute them; Wallace, Miss Kuhn, Wallace's secretary, George, and Abigail were present at the time the wills of George and Abigail were executed; he does not remember much about that conference. He testified: "My recollection is that they each of them read over the wills that had been prepared for each one respectively. I believe Mr. Wallace went over paragraph by paragraph reading at least one of the wills, reading the will to them, whereupon they indicated their readiness to sign, stated that they were ready to sign, and did sign, and asked the witnesses to witness their signatures, and they declared it then to be their last wills and testaments, respectively"; he had no recollection of a conference at which a draft of the wills was prepared.

Crandall testified he prepared the codicils; there was one conference; Wallace, George, Abigail, and himself were present; the substance of the conversation with respect to the codicils was that there was a changed condition regarding Mrs. Ellis, Abigail's sister;[4] he told them the change could be made by a codicil; the codicils were signed the same day; at the time they were executed he, Wallace, George, and Abigail were present; he does not know whether Abigail read her codicil before it was executed; he did not read it to her; after George died, Abigail employed him to act as attorney for her as executrix of George's will.

Crandall testified further: in the consultations with George and Abigail, Abigail remained silent for the most part; she "was not a talking person," George was; at the time of the conferences regarding the wills and codicils he observed Abigail's physical condition in a general way; she did not appear to be under any compulsion or fear; he did not notice any particular infirmity and he did not recall anything being said about any recent illness; Abigail appeared to be some years younger than George at the time.

Abigail testified: at the time she married George in 1910 she had some trust deeds of a value of less than $10,000, some cash, and jewelry; George had interests in dry goods stores; she does not know their value; George worked for a salary from 1910 until 1921; his salary at the last was "maybe five or six" thousand a year; after 1921 he just tended to his own affairs and was interested in trust deeds and real estate; from the time they married until George's death they kept their funds in separate bank accounts.

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[4] Mrs. Ellis has since died and under the the terms of the wills plaintiffs are bequeathed and devised her interest in the estate on the death of Abigail.

Abigail testified further: on the day she and George first talked to the lawyers about wills George had other business he wanted to do and they went together; they had not previously discussed the making of wills; they talked to Crandall about having a will; they did not know how to have it done and thought he could tell them the proper way; Crandall did the talking; Wallace came in and they talked together; Wallace and Crandall each had something to do with preparing "it"; she does not know just what part each one had; she does not know which one of them mentioned about mutual wills; "he tried to explain it to us"; George and she listened but did nothing about it that day; Crandall told them "about it, and that they would be worded the same, only one would be mine and one would be" George's; she and George went home, thought about it, when it was convenient went down, and finally decided on having the mutual wills made; she remembers that a draft of a will was talked about; she does not recall that either George or she brought a memorandum; she is not able to tell anything else that was said at the conferences; she remembers when she and George signed the wills; she does not know where the will is now, and does not know what happened to it; she does not recall executing a codicil in October 1936.

Abigail also testified: on none of the occasions when she went to the office of Wallace & Crandall did she have any intention of making any contract with George with respect to her will, and she did not go there for that purpose; neither at the time she signed her will nor at the time she signed the codicil did she think she was making a contract with George with respect to her will; Wallace did not tell her she could not revoke her will after George's death; when she signed her will she "just thought, 'Well, if it is what Mr. Brown wants, why, all right,' and I knew that it would be all right if he did it, and I knew he would protect me by it"; she has never been trained in the law; she has been a housewife all her adult life.

Abigail testified further that when she went to the office of Wallace & Crandall after George's death to see about probating George's will, she talked to both Wallace and Crandall; neither of them told her she had made a contract with George by the two wills; neither of them at any time after George's death told her that by her will and George's will she had entered into a contract with George; after George died she did not obtain advice from any lawyer as to what rights she might or might not have by reason of George's death; in connection with the probate of George's will and the administration of his estate there were no discussions with either Wallace or Crandall as to any rights she might have; the first information she had that someone claimed rights under a contract which arose by the making of her will and George's will was when she was served with a subpoena in the matter of the application of Maurice C. Brown to perpetuate testimony.

We have canvassed the record and find no other evidence bearing on the question of the sufficiency of the evidence to sustain findings XI and XVI.

[1, 2] The determination of the question whether a finding of fact is supported by substantial evidence presents a question of law. Burtis v. Universal Pictures Co., Inc., 40 Cal.2d 823, 831, 256 P.2d 933. It is our duty to analyze the record for the purpose of determining whether there is any substantial evidence which reasonably supports findings XI and XVI. Potter v. Pacific Coast Lumber Co., 37 Cal.2d 592, 598, 234 P.2d 16. On such review the conclusion is inescapable that the record does not justify those findings and that the trial court erred as a matter of law in adjudicating this issue.

[3, 4] We must distinguish between the effect of the will and the rights and duties created by the alleged agreement. The al-

leged agreement, if made, is irrevocable except by mutual consent of both parties to it and the will is always revocable so long as the testator is alive and sui juris. Prob. Code, § 23. Plaintiffs' rights, if any, flow primarily from the alleged agreement; and the ordinary requirements of contract law govern the validity and enforcement of the agreement.

An apparent consent is not real or free when obtained through undue influence. Civ.Code, § 1567. In such case the injured party may avoid the contract by rescission or defend against its enforcement. 12 Cal. Jur.2d 258, § 58.

Civil Code, section 158, reads:

> "Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying the confidential relations with each other, as defined by the Title on Trusts."

Civil Code, section 2235, in the title on trusts, reads:

> "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence."

"In passing upon that statute [section 2235] our Supreme Court, in White v. Warren, 120 Cal. 322, 49 P. 129, 52 P. 723, said: 'As applied to the relations of husband and wife, the aforesaid section 2235 may be read as follows: "All transactions between the husband and wife, by which one obtains *any advantage* from the other, are presumed to be entered into by the latter *without consideration, and under undue influence.*"'" Gaines v. California Trust Co., 48 Cal.App.2d 709, 714, 121 P.2d 28, 30.

Bradner v. Vasquez, 43 Cal.2d 147, at pages 151, 152, 272 P.2d 11, at page 13, says:

> "It is plaintiff's contention that the advantage gained by the fiduciary must be an unfair advantage before the presumptions of section 2235 are properly in the case. We find no language in this section which imposes such an additional requirement. * * *
>
> "When a fiduciary enters into a transaction with a beneficiary whereby the fiduciary's position is improved, or he obtains a favorable opportunity, or where he otherwise gains, benefits, or profits, it may fairly be said that an advantage has been obtained. To declare that the advantage obtained must be shown to be unfair, unjust, or inequitable before the presumptions arise would result in the imposition of a condition which is not required by section 2235."

In Matassa v. Matassa, 87 Cal.App.2d 206, at pages 214, 220, 196 P.2d 599, at page 604, the court stated:

> "'It is established law that confidential relations are presumed to exist between husband and wife; if the husband obtains any advantage over his wife he must stand unimpeached of any abuse of the confidence presumptively reposed in him, and failing in this he bears the burden of showing that the transaction was fair and just and fully understood by the party from whom the advantage was obtained. In re Estate of Cover, 188 Cal. 133, 143, 204 P. 583; Locke Paddon v. Locke Paddon, 194 Cal. 73, 80, 227 P. 715. The policy of the law in respect to such transactions can best be enunciated by quoting from In re Estate of Cover, supra, 188 Cal. at page 144, 204 P. [583] at page 588: "In short, a husband, by reason of the marital relation, is bound in his dealings with his wife to the highest and best of good faith and as a consequence is obligated in such dealings not to obtain and re-

tain any advantage over her resulting from concealment or adverse pressure, and he must, if he would avoid the presumption of undue influence emanating from the procurement of any advantage over her, make full and fair disclosure to her of all that she should know for her benefit and protection concerning the nature and effect of the transaction, or else he must deal with her at arm's length and as he would with a stranger, all the while giving her the opportunity of independent advice as to her rights in the premises." See also McKay v. McKay, 184 Cal. 742, 747, 195 P. 385, where it was held that this presumption of undue influence in transactions between husband and wife prevails over other presumptions.' * * *

"Keeping in mind that the instant contract is a postnuptial agreement between husband and wife, not made in contemplation of a divorce, the rule enunciated by this court in Re Estate of Hurley, 28 Cal.App.2d 584, 588–589, 83 P.2d 61, 63, appears particularly applicable to the situation under consideration, to-wit:

"'It is not disputed that husband and wife may by appropriate agreement waive their respective inheritable rights in the estate of the other. It is equally well established, however, that courts will not construe a property settlement between husband and wife as depriving the survivor of inheritance or other rights growing out of the marital relation, except where there is a clear and unmistakable intention to barter away such rights.'"

[5] The wife's consent to an agreement with her husband to make irrevocable mutual wills must be an actual one, based on an intelligent knowledge of his property and the effect of her consent, as distinguished from one merely formal. State ex rel. Minnesota Loan & Trust Co. v. Probate Court, 129 Minn. 442, 448, 152 N.W. 845, 846, L.R.A.1915E, 815.

In Andrew v. Andrew, 51 Cal.App.2d 451, 125 P.2d 47, the trial court set aside a property settlement agreement. Affirming, the court stated (51 Cal.App.2d at pages 454, 455, 125 P.2d at page 48):

"With interests so varied the defendant suggested to the plaintiff that they should make a property settlement. She consented. He employed his present attorney, Mr. Hjelm, to reduce the contract to writing. The latter prepared a written instrument. The plaintiff and defendant went to his office and plaintiff testified they both signed it. She testified she had no advice except what her husband said and what Mr. Hjelm said. She also testified she did not read said written instrument, and never read it nor knew its contents until the time she commenced this action. * * *

"* * * Before it was executed it is not even claimed the plaintiff had had the benefit of independent legal advice. Ordinarily her grantee under such circumstances could not retain the benefits under said instrument. 9 Cal. Jur. 230. Being a purported contract between husband and wife, it was between those standing in a confidential relation and was presumed to be fraudulent."

In Gregory v. Gregory, 92 Cal.App.2d 343, 349, 206 P.2d 1122, it was held that in negotiations between husband and wife for settlement of property matters, both parties should at all times be represented by counsel, and while one attorney may serve both parties in such negotiations, he should make sure that each party is fully advised as to his or her legal rights, including the right to independent counsel.

Auclair v. Auclair, 72 Cal.App.2d 791, at page 801, 165 P.2d 527, at page 532, says:

"The least overreaching or misrepresentation by a husband through which he gains the property of his wife is fraudulent and will justify an action to avoid a settlement. [Citation.] That confidential relation exists so long as the parties are husband and wife. [Citation.] A husband is bound in his dealings with his wife to the highest and best of good faith and if he would avoid the presumption of undue influence emanating from the procurement of any advantage over the wife, he should make a full and fair disclosure to her of all she should know for the protection of her interest, *giving her the opportunity of independent advice.*" (Emphasis added.) Also see Cox v. Schnerr, 172 Cal. 371, 378–379, 156 P. 509; Nobles v. Hutton, 7 Cal. App. 14, 23, 93 P. 289; Burrows v. Burrows, 136 Cal.App. 323, 329, 28 P.2d 1072; Khoury v. Barham, 85 Cal. App.2d 202, 212, 192 P.2d 823; Sparks v. Sparks, 101 Cal.App.2d 129, 135, 225 P.2d 238.

Apropos were the words of the court in Peyton v. William C. Peyton Corp., 23 Del.Ch. 321, 7 A.2d 737, 123 A.L.R. 1482. The husband executed a will. The wife, in writing, consented to the execution of her husband's will and approved the disposition of his estate as therein provided. The will and the consent which was attached thereto were drawn by her husband's attorney. The will and the consent were presented to her by an office associate of her husband's firm of lawyers. The husband was not present when the wife signed the consent. Holding that the consent was voidable at the wife's election, the court stated (7 A.2d 746, 750, 753):

> "Confidential relations are presumed to exist between husband and wife. The most dominant influence of all relations is that of husband over wife; and the relation is confidential to the highest degree. There are exceptional cases, of course, where the woman is the more masterful; but, generally speaking, the trust of the wife is so absolute and her dependence so entire, while the dominion of the husband is so complete and his influence so controlling, that equity scrutinizes severely all transactions between them; for, in the proportion to the affection and trust is the probability of the wife to be subject to the husband's influence, and in the same proportion is the vigilance of the court aroused. * * * So, the principle is well established that a person standing in a confidential relation towards another may not retain benefits conferred by his principal in a transaction as to which competent independent advice is considered necessary, except upon a satisfactory showing that the principal had such advice in conferring the benefits. Wherever independent counsel would be of real assistance to the principal in deciding whether to enter into the transaction with his fiduciary, it is the latter's duty to advise his principal to seek such counsel; and where in the circumstances of the case independent advice is deemed to be indispensable, it is not enough that the fiduciary has urged his principal to obtain such advice; the transaction will be voidable, at the election of the principal, if independent advice was not, in fact, had. The equitable principle has its root in the fact that the parties are not regarded as being on an equal footing; and the court cannot be sure that the principal acted freely and in such way that he ought to be bound irrevocably, unless it be shown satisfactorily that he actually had the benefit of unbiased, competent counsel, and fully understood the matter of the proposed transaction. Application of the principle is not restricted to cases where, by evil design or contrivance to injure another, a benefit has been gained by a fiduciary at the expense of his principal; for even though a fiduciary has no purpose or intention to take an unfair advantage, equity will not lend its aid to the enforcement of the transaction and the fiduciary will not be permitted to retain advantage acquired as a consequence of it, if the

transaction results in inequality and injustice. The purpose of the rule is not so much to protect the cestui against the consequences of undue influence as it is to safeguard him against the results of his own voluntary acts induced by the confidential relation between him and his fiduciary the effect of which with respect to his own interests he may not fully comprehend. * * *

"* * * It does not appear, indeed it is not claimed, that Mrs. Peyton ever had legal advice from any one, competent or incompetent, impartial or biased, or that she ever was urged by her husband, or that he ever offered to obtain for her, such advice; but on behalf of the executors and trustees it is urged that Mrs. Peyton sought no explanation of the documents or advice in the transaction from Mr. Chambers when he took the papers to her, although he would have explained them to her had he been requested; or that she could have consulted her own counsel. This argument is without merit. It ignores the duty cast upon the fiduciary at least to advise his principal to seek independent counsel; and advice from a law associate of Mr. Coulson could hardly be characterized as impartial. * * *

"* * * The equitable principle invoked as applicable to the circumstances of the transaction under scrutiny does not require a showing of design founded in evil purpose."

[6, 7] It is patent that George obtained an advantage by the execution of Abigail's will. The power to control the devolution of one's property has value and importance as a resource. Abigail surrendered her power to dispose of her estate as she wished. George and Abigail had no children. She parted with her entire interest in the combined estates, except for a life estate, extending beyond George's life. The court found that between George's death and her death she has only the reasonable use and enjoyment of the combined estates. She retained a mere life estate with remainder to plaintiffs, who concede they stand in the shoes of George. She parted with the power to consume to the benefit and profit of plaintiffs. The court found that all property acquired during their marriage of 26 years was community property. In the absence of the wills, should George die first, all the community interest of George would have gone to Abigail.[5] Prob.Code, § 201. Aside from any agreement, Abigail had the power to dispose of half of the community property to parties of her own choice. Prob.Code, § 201. Hence, when Abigail made the oral agreement binding herself to leave her estate to George and in the event of his predeceasing her, to the other named beneficiaries, she was deprived of this power and George benefited. He obtained a "favorable opportunity" and an advantage for himself. As stated in Bradner v. Vasquez, 43 Cal.2d 147, 152, 272 P.2d 11, section 2235 does not require that the advantage to the husband be an unfair advantage. The transaction is presumed to have been "without sufficient consideration, and under undue influence." Civ. Code, § 2235.

[8, 9] Of course the presumption of undue influence is rebuttable and may be overcome by proof of full and fair disclosure of all that the wife should know for her benefit and protection concerning the nature and effect of the transaction. In re Estate of Cover, 188 Cal. 133, 204 P. 583. The burden was on plaintiffs of overcoming the presumption. As we shall see, they did not sustain the burden.

The court found: "*At all times* during the marriage to George, Abigail had complete trust, faith and confidence in him and *at all times* during such marriage she signed such papers and documents as George requested her to sign." (Emphasis added.)

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[5] George was 72 at the time the wills were executed. He died eight months and a few days later.

In view of this finding and the uncontradicted evidence, it must be held that the presumption was not overcome. There was no evidence that Abigail ever discussed the alleged agreement with anyone other than George and his attorneys. George took her to his lawyers. He was present at all times during the preparation and execution of the wills. He did the talking. It is uncontradicted, indeed it is conceded, that Abigail had no legal advice from anyone other than from George's attorneys. No one informed her she was entitled to independent counsel and independent advice. So far as the record shows, she had no opportunity to seek independent counsel and advice. She relied entirely on George and his attorneys. She executed the will in ignorance of her rights and without any advice as to its effect. There is a complete absence of any evidence that anyone advised her of the comparative values of George's and her estates or of the nature of their property, whether community or separate. No one told her she was entering into a contract for the express benefit of plaintiffs. No one told her that if George died first she would be without power to convey or transfer any of the property, or that she would merely have a life estate, or that she would be without power to mortgage more than her life interest. No one informed Abigail that if she survived George she would have only the reasonable use of the combined estates during her lifetime and could not make gifts. No one explained to her that future-acquired property would be within the life estate-remainderman status; that if George died first and her estate was increased by gifts, inheritance, or as a result of her own efforts, she would still be bound by the alleged agreement. Homestead rights were not explained to her and she was not told that she might lose such rights if George died first. See In re Estate of Sloan, 179 Cal. 393, 396, 177 P. 150; Prob. Code, §§ 660, 661. The mere statement of Wallace to her that she could not change her will was wholly inadequate to convey to her, a woman unversed in the law, the full legal effect of making the will. The statement did not inform her of her rights. It is relevant to note that there is no statement in either will that the maker cannot change the will if he or she is the survivor.

There was evidence that prior to any controversy with George's relatives or with plaintiffs and prior to her marriage to Ross, Abigail was under the belief that George intended she should be free to remarry. No one told her the effect of an agreement to make irrevocable mutual wills should George die first and should she remarry. Prob.Code, § 70.[6] No one advised her that if she survived George and remarried she could not give or will any property to her new spouse and that her obligations to him would be subordinated to the provisions of the will in favor of George's relatives and her distant relatives.

There was no evidence that Abigail had any more information or knowledge with respect to her rights at the time she executed the codicil than she had at the time she executed the will. There was only one conference at that time. George, Abigail, Wallace, and Crandall were present. The only subject discussed was a change with respect to Mrs. Ellis, Abigail's sister. All Wallace remembered about that meeting was that he asked Abigail if she was a member of P.E.O., that Abigail said yes, and that he witnessed the codicil. Neither Wallace nor Crandall testified that anything was said with respect to Abigail's rights or that the alleged agreement was even mentioned.

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[6] Probate Code, section 70: "If a person marries after making a will, and the spouse survives the maker, the will is revoked as to the spouse, unless provision has been made for the spouse by marriage contract, or unless the spouse is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation can be received."

[10–13] Plaintiffs contend Abigail may not assert undue influence by George after offering his will for probate and accepting benefits thereunder, relying on Civil Code, section 1589. They say that by doing so, she ratified the alleged agreement and is estopped from asserting undue influence. The point is without merit.

Abigail employed the law firm of Wallace & Crandall to act as her attorneys in the probate of George's will and the administration of his estate. She had no other legal advice. There is no evidence that either Wallace or Crandall, or anyone else, advised Abigail of the legal effect of probating George's will and accepting benefits thereunder, or of any of her legal rights arising from George's death. Abigail testified that neither Crandall nor Wallace told her, in connection with the probate of George's will or the administration of his estate, that by reason of an oral agreement she had made with George or because she and George had executed mutual wills she now had certain obligations which she would confirm by accepting benefits under George's will. Crandall and Wallace were plaintiffs' witnesses and they were available to contradict Abigail's testimony. They did not contradict it and an inference arises that their testimony would have confirmed the testimony of Abigail. Joseph v. Drew, 36 Cal.2d 575, 579, 225 P.2d 504; Shehtanian v. Kenny, 156 Cal.App.2d 576, 580, 581, 319 P.2d 699.

Neither Wallace nor Crandall testified to any discussion with Abigail in which they told her that by reason of any "oral agreement" with George or because of the execution of "mutual wills" by herself and George she now had certain obligations which she would confirm by accepting benefits under George's will; they did not testify to any discussion of any kind which dealt with an agreement with George or the "mutual wills" or either of them. Abigail on the other hand testified positively that neither Wallace nor Crandall had any discussion with her as to any rights or obligations which she might have. Plaintiffs say the court was not compelled to believe Abigail. Assuming it did not, disbelief of her testimony does not supply affirmative evidence that she had any advice as to her rights. In re Estate of Bould, 135 Cal. App.2d 260, 264, 287 P.2d 8, 289 P.2d 15.

A confirmation necessarily supposes a knowledge of the thing ratified, the term implying a deliberate act intended to renew and ratify a transaction known to be voidable. 15 C.J.S. Confirmation, p. 826.

There can be no estoppel where the party against whom it is invoked did not know the full truth of the facts to which his conduct related; and such knowledge must be actual, not merely presumptive. 18 Cal. Jur.2d 409, § 9. In re Estate of Cover, 188 Cal. 133, 204 P. 583, is in point. The court stated (188 Cal. at page 146, 204 P. at page 589):

> "It is argued on behalf of the appellant, in effect, that even though the doctrine of laches may not be formally pleaded in avoidance of the defense of fraud, nevertheless the widow, having accepted and retained, without protest or repudiation, the benefits of the agreement during a period of several years after its making, is estopped from defending against its operation. There might perhaps be much force in this contention if it had been shown in evidence that the widow had discovered, at any time subsequent to the making of the agreement and prior to the death of the deceased, the fraud alleged to have been practiced upon her by the deceased. But the pleadings, the evidence and the supported findings show, in substance, that the widow was ignorant of the scope and effect of the agreement, not only at

the time of its making, but at all times thereafter until shortly before she petitioned for letters of administration, and that not until then did she have occasion to doubt the *bona fides* of the deceased. Accepting the agreement in the belief that the deceased was dealing honestly with her, she was justified in resting in that belief, and was not called upon then or thereafter to make independent inquiry as to his good faith. [Citation.] Accepting and retaining the benefit of the agreement, as the evidence shows she did, in continuing ignorance of the effect thereof upon her right to succeed to a portion of the estate of the deceased in the event of his dying intestate, did not operate as an estoppel, for to constitute an estoppel it must be made to appear that she acted with full knowledge of all the material facts and circumstances and with full knowledge of her rights in the premises." Also see In re Estate of Poole, 156 Cal.App.2d 768, 775, 320 P.2d 62; Williams v. Sechler, 127 Kan. 314, 273 P. 447, 448.

"Contracts to make wills are probably less adequately understood by the parties to them than any other contracts known to the law. * * *

"Where legal advice is possible it is highly important that a person about to agree to devise or bequeath his property be fully informed of the probable consequences of such a contract. He should also have pointed out to him the possibility that a future change of circumstances might make such a contract undesirable. A party to such a contract should be made to understand clearly that the law does not permit a man to have his cake and eat it too. If he does enter into such a contract he should do so with a knowledge of the legal significance which the law will attach to his act, and with a realization that a part of that legal significance might be the prevention of his making some future use or disposition of his property which might become highly desirable to him. That parties have often failed to consider these matters is demonstrated by the frequency with which they have tried to get from under the effects of the contracts once they have entered into them. To accomplish this result various means have been attempted, including inter vivos gifts, inter vivos sales, transfers with a reservation of a life estate, various types of trust arrangements, and others. Some of these schemes have achieved the desired purpose and some of them have not. It would seem that most of these unfortunate experiences could be avoided if the parties realized in advance the nature of the obligation the promisor assumed toward his promisee." Sparks, Contracts to Make Wills, 1956, N.Y.Univ. Press, 50, 52.

[14] The evidence is without conflict that Abigail did not at any time have full knowledge and understanding of the consequences of the alleged oral agreement or of the will she executed. She did not have an intelligent, knowledgeable choice. Assuming, without deciding, that there was an oral agreement not only to make mutual wills but also an agreement that they would be irrevocable—an offer and an acceptance, a bargain—plaintiffs did not sustain the burden resting on them of overcoming the presumption of undue influence. There was no evidence rebutting the presumption. Consequently, as defendants contend, findings XI and XVI not only have no scintilla of evidence or inference to support them but are contrary to the uncontradicted evidence. No finding of fact is binding on a reviewing court if it is not supported by substantial evidence. Golding v. R. K. O. Pictures, Inc., 35 Cal.2d 690, 699, 221 P.2d 95.

Since findings XI and XVI are vital to the judgment, it must be reversed. As previously stated, defendants challenge the sufficiency of the evidence to sustain the findings that George and Abigail entered into an oral agreement to make irrevocable mutual wills, that the wills are a true memorandum of the original agreement, and that they were irrevocable after the death of one of them. Defendants also assert various other findings are unsupported; that certain findings are inconsistent; that the alleged oral agreement is harsh, oppressive, unjust, and inequitable; that it is void against public policy; that the defenses of the statute of frauds, laches, and the statute of limitations were established; and that plaintiffs were only incidental beneficiaries and, as such, not entitled to enforce the alleged oral agreement. In view of our conclusion that findings XI and XVI, which are essential to the judgment, are unsupported by the evidence, it is unnecessary to discuss other points or to consider plaintiffs' appeal.

Reversed.

SHINN, P. J., and WOOD, J., concur.

Hearing granted; DOOLING, J. pro tem., participating in place of TRAYNOR, J.

52 Cal.2d 250

In re George P. TARTAR on Habeas Corpus.

Cr. 6407.

Supreme Court of California,
In Bank.
May 29, 1959.
Rehearing Denied June 24, 1959.

Application was made in the Supreme Court for habeas corpus to secure release of petitioner from prison. The Supreme Court, Schauer, J., held that where there was no allegation, proof, admission, or finding in second degree burglary prosecution in 1930 that defendant served terms of imprisonment on priors charged against him, determination that he was an habitual criminal became effectual when in 1931 statute was amended to require showing that defendant actually served a term of imprisonment on each prior conviction, and amendment was expressly made applicable to every person "heretofore" convicted and imprisoned, and that omission of retroactive provision from any subsequent amendment of the statute could not operate to restore a determination of habitual criminality which had previously been wiped out.

Petition for habeas corpus granted, and petitioner ordered discharged from custody.

1. Indictment and Information ⚷114

If indictment or information is to establish a basis for sentencing defendant as an habitual criminal, it should allege not only the fact of a prior conviction but also the fact that a term of imprisonment in a penal institution was served. West's Ann. Pen.Code, §§ 644, 666, 969, 1158, 1168.

2. Habeas Corpus ⚷30(2), 50

Where information failed to allege that defendant had served any term for prior convictions, which was prerequisite to holding defendant to be an habitual criminal, habeas corpus in District Court of Appeal was a proper remedy and was not premature, though defendant had not at the time served the term for which he had been legally committed for burglary in the second degree. West's Ann.Pen.Code, §§ 461, 644, 666, 969, 1158, 1168.

3. Criminal Law ⚷273

Insofar as concerns establishment of the status of an habitual criminal by plea of guilty to charges laid, defendant should be regarded as having pleaded guilty only to as great a charge as was contained in the information. West's Ann.Pen.Code, §§ 644, 666, 969, 1158, 1168.

4. Habeas Corpus ⚷90

Insofar as concerns establishment of the status of an habitual criminal by a plea of guilty to charges laid, if there is any reasonable doubt as to identity of offense, Supreme Court in habeas corpus proceeding is bound to resolve that doubt in favor of petitioner. West's Ann.Pen.Code, §§ 644, 666, 969, 1158, 1168.

5. Statutes ⚷241(1)

When language, which is reasonably susceptible of two constructions is used in a penal law, ordinarily that construction which is more favorable to the offender will be adopted, and he is entitled to the benefit of every reasonable doubt, whether it arises out of a question of fact, or as to the true interpretation of words or the construction of language used in statute.

6. Criminal Law ⚷1201

Where there was no allegation, proof, admission, or finding in second degree burglary prosecution in 1930 that defendant served terms of imprisonment on priors charged against him, determination that he was an habitual criminal became ineffectual when in 1931 statute was amended to require showing that defendant actually served a term of imprisonment on each prior conviction, and amendment was expressly made applicable to every person "heretofore" convicted and imprisoned, and omission of retroactive provision from any subsequent amendments of the statute could not operate to restore a determination of habitual criminality which had previously been wiped out. West's Ann.Pen.Code, §§

461, 644, 666, 969, 1158, 1168; West's Ann. Gov.Code, § 9607; West's Ann.Const. art. 1, § 16.

7. Criminal Law ⚿1202(3)

Statements in report of probation officer, which was considered by trial court before defendant was adjudged an habitual criminal, and which indicated that defendant actually served separate terms of imprisonment on two prior convictions admitted by him, were mere hearsay and did not constitute the equivalent of trial, proof, finding, or adjudication that he had served terms of imprisonment on prior convictions, as required by statutes. West's Ann.Pen. Code, §§ 644, 969, 1158, 1168.

◆

Lawrence W. Jordan, Jr., San Francisco, for petitioner.

Stanley Mosk, Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., for respondents.

SCHAUER, Justice.

By application for habeas corpus petitioner seeks release from prison on the ground that he has already served more than the maximum term for the crime of which he was convicted (second degree burglary). His imprisonment under sentence and commitment for this crime began in 1930, and the Adult Authority has chosen to treat him as serving a life sentence. This court issued an order to show cause and appointed counsel for petitioner.

The question is whether, under the circumstances of this case, a finding and declaration by the trial court that petitioner is an habitual criminal under the provisions of section 644 of the Penal Code can be effectual to extend his term to life imprisonment. We have concluded that by reason of certain expressly declared retroactive provisions included in section 644 when it was amended in 1931 [1] to require a showing of service of terms of imprisonment upon prior convictions as a basis for making such prior convictions competent to establish the status of a defendant as an habitual criminal, petitioner is entitled to the relief he asks.

In June, 1930, petitioner pleaded guilty to second degree burglary committed on May 5, 1930, in the County of San Bernardino and admitted that he had "suffered the two prior convictions alleged in the amended information" [2] on charges separately brought and tried. As a basis for finding habitual criminality the statute did not then require a showing, and there was no allegation, that any term of imprisonment had been served. The court declared petitioner to be an habitual criminal and adjudged that he be "punished for the crime of burglary in the second degree by imprisonment in the State Prison * * * for the term prescribed by law." The maximum term for burglary in the second degree is 15 years (Pen.Code, § 461) and petitioner has already served more than that time. The maximum term for an habitual criminal was, and is, life, but since the 1945 amendment of section 644 burglary of the second degree has not been included among the substantive offenses upon conviction of which, with priors, habitual criminal status can be declared (Stats.1945, ch. 934, § 1).

At the time petitioner was convicted in 1930, section 644 of the Penal Code provided that "Every person convicted in this state of any felony, who shall have been previously twice convicted upon charges separately brought and tried, either in this state or elsewhere, of the crime of robbery, burlary, [and various other listed crimes] * * * shall be adjudged an habitual criminal and shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole until he shall have served * * * at least twelve years. Every person * * * who shall have been previously three times convicted * * * of any felony, shall be punished by imprisonment in the state prison for not less than life and shall not be eligible to parole." Stats. 1927, p. 1066. However, in 1931 the section was amended to require, among other things, a showing that the defendant had actually served a term of imprisonment in a "state prison and/or federal penitentiary" upon each prior conviction on a charge "separately brought and tried" that is to be used as a basis for a determination of habitual criminal status. Stats.1931, p. 1052. The amendment further specifically declared that "The provisions of this act shall be retroactive, and be deemed and construed to apply to *every person heretofore convicted* of *and imprisoned* for the crimes herein enumerated [including "burglary"]." (Italics added.) Section 644 has also undergone five subsequent amendments, but the requirement of a showing of service of a term of imprisonment in an appropriate penal institution for each prior conviction which is to be a basis of habitual criminal punishment has at all times been retained.

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[1] We note that by Stats.1941, ch. 106, p. 1080, section 644 was further amended and some of the material formerly there contained was distributed to other portions of the Penal Code and declared to be retrospective as well as prospective in application, but by reason of the conclusion we have reached we find it unnecessary to consider the possible effect of such legislation on this case.

[2] The amended information alleged that one of such prior convictions was of the felony of burglary in Oklahoma and the other was that of robbery in Nebraska.

We note that Penal Code, section 969 which provides in general terms how the fact of a prior conviction shall be alleged was enacted in 1905 (Stats.1905, p. 772), and although amended in 1927 (Stats.1927, p. 1152) and again in 1951 (Stats.1951, ch. 1674, § 57), does not specify a requirement that the information or indictment allege that a term of imprisonment has been served on each prior charge. But this fact is immaterial in determining the sufficiency of the pleading and proof, and verdict or finding, essential to establish a prior conviction which may constitute a part of the basis for imposing the punishment prescribed by section 644. The latter section was not enacted until 1923. Stats.1923, p. 237. Only a conviction for one of the crimes specified in section 644 (or its equivalent in another jurisdiction) coupled with the actual service (in a penal institution) of a term of imprisonment for such conviction can now be considered as a part of the foundation for such punishment. Section 969, when it was enacted in 1905, presumably had reference to alleging prior convictions of the character which by section 666, as amended at the same session of the Legislature (Stats.1905, p. 667), provided that "Every person who, having been convicted of petit larceny, or of any offense punishable by imprisonment in the state prison, commits any crime after such conviction, is punishable therefor as follows:" (1) If the punishment for a first offender would be "imprisonment in the state prison for any term exceeding five years" then the punishment for a subsequent offender shall be "imprisonment * * * not less than ten years" and (2) if the punishment for a first offender would be "imprisonment * * for five years, or any less term," then the punishment for a subsequent offender shall be "imprisonment * * * not exceeding ten years." It thereupon (if not before) became material that indictments and informations allege the fact of prior convictions without the necessity, in situations not encompassed by the subsequently enacted section 644, of alleging and proving that a term of imprisonment had been actually served in a penal institution. Therefore, the failure of section 969 to require specific allegation of the service of such term of imprisonment cannot be regarded as controlling here. The finding of facts as to prior convictions, regardless of whether terms of imprisonment were served is, of course, still material for proper prison administration, particularly where the system encompasses the indeterminate sentence law. Pen.Code, § 1168; see also Stats.1931, pp. 1053, 1054.

[1] It is unnecessary for us to determine in this proceeding whether an indictment or information must as an absolute prerequisite, if it is to establish a basis for sentencing the defendant as an habitual criminal, specifically allege not only the fact of the prior conviction but also the fact that a term of imprisonment in a penal institution was served. Certainly such alle-

gation should be made. If it is not pleaded, then the special verdict required by section 1158 ("We find the charge of previous conviction true") would establish no greater extent of guilt than that encompassed in the charge. Section 1158 further specifies that "If more than one previous conviction is charged a separate finding must be made as to each" and, obviously, if the finding is to affect the status of a defendant for punishment under section 644 the nature and elements of the particular crime and the fact as to service of sentence therefor must be determined.

[2] In 1934 petitioner, apparently having been informed that he was being held as serving a life term, applied for habeas corpus as a method of adjudicating his status. The District Court of Appeal (in In re Tartar (1934), 1 Cal.App.2d 400, 36 P.2d 419, citing People v. Dawson (1930), 210 Cal. 366, 372 [6], 292 P. 267) held that "The information failed to allege petitioner had served any term for the prior convictions, which is prerequisite to holding petitioner to be an habitual criminal * * * However, the petition is premature, for the punishment of burglary of the second degree is one year to fifteen years (Pen.Code, sec. 461), and it is apparent petitioner has not yet served the term for which he was legally committed. Writ denied." Habeas corpus was a proper remedy and it was the duty of the court to adjudicate the issue. (In re Chapman (1954), 43 Cal.2d 385, 387 [1], 273 P.2d 817; In re Chessman (1955), 44 Cal.2d 1, 6 [1], 279 P.2d 24.) The holding that the application was premature is inconsistent with the holdings of this court in such cases as In re McVickers (1946), 29 Cal.2d 264, 176 P.2d 40; In re Seeley (1946), 29 Cal.2d 294, 176 P.2d 24; In re Chapman (1954), supra; and In re Chessman (1955), supra, and is in that respect disapproved.

[3–5] Insofar as concerns establishment of the status of an habitual criminal by plea of guilty to the charges laid it is the rule that the defendant shall be regarded as having "pleaded guilty only to as great a charge as was contained in the information." (People v. Dawson (1930), supra, 210 Cal. 366, 373 [7], 292 P. 267; People v. Murray (1940), 42 Cal.App.2d 209, 219 [9], 108 P.2d 748:) "Furthermore, if there be any reasonable doubt as to identity of offense we are bound to resolve that doubt in favor of petitioner." (In re Bramble (1947), 31 Cal.2d 43, 51 [6], 187 P.2d 411.) It has also been held that since the amendment of section 644 of the Penal Code in 1931, adding the requirement of service of terms of imprisonment, "in order to invoke the operation of the habitual criminal statute the prosecution * * * must allege and prove that the accused has served a term of imprisonment * * * for the particular felony of which he is charged with having been previously convicted, and that the failure to allege or prove such servitude is fatal to the adjudication, unless it appears from the record in some manner that the accused has admitted having served such term of imprisonment or that the court in its judgment has so found." (People v. Murray (1940), supra, 42 Cal.App.2d 209, 217 [7], 108 P.2d 748, and cases there cited; In re Bertrand (1943), 61 Cal.App.2d 183, 186–187, 142 P.2d 351; cf. In re Boatwright (1932), 216 Cal. 677, 679–682, 15 P.2d 755; In re Schenk (1943), 61 Cal.App.2d 168, 170–174, 142 P.2d 343.) Moreover, the rule is established that when language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted. The defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the contruction of language used in a statute. (People v. Stuart (1956), 47 Cal.2d 167, 175 [7], 302 P.2d 5, 55 A.L.R.2d 705; People v. Smith (1955), 44 Cal.2d 77, 79 [2], 279 P.2d 33; In re Bramble (1947), supra, 31 Cal.2d 43, 51 [6, 7], 187 P.2d 441; In re McVickers (1946), supra, 29 Cal.2d 264, 278, 176 P.2d 40; People v. Valentine (1946), 28 Cal.2d 121, 143 [20], 159 P.2d 1; People v. Ralph (1944), 24 Cal.2d 575, 581 [2], 150 P.2d 401.)

[6] Inasmuch as there was no allegation, proof, admission, or finding that petitioner served terms of imprisonment on the priors charged against him, it follows that the determination that he was an habitual criminal became ineffectual when in 1931 section 644 was amended and the amendment was expressly made applicable to "every person heretofore convicted * * * and imprisoned." Omission of the retroactive provision from any subsequent amendments of the section could not, of course, operate to restore a determination of habitual criminality which had previously been wiped out. (See Gov.Code, § 9607; Cal.Const., art. 1, § 16.)

[7] Respondent urges, nevertheless, that certain statements in the report of the probation officer which was "filed, read and considered" by the trial court before judgment was pronounced on petitioner, indicate that petitioner actually did serve separate terms of imprisonment on the two prior convictions admitted by him. Such statements, however, are mere hearsay, do not constitute the equivalent of trial, proof, finding or "adjudication," in the sense in which it is used in section 644, and do not supply the missing element. (Cf. In re Basuino (1943), 22 Cal.2d 247, 250, 138 P.2d 297; In re Schneider (1943), 23 Cal.2d 427, 429, 144 P.2d 329; In re Bramble (1947), supra, 31 Cal.2d 43, 50, 187 P.2d 441; In re Etie (1946), 27 Cal.2d 753, 757, 167 P.2d 203; In re Marvich (1946), 27 Cal.2d 503, 518, 165 P.2d 241; In re Valenzuela (1945), 71 Cal.App.2d 198, 201, 162 P.2d 301; People v. Becker (1947), 80 Cal.App.2d 691, 694–695 [2–4], 181 P.2d 958.)

Respondent relies also upon In re McConnell (1936), 5 Cal.2d 436, 55 P.2d 205. In that case when in 1936 a defendant convicted in 1928 of grand theft and adjudged an habitual criminal sought release on habeas corpus on the "theory * * * that proof of an essential element necessary to adjudge him an habitual criminal is lacking, namely, service of a term of imprisonment on each of the prior convictions," this court declared: "Petitioner's contention is based upon the present wording of Penal Code, section 644, as amended in 1931. The amendment added to the provision for two prior convictions the requirement that the accused have 'served a term therefor in any state prison and/or federal penitentiary'. But the section contained no such requirement in 1928, when petitioner was convicted, and there is consequently no merit in the argument." The writ was denied. However, the opinion does not discuss the expressly retroactive provision added to section 644 in 1931. Cases are not authority for propositions not considered. (Fricker v. Uddo & Taormina Co. (1957), 48 Cal.2d 696, 701 [6], 312 P.2d 1085; Maguire v. Hibernia Sav. & Loan Soc. (1944), 23 Cal.2d 719, 730, 146 P.2d 673, 151 A.L.R. 1062.) The same may be said of People v. Spalis (1943), 56 Cal.App.2d 869, 873 [1], 133 P.2d 679; Spivey v. McGilvray (1938), 29 Cal.App.2d 357, 359 [1, 2], 84 P.2d 256; In re Schenk (1943), supra, 61 Cal.App.2d 168, 171–173, 142 P.2d 343.

Because of our conclusion that petitioner is entitled to his discharge for the foregoing reasons, other contentions which he advances need not be discussed.

The petition for habeas corpus is granted and petitioner is ordered discharged from custody.

GIBSON, C. J., and SHENK, TRAYNOR, SPENCE, and McCOMB, JJ., concur.

PEOPLE of the State of California, Plaintiff and Respondent,
v.
Roland A. SCHAUMLOFFEL and Edna Crutchfield, Defendants,

Roland A. Schaumloffel, Defendant and Appellant.*
Cr. 6268.

District Court of Appeal, Second District, Division 3, California.
May 29, 1959.

Hearing Granted July 22, 1959.

Physician was convicted of abortion on two counts. The Superior Court, Los Angeles County, Stanley Mosk, J., entered judgment and order denying motion for new trial, and the physician appealed. The District Court of Appeal, Parker Wood, J., held that were search of office of physician by police officers, who did not have a search warrant or warrant of arrest, was general and exploratory and resulted in seizure of confidential records, which were not connected with alleged abortion, for which arrest of physician was made, records were obtained by illegal search and seizure, and abortion convictions based on such records would be reversed.

Judgment and order reversed.

Criminal Law ⟹394.4(10)
Searches and Seizures ⟹3(1)

Where search of office of physician by police officers, who did not have a search warrant or warrant of arrest, was general and exploratory and resulted in seizure of confidential records, which were not connected with alleged abortion, for which arrest of physician was made, records were obtained by illegal search and seizure, and abortion convictions based on such records would be reversed. West's Ann.Pen.Code, § 274.

Homer C. Compton, Los Angeles, Brock, Fleishman & Rykoff, and Robert L. Brock, Hollywood, for appellant.

Edmund G. Brown, Atty. Gen., and N. B. Peek, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant Schaumloffel was accused, in three counts, of the crime of abortion, in violation of section 274 of the Penal Code. The counts related, respectively, to alleged abortions committed on Rosella Edgar, Betty Watts, and Betty Justsen. Prior to the trial, count 3 (relating to Justsen) was dismissed on motion of the prosecution. In a jury trial, defendant Schaumloffel was convicted on counts 1 and 2. He appeals from the judgment and the order denying his motion for a new trial.

Defendant Crutchfield was also accused in said count 2 with the crime of abortion, but upon her motion, at the close of the prosecution's case, the court dismissed that count insofar as it pertained to her.

Appellant Schaumloffel, who is a doctor of medicine, contends that the arresting officers illegally searched his office records and illegally seized records and papers belonging to him; that the conviction was based on evidence derived solely from the illegal search and seizure; that the court erred in denying appellant's motion to suppress the evidence based on such search and seizure; and that the court erred in overruling appellant's objections to the admission of that evidence.

Officer Zander testified that in 1952 or 1953 he received information from other police officers that appellant was performing illegal operations; in 1954 he (witness) received similar information from police officers in San Francisco; also in 1954 police officers in Los Angeles told him that a woman at the receiving hospital had told them that appellant had performed an abortion on her; in the latter part of 1956, he (witness) read a newspaper article wherein appellant asserted that someone had attempted to extort money from him by threatening to expose him for performing abortions; he (witness) interviewed John Russo, whom appellant had named as the extortionist, and was told by him that appellant had committed an abortion on Betty Barofsky; Russo also said that Barofsky told him that when she was in appellant's office he wrote, on a card, limited information about her; the card and the writing thereon, as described by her, were similar to certain cards and the writing thereon (later referred to herein) which were taken by the officer from appellant's office; he also talked to Barofsky, who made a statement which was in substance the same as the statement of Russo; he (witness) received information, by telephone from an unknown person, that a woman was coming from Las Vegas to appellant's office to have an illegal abortion performed on her, and that she would arrive at the office about 1 p. m. on January 29, 1957; the officer and three other officers placed the office under surveillance; about 1 p. m. of that day, an automobile arrived at the entrance of the building in which appellant's office was located; a woman got out of the automobile and entered the building, and a man drove the automobile to the rear of the building; the officer (witness) talked to the man, Mr. Thurmond, who said that he brought Mrs. Thurmond to appellant's office, and that she had made arrangements for appellant to perform an abortion on her; when Mrs. Thurmond came out of the office, she told the officer that appellant had performed an abortion on her; she also said that appellant had written her name and some information on a 5 by 7 card and had placed the card on a shelf near the operating table; then (about 2 p. m.) the four officers entered appellant's office and arrested him for committing abortions illegally; he (witness) searched appellant and the immediate premises; the search related primarily to seeking evidence as to the Thurmond abortion, but he was also seeking evidence regarding Barofsky; he took the following things from the office: a number of deposit slips from the drawer of the desk in the consultation office, loose sheets of paper, loose-leaf alphabetical notebook, and a 1956 diary; none of those things related to Thurmond or Barofsky; he took $600 from appellant's pockets, and he also took from appellant's pocket a small vial containing what appeared to be parts of a fetus; one group of patient records was in a filing cabinet in the nurse's office, and another group of such records was on a shelf by the operating table; he (witness) looked through the regular file of patient records, but he could not recall whether those records were 5 by 7 cards; he looked wherever it was apparent to him that such cards might be found; from the shelf, he took a number of 5 by 7 cards on which there was writing; the cards on the shelf were not in a box or cabinet but were "lying out" in the open; the names on those cards were names of persons unknown to the witness; he did not find a card that referred to Thurmond or Barofsky or Watts; one of the cards which he took from the shelf had the name "Rosella Edgar" on it; he took that card because it was similar to cards which had been described by Thurmond and Barofsky; when he took the Edgar card he anticipated that he would "contact her and see under what circumstances she had been" in appellant's office; he took cards from the shelf because those cards were separated from other cards in the office, and there were names and addresses on them; he wanted "to follow that [Edgar card] up" because it would tend to corroborate the charge against appellant on the Thurmond matter, and it would tend to support a charge against appellant with reference to Edgar; he did not find anything in the office relating to Edgar, other than the card with her name on it; a distinguishing factor of the cards was that names of women were on them; his (witness') experience had been that doctors who perform abortions do not keep proper records, and sometimes the records are cryptic or they report something "other than what they actually do"; prior to the arrest of appellant, the officer (witness) had no information relating to Edgar, Watts, or Justsen; he did not have a search warrant or a warrant of arrest; over a period of approximately seven years he had made about 100 arrests for the crime of abortion, and in connection therewith he had made searches; he had never obtained a warrant for the searches; as a matter of policy a search warrant is not sought; when he had obtained a search warrant in cases which did not involve abortion, he found "the procedure to be rather time consuming and cumbersome."

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* Opinion vacated 346 P.2d 393.

As stated in respondent's brief, apparently Officer Zander secured from Edgar the names of Watts and Justsen. Officer Zander testified that indirectly through the Edgar card, which he took from appellant's office, he secured the names of Watts and Justsen.

The Edgar card and the desk diary, which were taken from appellant's office, were offered in evidence by the prosecution, and they were received in evidence. Appellant objected to the offer of said articles on the ground that the search for and the seizure of those articles were illegal. The objection was overruled. Prior to the trial, appellant made a motion to suppress the evidence, which had been seized by the officers, on the ground that the search was illegal. During the trial appellant objected when the seized articles were offered in evidence, and he objected to the evidence which was obtained as a result of such seizure. Those objections, which were made on the ground that the search was illegal, were overruled. During the trial appellant was permitted to have a continuing objection to the offer of evidence which was based on the said search and seizure. The objection was overruled.

By information, filed in April, 1957, the defendants herein, Schaumloffel and Crutchfield, were accused of illegally performing abortions on Thurmond and Barofsky. In May, 1957, that information was dismissed.

In the trial of the present case, Edgar, Watts, and Justsen were witnesses called by the prosecution. The count as to Justsen (count 3) pertained to an alleged offense occurring about 2½ years before the alleged offense involving Edgar. As above stated, the count relating to Justsen was dismissed before the trial.

Edgar and Watts testified, among other things, that appellant gave them pelvic examinations. It is not necessary to state the details of their testimony. The testimony of each of them was to the effect that appellant illegally performed an abortion on her. The testimony of appellant was to the effect that he did not perform an abortion on either of them. Appellant objected to the testimony of Edgar, Watts, and Justsen on the ground that their names as witnesses in the case were obtained as a result of illegal search and seizure. The objections were overruled.

According to Officer Zander's testimony, the officers entered appellant's office for the purpose of arresting him on a charge of illegally performing an abortion on Mrs. Thurmond; they arrested him on that charge; and they searched him and his office for the purpose of obtaining evidence in connection with that arrest and in connection with the alleged abortion performed on Barofsky. The officers searched all of the doctor's records regarding his patients, and they looked wherever it seemed to them that there might be 5 by 7 cards. It thus appears that they ransacked and looked at all his medical records which were confidential as between the doctor and his patients, and they took many of such records and carried them away from his office. The charge which was made in connection with the original purpose of entering appellant's office (that is, the charge relating to Thurmond) was dismissed. Also, the charge against appellant with respect to Barofsky was dismissed. The Edgar card which the officers carried away from appellant's office was not connected in any way with the charge relating to Thurmond or Barofsky. Prior to the arrest, the officer had no information relating to Edgar, Watts, or Justsen. When the officer took the Edgar card it was his intention to use it in locating Edgar, in interviewing her, and in investigating the circumstances under which she was a patient of appellant. The names of Watts and

Justsen were obtained from Edgar, by the officer, as a result of having taken the Edgar card from the office. The Edgar card and the desk diary were placed in evidence by the prosecution. In the diary, under the date of January 24, 1957, there were the words, "Betty Justsen and Edgar, Rosella." Also, in the diary, under the date of January 29, there was the word, "Edgar." Neither the Edgar card, nor the diary, was connected in any way with the specific offense for which the arrest was made, namely, the charge relating to Thurmond. Possession of that card or diary by the doctor was not a public offense or illegal. That card was not contraband or an offending article of any kind. It appears that the search was general and exploratory and resulted in the seizure of confidential records which were not connected with the offense for which the arrest was made.

In People v. Mills, 148 Cal.App.2d 392, 306 P.2d 1005, the defendant was convicted on 13 counts, including charges of grand theft, violating the Corporate Securities Act, Corporations Code, § 25000 et seq., and conspiracy to commit those crimes. A police officer, posing as a prospective investor, agreed to buy certain shares of stock from defendant. The officer knew that defendant did not have a permit to sell the stock. While the officer was in defendant's office (a hotel room) and was completing the purchase of the stock, he arrested the defendant for violating the Corporate Securities Act. Then other officers, who had been waiting outside, entered the room and were directed by the officer (who had purchased the stock) to search the entire office for all things having to do with stock, stock promotion, and other investors. There was no search warrant or any warrant. The entire office was searched by six persons, during a period of approximately forty-five minutes. Many documents were seized in the search. The search was directed toward the discovery of evidence of the commission of similar crimes. At the trial therein the prosecution witnesses who testified regarding the 12 counts (other than the count involving the purchase by the officer) were persons whose identity and testimony had been discovered or procured through the seized documents. In that case it was said, 148 Cal.App.2d at page 399, 306 P.2d at page 1010: "The search was wholly exploratory, a quest for evidence of other crimes. Such a procedure has been condemned repeatedly and for many years." It was also said therein, 148 Cal.App.2d at page 400, 306 P.2d at page 1011: "This condemnation of exploratory searches is fully supported by decisions of the United States Supreme Court and other Federal and State tribunals; and the exclusion of illegally seized documents extends to other evidence which is derived from those documents directly or indirectly." It was also said therein, 148 Cal.App.2d at page 401, 306 P.2d at page 1012: The search "may be exercised in aid of discovery of evidence of the particular crime for which the arrest is made." On page 402 of 148 Cal. App.2d, on page 1012 of 306 P.2d of that case, it was said: "Where the bounds of a reasonable search have been exceeded, as here, neither the evidence wrongfully seized nor any of its derivatives may be used against defendant." The judgment therein was reversed as to the 12 counts which were based on evidence derived from seizure of documents that were not connected with the crime for which the arrest was made; and the judgment was affirmed as to the count based on the sale to the police officer. The opinion in that case, prepared by Justice Ashburn on behalf of the court, cites and analyzes many cases on the subject of search and seizure.

In the Mills case, just referred to, it was said (148 Cal.App.2d at page 403, 306 P.2d at page 1013) that People v. Martin, 382 Ill. 192, 46 N.E.2d 997, "is factually four-square with the case at bar, and it was held that the witnesses discovered through the wrongfully seized documents could not testify to the other crimes disclosed by those documents." The charge in the Martin case was conspiracy to commit abortion. In the Martin case, the Supreme

Court of Illinois said (382 Ill. at page 196, 46 N.E.2d at page 1000): "There is no manner of question but what the several searches and seizures of papers obtained upon the premises of plaintiff in error, Martin, were illegal and without any pretense of compliance with the law." It was also said in that case (382 Ill. at page 203, 46 N.E.2d at page 1002) that the evidence "was obtained from the matters illegally seized, and this being our conclusion, the evidence should have been suppressed and excluded."

Respondent cites People v. Schmitt, 155 Cal.App.2d 87, 317 P.2d 673, wherein a chiropractor and another person were convicted of conspiracy to commit grand theft. That case is distinguishable from the present case. When the chiropractor was arrested in his office, the officers had a warrant for his arrest on a misdemeanor charge of false advertising, but they did not have a search warrant. In that case there was a general ransacking of defendant's office, but the question was whether the evidence obtained illegally was used against defendant. It was said therein (155 Cal.App.2d at page 103, 317 P.2d at page 684) that the evidence used was obtained in a search that was permissible under the charge for which defendant was arrested. It was also said therein (155 Cal.App.2d at page 102, 317 P.2d at page 684): The "medical records which were received in evidence were connected with the commission of the crime for which he was arrested."

Respondent also cites United States v. Lindenfeld, 2 Cir., 142 F.2d 829, where there was a seizure of patient record cards which were in possession of a physician. Defendant therein was convicted of unlawfully issuing prescriptions of morphine to narcotic addicts. That case is distinguishable from the present case. The defendant therein was required to keep records of the drugs distributed by him. The federal agents seized all of his cards containing the names of patients for whom he had prescribed drugs. It was held therein that the seizure was legal. In that case, the records which were seized were records which the federal agents were authorized by law to examine. In the present case, the records were not public records but were private and confidential records of the physician.

In the present case the convictions were based upon evidence that was obtained by illegal search and seizure.

In view of the above conclusion, it is not necessary to discuss other contentions on appeal.

The judgment (as to both counts) and the order denying the motion for a new trial are reversed.

VALLÉE, J., concurs.

SHINN, P. J., did not participate.

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170 Cal.App.2d 763

SUN GARDEN PACKING COMPANY, a corporation, Plaintiff, Cross-Defendant and Respondent,

v.

Olinto NARDUCCI and Vincent Luchini, Defendants, Cross-Complainants and Appellants.

Civ. 9415.

District Court of Appeal, Third District, California.

May 28, 1959.

Rescission action. The Superior Court, San Joaquin County, R. M. Dunne, J., rendered judgment for plaintiff and defendants appealed. The Third District Court of Appeal, Van Dyke, P. J., held that evidence sustained finding that it had been intent of parties that plaintiff should receive immediately title to undivided one-half interest in lease, asparagus crop and personal property, rather than merely an interest in partnership which owned such property, and held that since defendants had only interest in partnership to convey, there was a failure of consideration.

Affirmed.

1. Sales ⚿52(5)

In action for rescission, evidence sustained finding that it had been intent of parties that plaintiff should receive immediately title to undivided one-half interest in lease, asparagus crop and personal property, rather than merely an interest in partnership which owned such property, and that since defendants only owned interest in partnership, there was a failure of consideration.

2. Sales ⚿130(3½)

In action to rescind contract for purchase by plaintiff of undivided one-half interest in lease, asparagus crop and personal property, on ground that there was a failure of consideration since defendants did not own lease, crop and personal property but merely an interest in partnership which owned same, whether lapse of time between knowledge of right to rescind and election to do so furnished ground for successful claim of waiver of right to rescind was question for trial court to settle factually; and, on record presented, it was not error to find for plaintiff.

Mazzera, Snyder & DeMartini, Stockton, for appellants.

Boccardo, Blum, Lull, Niland & Teerlink, San Jose, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment rescinding a contract. Prior to October 7, 1947, appellant Narducci was the owner of some 800 acres of land suitable for the growing of asparagus. On that day he leased the same to appellant Luchini and to Louis Gianni and Giovanni Sani. The term of the lease was fourteen cropping years. On December 18, 1947 the three lessees and appellant Narducci formed a partnership for the specific and sole purpose of growing asparagus on the leased property. Thereafter the lease was assigned to the partnership. In 1955, the corporate respondent which operates a cannery sought to purchase the partnership's lease in order to obtain the asparagus crop growing on the property. Negotiations therefor were carried on through a Mr. Williams, a real estate broker. Appellants Narducci and Luchini were willing to sell their interests if Gianni and Sani did not object. The latter two refused to sell, but Williams and an agent of respondent assured appellants that if they would sell their interests respondent "would take care of" Gianni and Sani. The negotiations between respondent and appellants continued and resulted in the execution of title of documents as follows: (1) An assignment from appellants to respondent dated March 10, 1955, which, after reciting that appellants were the owners of a one-half interest in the lease, declared that appellants did thereby "sell, assign and transfer over to Sun Garden Packing Company, a California Corporation, all our one-half interest in and to said Lease." (2) A consent to the assignment by appellant Narducci as owner of the land covered by the lease. (3) An acceptance by respondent Sun Garden Packing Company of the assignment whereby it also bound itself to perform the terms, covenant and conditions of the lease. (4) A document called a "Bill of Sale" which document recited that appellants did thereby sell, assign, transfer and set over to respondent their "undivided one-half (½) interest in and to" certain described personal property "included in Empire Ranch Lease, * * * by and between Olinto Narducci, as Lessor, and Louis Gianni, Giovanni Sani and Vincent Luchini, as Lessees." This document described the personal property sold and stated that the bill of sale covered all equipment "now owned by the partnership consisting of Olinto Narducci, Vincent Luchini, Louis Gianni, and Giovanni Sani" and on the ranch premises. By that document appellants also warranted that they owned an undivided one-half interest in the described personal property free and clear of liens and encumbrances, that there were no bills outstanding against the property; and they warranted the sale of their "undivided one-half interest in and to said personal property" against all persons lawfully claiming or to claim the same. At the trial of this case it was stipulated that the lease and the personal property were assets of the partnership.

Section 15027, Subdivision (1), of the Corporations Code provides that:

> "A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, * * *; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled."

Respondent agreed to pay appellants $80,000 in consideration of the bargain between them and after the execution of the aforementioned documents, respondent endeavored to enter into possession of the leasehold with Gianni and Sani as owners of the other one-half interest. But Gianni and Sani refused to admit them, claiming that as nonselling partners they were entitled to exclusive possession as against respondent and the exclusive right to conduct the business of the partnership without interference from or intrusion by respondent. It appears that the primary motive of respondent in purchasing from appellants was to obtain asparagus for their cannery. That commodity was in scarce supply and at the time commanded a high price on the market. After attempting to obtain a share of the asparagus—the attempts including amicable negotiations with Gianni and Sani and the filing and later dismissal of a suit in partition—respondent began this action for rescission. The trial court granted respondent this relief, basing its action upon failure of consideration. Appellants have appealed, contending that the evidence is insufficient to support the judgment and that respondent, by failing to rescind promptly, had elected to affirm the transaction.

The trial court found that appellants had sold to respondent an undivided one-half interest in the lease and in the crop of asparagus growing on the property and in the personal property described in the bill of sale; that it was the intention of appellants by the sale to vest in respondent such undivided one-half interest; that prior to the sale appellants had entered into a partnership agreement with Gianni and Sani and that the lease had been assigned to the partnership which was the owner thereof; that thereafter appellants no longer had any right, title or interest which they could convey to respondent but that prior to the sale they did not make known to respondent that the partnership owned the subject matter of the sale and on the contrary had represented to respondent that appellants had title to the property sold; that respondent relied on the representations and so relying consummated the sale and paid the consideration to appellants; that the purported assignment of the lease conveyed nothing to respondent resulting in a failure of consideration; that the partnership agreement contained a restrictive covenant providing that Gianni and Sani should have the right of control and supervision over all of the farming operations of the partnership and the business thereof and that equipment and property owned by the partnership should not be used for other than partnership purposes; that it was neither the intention of appellants nor of respondents that a sale of the lease and personal property should be made subject to said restrictive covenant; that respondent at no time prior to consummation of the sale and payment of the price had had any knowledge of the existence of said restrictive covenant in said partnership agreement nor of any of the terms and conditions of that agreement; that after the payment of the price respondent endeavored to take possession of an undivided one-half interest in the property sold, but that Sani and Gianni had refused to deliver possession thereof, claiming that under the partnership agreement they were the sole owners thereof; that during the year 1955 Sani and Gianni had converted to their own use all of the leasehold interest, all of the asparagus crop grown and harvested upon the property, and all of the personal property; that respondent had received nothing whatsoever for the purchase price and that on June 1, 1955, respondent had notified appellants that it cancelled and rescinded the agreement of sale between them for failure of consideration and had demanded return of that part of the price paid in cash with cancellation of the note and chattel mortgage securing the note for the balance of the price. As conclusions of law from the foregoing findings of fact, the court concluded that the respondents were entitled to the relief of rescission and judgment was thereafter entered accordingly.

Attacking the findings as unsupported by the evidence, appellants contend that there is no evidence to support the following findings: That it was the intention of appellants by the sale to vest in respondent an immediate right to receive an undivided one-half interest in the lease, the asparagus crop and the personal property; that the lease and the personal property were assets of the partnership; that appellants, as individuals, had no interest in the lease and personal property which they could convey; that the purported assignment of the lease and the bill of sale conveyed nothing. Appellants insist that the evidence conclusively establishes, contrary to the findings, that respondent was willing to and did purchase the partnership interest of defendants, knowing that was what it was purchasing because it wanted to have an advantage in dealing with Gianni and Sani in an effort to control the crop of asparagus, being aware at all times of the existence of the partnership and of its ownership of the lease and personal property.

[1] First, as to the intention of the parties to the bargain that thereby respondent should receive immediately a title to an undivided one-half interest in the lease, the asparagus crop and the personal property, the finding is supported by ample evidence. The form of the documents executed at the conclusion of and in consummation of the bargain are in harmony with the court's finding as to intention. They purport to convey a common tenancy title, not an interest in a partnership. There was direct testimony that it was the desire of respondent to buy such an interest in the asparagus operation as would entitle it to take and use one-half of the asparagus crop and that this was known to appellants. Appellant Narducci testified that he knew respondent wanted to "buy something, that * * * would give them some asparagus" and that he supposed that when respondent had paid for what he sold it would "be able to get some asparagus"; that he knew respondent wanted to buy something that would give it one-half the asparagus. Appellant Luchini testified that when he talked with the agent of respondent and with Mrs. Williams they told him they were interested in getting asparagus for respondent; that they wanted to get his quarter and Narducci's quarter so that between them they would get one-half the asparagus and that he (Luchini) wanted to do whatever had to be done in return for the $80,000 so that respondent would get the asparagus; that when he signed the papers he supposed that respondent would get one-half of the asparagus not only for that year but year by year to the end of the lease. There is much more than this but that is enough to support the court's finding that it was the intention of the parties to the bargain that thereby respondent would immediately receive title to an undivided one-half interest in the lease, the asparagus crop and the personal property.

Turning now to the second assignment of insufficiency of evidence, it is apparent that the language of the findings attacked was adopted in view of the court's finding as to the object of the parties and as to their intentions concerning the completed bargain. The challenged findings are to the effect that, because the lease and the personal property had become assets of the partnership, appellants could no longer convey to someone else the same interest which they had already conveyed to the partnership and since the transfer of such an interest was the subject of the bargain the purported assignment of the lease and bill of sale of the personal property did not convey that interest. Therefore, in view of the real bargain and of the intention of the parties to that bargain, there was a failure of consideration. Appellants argue that they did have an interest which they could and, by the documents they executed, did convey. Those documents, they argue, were sufficient to convey whatever interest they had. Arguendo, this may be conceded, but the concession does not detract from the court's findings of failure of consideration in view of the subject of the bargain being made and the intention of the parties with respect thereto. The trial judge summed up the matter succinctly at the close of the evidence as follows: "They didn't buy an interest in the partnership. They bought an interest in the leasehold, and you came in here when they tried to take possession, did everything you could to keep them out. Now, you are taking the position that they shouldn't get their money back. I can't reconcile it, so I will dispense with any briefs and plaintiff will take judgment as prayed for."

Appellants further contend that respondent was willing to and did purchase a partnership interest, knowing it to be such and therefore got exactly that for which it bargained. In support of this contention appellants refer to various portions of the evidence. Thus they refer to the testimony of a Mr. Hamm, appellant Narducci's attorney, who drafted the various documents executed in consummation of the bargain and who stated that Narducci and Williams told him that there was a partnership and that Narducci and Luchini were selling out their half interest in the lease and in the asparagus crop to respondent. They refer to the testimony of an agent for respondent to the effect that asparagus was in great demand in 1955 and that it was necessary for respondent to have a constant and ample flow of asparagus each year thereafter. They refer to the testimony of Luchini that Williams and two officers of respondent had promised him "to take care of everything" and to "take care of Sani and Gianni." They refer to the documents executed in which there appear some references to a partnership. These portions of the evidence do no more than raise a conflict with the evidence hereinbefore referred to which supports the trial court's resolution of the issues. Mr. Hamm did not testify that he ever told respondent anything about the existence of the partnership and he said he had not been shown any partnership agreement until after the bargain had been made. One of the agents of respondent testified that Mr. Hamm had told him that he knew of nothing that "combined a partnership with the lease".

In further support of their claim that respondent was fully aware of the existence of the partnership, or at least was charged with knowledge thereof, appellants refer to testimony by themselves as witnesses that throughout the negotiations they requested respondent's representatives with whom they dealt to be sure that Gianni and Sani would be satisfied with their sale to respondent and that they received assurances that Gianni and Sani would be taken care of and that appellants need not concern themselves about that matter. They point to testimony that one of respondent's representatives saw Gianni at the ranch before the bargain was closed but did not ask him what interest he had in the property nor why he was apparently in possession. Such matters again go no farther than to raise conflict. There was the lease which showed on its face that Gianni and Sani were co-lessees and, therefore, cotenants under the lease, making the apparent fact of their possession harmonious and consistent with the lease provisions and consistent further with the conveyance by appellants of the interest in the leasehold, which, as the court found, respondent was interested in buying. There was the form of the bargain documents actually executed from which could be inferred an innocent ignorance on the part of respondent and its agents that appellants could not convey the particular interest which they purported to convey and which respondent wanted to buy. There was the great need of respondent to obtain asparagus for its cannery, particularly during the year in which the bargain was made, indicating they would not have paid $80,000 for a mere interest in the profits that might through the years inure to them if they purchased appellants' partnership interest. It is clear from the record that the trial court was not compelled as a matter of law to hold that respondent had or was charged with such knowledge as to compel findings that it knowingly bought partnership interests and therefore could not complain or claim failure of consideration when it got nothing more.

[2] Finally, appellants contend that respondent did not rescind or attempt to rescind with sufficient promptness but actually elected to and did affirm the transaction. It appears that after the bargain had been consummated and respondent had endeavored to enter upon the real property as cotenants with Gianni and Sani and had been prevented from doing so, respondent, on April 6, 1955, filed a suit against Gianni and Sani for partition and the appointment of a receiver. In the complaint respondent alleged that it was co-owner and co-lessee of an undivided one-half interest in the leasehold by reason of the assignment of Narducci and Luchini of such undivided one-half interest. Before filing the suit respondent had attempted to work out its problems by an amicable deal with Gianni and Sani. Chronologically, with respect to lack of diligence in declaring rescission, the following appears in the record: The sale was completed March 11, 1955. On March 14th Gianni and Sani refused to allow respondent's representative to take an inventory, stating that appellants were his "partners" and had had no right to sell their interest in the lease. About ten days or two weeks later the written partnership agreement was found and disclosed to respondent. For several weeks thereafter respondent tried unsuccessfully to arrange matters so that it could get the asparagus it needed for its cannery. On April 6th respondent filed the partition action. On April 19th its motion for appointment of a receiver was argued before the court and submitted. On May 5th the court denied the motion for the appointment of a receiver. On July 22d respondent dismissed its partition action. On August 1, 1955, it began the present action for rescission. Whether or not the lapse of time between knowledge of the right to rescind and the election to do so furnishes ground for a successful claim of waiver of the right to rescind was a question for the trial court to settle factually. French v. Freeman, 191 Cal. 579, 590, 217 P. 515; Williams v. Marshall, 37 Cal.2d 445, 455, 235 P.2d 372. Upon this record the decision of the trial court upon the point of promptness and waiver cannot be disturbed.

The judgment appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.

170 Cal.App.2d 709

Joseph HEFFRON and Ethel Heffron, Plaintiffs and Appellants,

v.

LOS ANGELES TRANSIT LINES, a corporation, M. F. Wiltgen, Doe I, II, III, IV AND V, Defendants.

Los Angeles Transit Lines, Respondent.

Civ. 23379.

District Court of Appeal, Second District, Division 2, California.

May 27, 1959.

Hearing Denied July 22, 1959.

Parents of deceased brought action against bus company and others for death of deceased. The Superior Court of Los Angeles County, Jerold E. Weil, J., entered judgment adverse to the parents, and they appealed. The District Court of Appeal, Herndon, J., held that where action was commenced on November 2, 1956, nearly 10 months after death of deceased, and answer was filed on December 21, 1956, and pretrial hearing was held on September 25, 1957, and at conclusion of such hearing cause was set for trial on November 26, 1957, and on November 26, 1957 both parties appeared in master calendar department and announced "ready for trial," but, due to congested calendar, Supreme Court, on its own motion, ordered trial continued to February 24, 1958, and on February 5, 1958 plaintiffs served on one of the defendants a set of 52 quite comprehensive written interrogatories, and that defendant on February 17, 1958 filed quite extensive objections to the interrogatories, it was a reasonable exercise of discretion for Superior Court to sustain the objections to the interrogatories, primarily on ground that they were untimely and tardy.

Judgment affirmed.

1. Discovery 🔑53

Where action for wrongful death was commenced on November 2, 1956, nearly 10 months after death of deceased, and answer was filed on December 21, 1956, and pretrial hearing was held on September 25, 1957, and at conclusion of such hearing cause was set for trial on November 26, 1957, and on November 26, 1957, both parties appeared in master calendar department and announced "ready for trial," but, due to congested calendar, Superior Court, on its own motion, ordered trial continued to February 24, 1958, and on February 5, 1958, plaintiffs served on one of the defendants a set of 52 quite comprehensive written interrogatories, and that defendant on February 17, 1958, filed quite extensive objections to the interrogatories, it was a reasonable exercise of discretion for Superior Court to sustain the objections to the interrogatories, primarily on ground that they were untimely and tardy. West's Ann.Code Civ.Proc. § 2030.

2. Discovery 🔑90

Where, after witness for plaintiffs had testified in action for wrongful death, as to her observations relating to circumstances of accident, counsel for plaintiffs elicited information that representative of defendant's insurer had interviewed witness and had made notes during interview, but witness testified that she had never signed any statement and that she did not know what insurer's representative had written during their conversation, and plaintiffs claimed no right to impeach testimony of witness and asserted no need to refresh her recollection, trial court properly refused request of plaintiff's counsel that he be permitted to examine whatever writing insurer's representative had prepared.

3. Discovery 🔑90

In any given situation, determination of question whether attorney-client privilege exists which will make communication not subject to discovery, must be made on facts asserted as a basis for the privilege, and such determination is for trial court in the first instance.

4. Discovery 🔑90

Where communication appears to serve a dual purpose, one for transmittal to an attorney in course of professional employment, and one not related to that purpose, question presented to trial court in determining whether communication is privileged and not subject to discovery, is which purpose predominates, and question on appeal is whether conclusion of trial court on the facts is correct, or has resulted in an abuse of discretion.

5. Discovery 🔑90

Where there was an agreement between bus company and its insurance carrier that insurance carrier would defend company against claims and losses arising from accidents, and insurance carrier was given right to make investigations for purpose of enabling him to prepare defenses to such claims and suits, and bus driver made his report of fatal accident in triplicate, and two copies of the report went to company's statistical department and were destroyed after statistical data were taken therefrom, and third copy went to attorneys for insurance carrier in accordance with agreement, report was privileged and was therefore not subject to discovery in death action against company.

6. Discovery ⚷90

Transmission by bus company of privileged communication to attorney, who was to defend wrongful death action against company, through agency of company's insurance carrier, did not destroy privilege of attorney-client, and did not make the communication subject to discovery in wrongful death action.

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Ellis J. Horvitz, Max Candiotty, Los Angeles, S. M. Dana, Hollywood, for appellants.

Henry R. Thomas, Henry F. Walker, Los Angeles, for respondent.

HERNDON, Justice.

Appellants sued to recover damages for the death of their 12-year old son who was killed when, in some unexplained manner, he came into contact with a bus owned and operated by respondent Los Angeles Transit Lines. The trial court made findings of fact which included a finding that the operator of the bus was not negligent at the time and place of the accident, i. e., "* * * that at the said time and place the said bus * * * was operated in a careful and prudent manner * * *"

Appellants concede the sufficiency of the evidence to support the quoted finding, but on their appeal from the judgment they contend that the trial court erred (1) in sustaining respondent's objections to certain written interrogatories which appellants served upon respondent for discovery purposes shortly before the date of trial; and (2) in denying appellants' motions made during the trial seeking an examination of certain documents in possession of respondent's counsel.

The main issue in this case and the one to which counsel have directed the greater part of their arguments is simply this: did the trial court abuse its discretion in sustaining respondent's objections to some 52 interrogatories which were served upon respondent only a few days before the date of trial? It appears that the ruling of the trial court was based primarily upon the conclusion that appellants' interrogatories were untimely and tardy in that they were served at so late a date that respondent's objections thereto came on regularly for hearing on the date previously set for the commencement of the trial.

The facts bearing upon the reasonableness of the ruling under discussion may be stated briefly. This action was commenced on November 2, 1956, nearly ten months after the child's death. Respondent's answer was filed on December 21, 1956. A pre-trial hearing was held on September 25, 1957, and at the conclusion of this hearing the cause was set for trial on November 26, 1957. The pre-trial conference order recited that the parties were ready for trial and made no reference to any discovery proceedings remaining to be taken except that arrangements would be made prior to November 1, 1957, for respondent to examine the bicycle which decedent was riding on the date of the accident. On November 26, 1957, both parties appeared in the master calendar department and announced "ready for trial", but due to a congested calendar the court, on its own motion, ordered the trial continued to February 24, 1958.

Among the new discovery statutes enacted at the 1957 session of the Legislature, and made operative January 1, 1958, was Code of Civil Procedure section 2030 providing that "[a]ny party may serve upon any adverse party written interrogatories to be answered by the party served * * *." The section further provides, among other things: "Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined."

On February 5, 1958, appellants served upon respondent a set of 52 written interrogatories. Respondent's objections to the interrogatories were filed on Monday, February 17, 1958, and were noticed for hearing on Monday, February 24, 1958, which was the date previously set for the commencement of the trial. It appears that compliance with the usual requirement of a five-day notice of hearing prevented an earlier hearing on the objections. Under then effective rules of the Los Angeles County Superior Court, all such matters were heard on specified days in Department 38.

On February 24, 1958, at 9:15 a. m. the cause was called for trial in the Master Calendar Department and both sides announced ready. The presiding judge transferred the cause to Department 64, the trial department in which Judge Weil presided. On the same morning the objections to the interrogatories came on for hearing in Department 38 before Judge Gumpert. Since the record indicates that the trial was commenced in Department 64 at 9:45 a. m., we infer that the hearing on the objections in Department 38 was concluded between 9:15 and 9:45 a. m.

The interrogatories were quite comprehensive. They sought, among other things: (1) discovery of the names of any witnesses to the accident; (2) an examination of any statements made by such witnesses; (3) information concerning respondent's rules for taking statements of witnesses, its procedures in making investigations and the date counsel was retained; (4) information concerning the results of respondent's investigation of the accident and whether photographs were taken; (5) information concerning any physical examination of the bus driver and any records relating to the mechanical characteristics of the bus which figured in the accident.

The objections to the interrogatories were also quite extensive. The first objection went to all of the interrogatories and was made upon the ground that they were filed "* * * so late and so close to the date of trial (February 24, 1958) as to make the same improper and tardy and to constitute an undue interference with the orderly process and conduct of the Court and its calendar." In addition, some 53 specific objections were interposed on various grounds including privilege, incompetency, lack of relevancy or materiality, and infringement of constitutional guaranties against unreasonable searches.

Judge Gumpert sustained respondent's objections to the entire set of interrogatories. According to a statement made by appellants' counsel during the course of the trial, the ruling was based primarily upon the tardiness of the service of the interrogatories. However, the court expressed the view that respondent's objections on the ground of privilege were valid at least with respect to a number of the interrogatories. Appellants did not move for a continuance either in the Master Calendar Department or in the trial department.

[1] In the light of the circumstances above recited, we hold that Judge Gumpert's ruling constituted an entirely reasonable exercise of the discretion which the trial courts must exercise in the proper control of discovery proceedings. Without reasonable judicial control, the instruments of discovery are susceptible to abuse and may be utilized for purposes of delay, annoyance and harassment. If a reasonable control is exercised, the salutary purposes of discovery will be served, abuses will be prevented and undue interference with orderly procedures will be avoided.

The decisions indicate that under the Federal Rules of Civil Procedure the trial court may properly exercise its discretion in sustaining objections to interrogatories on the ground that they were served too late. United States for Benefit of General Electric Supply Corp. v. W. E. O'Neil Const. Co., D.C., 1 F.R.D. 529, 530; Securities and Exchange Commission v. Timetrust, Inc., D.C., 33 F.Supp. 590. In 7 Cyc.Fed.Proc., 3rd ed., p. 476, sec. 25.469, it is said: "Interrogatories served long after commencement of the action and a short time before the case will be reached for trial have been held to come too late."

In Barron & Holtzoff, Federal Practice & Proc., Rules Edition, Vol. 2, p. 470, sec. 773, it is said: "An objection that interrogatories were served too late must be determined by the court in the exercise of its sound discretion, there being no specific provision on this point."

The federal practice of course is not controlling here. But it does illustrate the need for the discretionary power for which respondent argues, and "* * * our courts [are] free to consider those decisions for such persuasive value as their reasoning may have." City and County of San Francisco v. Superior Court, 161 Cal.App.2d 653, 657, 327 P.2d 195, 198. Like the Federal Rules, 28 U.S.C.A., our statute does not specify a definite time within which interrogatories must be served, nor does it expressly authorize the trial court to reject interrogatories tardily served. But, of necessity, as we have pointed out, a substantial area of discretion must be vouchsafed to the trial judges to compel promptness within reasonable limitations.[1]

Under former Code of Civil Procedure, section 1000,* which was superseded in 1957 by the new discovery statutes, the trial court was vested with a wide discretion to determine the conditions under which discovery and inspection of documents would be allowed. As stated in Union Oil Co. of California v. Superior Court, 151 Cal.App.2d 286, 292, 311 P.2d 640, 643: "[T]he rule is well established that 'the trial court's action with respect to an inspection sought under section 1000 is discretionary within the field of reason and justice, that all intendments are in favor of the validity of the court's order, and that the order will not be interfered with unless a clear abuse of discretion is shown.'" See also Union Trust Company of San Diego v. Superior Court, 11 Cal.2d 449, 463–464, 81 P.2d 150, 118 A.L.R. 259.

An analogous situation is presented in the statutory requirement that proceedings be stayed until a nonresident plaintiff files a cost bond requested by defendant. Code of Civil Procedure, § 1030. That statute does not specify the time in which a request for cost bond must be filed, nor does it authorize the trial judge to reject the defendant's request as untimely. But in Straus v. Straus, 4 Cal.App.2d 461, 463, 41 P.2d 218, 42 P.2d 378, defendant filed a request for a bond the day before the case was set for trial. Although no bond was filed, the court proceeded to try the case at the time set. In upholding the trial court's action, this court held that defendant "* * * waived his right to make such demand, in the absence of some affirmative showing which would excuse the delay. A defendant has no right under the section cited to cause 'a continuance of the trial or delay proceedings or interfere with the business of the court' without good cause shown." Thus undue delay in making a demand for a cost bond may operate as a waiver of the right. Straus v. Straus, supra, 4 Cal.App.2d 461, 41 P.2d 218, 42 P.2d 378; see California Civil Procedure Before Trial, p. 238. Similarly, in the exercise of its judicial discretion the trial court may deny an untimely request to amend the pleadings "* * * in the absence of a satisfactory excuse for the delay in making application to amend." Davies v. Symmes, 49 Cal.App.2d 433, 440, 122 P.2d 102, 106; Manha v. Union Fertilizer Co., 151 Cal. 581, 584, 91 P. 393.

As the foregoing discussion indicates, the practical necessity for the exercise of a sound discretion in the proper judicial control of procedural machinery has long been recognized. See Hays v. Superior Court, 16 Cal.2d 260, 264–265, 105 P.2d 975. The circumstances of the instant case provide a classic illustration of that necessity. Had Judge Gumpert overruled respondent's objections and required that the interrogatories be answered, there would have been an inevitable delay in the trial. A motion for a continuance in the trial department almost certainly would have been made. In this light it seems most reasonable to regard appellants' late service of their interrogatories, and their answering ready for trial prior to a ruling on the objections, as sufficient to constitute a waiver of any right to further discovery through means so tardily invoked. The new discovery law was signed by the Governor on July 6, 1957. Counsel for appellants, knowing that the new law would become operative on January 1, 1958, and knowing the trial of this action had been continued to February 24, 1958, could and should have had their interrogatories prepared so that they could be served very promptly after the new law became effective. The record is devoid of any showing of excuse or justification for their failure so to do.

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[1] "In view of the wide discretion vested in trial judges to protect against abuse, as well as to enforce discovery, the significance of an able trial bench to sound and just judicial administration is further emphasized." (Louisell, Discovery Today, 45 Cal.L.Rev. 486, 514.)

* Now section 2031.

[2] At the trial a Mrs. DeKorven was called as a witness for appellants. After she had testified to her observations relating to the circumstances of the accident, counsel for appellants elicited the information that a Mr. West, representing respondent's insurer, had interviewed her and had made notes during the interview. Mrs. DeKorven testified that she had never signed any statement, and that she did not know what Mr. West had written during their conversation. At this point appellants' counsel requested that he be permitted to examine whatever writing Mr. West had prepared. Respondent opposed the request and the court denied it.

Appellants now argue that there was meager and conflicting evidence on the issue of negligence and "[i]t may well be that such disclosure would lead plaintiffs to the discovery of sufficient evidence to establish defendant's negligence." However, Mrs. DeKorven was appellants' witness and she testified fully as to her recollection of the accident. Even assuming that the investigator's notes were subject to plaintiffs' right of inspection (cf. City and County of San Francisco v. Superior Court, supra, 161 Cal.App.2d 653, 655, 327 P.2d 195; Holm v. Superior Court, 42 Cal.2d 500, 507, 267 P.2d 1025, 268 P.2d 722; Union Oil Co. of California v. Superior Court, supra, 151 Cal.App.2d 286, 292, 311 P.2d 640) appellants have failed to indicate in any manner how they were prejudiced by their inability to inspect the investigator's notes. Mrs. DeKorven did not read or sign any statement. Appellants claimed no right to impeach her testimony and asserted no need to refresh her recollection. This assignment of error must be rejected.

Marshall Wiltgen, the driver of the bus, was called as a witness for the defense. On cross-examination, Wiltgen testified that after the accident he had made a report pursuant to respondent's rules. Appellants then moved to examine said statement to which motion respondent objected on the ground of privilege. Counsel stipulated that the court might determine the question of privilege on the basis of the affidavits which respondent had filed in support of its objections to appellants' interrogatories. These affidavits developed at considerable length the procedures followed by respondent and its insurance carrier, the Transit Casualty Company, in conducting investigations of accidents. They disclosed an agreement between respondent and its insurance carrier whereby the latter agreed to defend respondent against claims and lawsuits arising from accidents and was given the right to make investigations for the purpose of enabling it to prepare defenses to such claims and suits. It was stated that the insurance contract required respondent to cooperate with the insurance carrier in securing witnesses, obtaining statements, etc. One of said affidavits contained the following averments: "That all of the investigation with respect to this accident and the resulting litigation has been done by Transit Casualty Company. That most of the investigation of this action was by Burke West, who is also an attorney at law. That, from experience, said Transit Company has learned that each accident in which an injury has been involved, is a potential lawsuit, for which reason Transit Casualty Company, in its investigation of accidents, including the securing of statements from witnesses, is motivated primarily by its desire to properly prepare a defense for possible litigation. For that reason, all witness statements are transmitted to attorneys for said Transit Casualty Company and are retained by the attorney who is selected to defend said litigation. The requirement that operators of busses and streetcars secure names and addresses of witnesses, where possible, has been adopted by Transit Casualty Company in order that the above purpose may be fulfilled."

It also appeared from the affidavits that the bus driver made his report of the accident in triplicate. Two copies of the report went to respondent's statistical department, and were destroyed after statistical data were taken therefrom. The third copy went to the attorneys for respondent's insurance carrier in accordance with the agreement above mentioned for use in preparing for the defense of litigation pending or in prospect.

[3, 4] The applicable rule by which the validity of the claim of privilege must be determined in such circumstances has been stated as follows in Holm v. Superior Court, supra, 42 Cal.2d 500, 507, 267 P.2d 1025, 1029, 268 P.2d 722: "In any given situation it is necessary that a determination be made concerning the facts asserted as a basis for the privilege. This determination is for the trial court in the first instance. Where it is clear that the communication has but a single purpose, there is little difficulty in concluding that the privilege should be applied or withheld accordingly. If it appears that the communication is to serve a dual purpose, one for transmittal to an attorney 'in the course of professional employment' and one not related to that purpose, the question presented to the trial court is as to which purpose predominates. The question then is whether the conclusion of the trial court on the facts is correct or has resulted in an abuse of discretion."

[5, 6] In the instant case there can be no question but that the affidavits set forth facts more than sufficient to support the trial court's implied finding that respondent's dominant purpose in obtaining and preserving the driver's statement was that it might be transmitted as a communication to the attorneys designated by its insurance carrier for use in the performance of professional responsibilities in defending respondent against a potential claim. Holm v. Superior Court, supra, 42 Cal.2d 500, 509, 267 P.2d 1025, 268 P.2d 722; see also Jessup v. Superior Court, 151 Cal.App.2d 102, 109, 311 P.2d 177; Union Oil Co. of California v. Superior Court, supra, 151 Cal.App.2d 286, 292, 311 P.2d 640. The driver's statement evidently set forth "* * * his version of the accident * * * and thus clearly is at the very heart of the attorney-client privilege." City and County of San Francisco v. Superior Court, supra, 161 Cal. App.2d 653, 656, 327 P.2d 195, 197. Although the point has not been raised on this appeal, it may be observed that in such circumstances as are here involved the transmission of a privileged communication to the attorney through the agency of an insurance carrier does not destroy the privilege. The prevailing rule has been stated as follows: "According to the weight of authority, a report or other communication made by an insured to his liability insurance company, concerning an event which may be made the basis of a claim against him covered by the policy, is a privileged communication, as being between attorney and client, if the policy requires the company to defend him through its attorney, and the communication is intended for the information or assistance of the attorney in so defending him." Annotation 22 A.L.R.2d 659, 660; 58 Am.Jur. 282, § 503, and 279, § 498; and see City and County of San Francisco v. Superior Court, 37 Cal.2d 227, 236–237, 231 P.2d 26, 25 A.L.R.2d 1418. The trial court did not err in denying appellants' motion to inspect.

Affirmed.

FOX, P. J., and ASHBURN, J., concur.

Hearing denied; GIBSON, C. J., dissenting.

170 Cal.App.2d 806

Ruth M. NORWICH, Plaintiff, Cross-Defendant, Respondent, and Cross-Appellant,

v.

Daniel NORWICH, Defendant, Cross-Complainant, Appellant, and Cross-Respondent.

Civ. 23383.

District Court of Appeal, Second District, Division 3, California.

May 29, 1959.

Action by wife for divorce on ground of cruelty. The husband cross-complained for divorce on ground of cruelty and desertion. The Superior Court, Los Angeles County, J. Howard Ziemann, J., granted divorce to husband and made a division of a community property and both parties appealed. The District Court of Appeal, Shinn, P. J., held that husband's earnings after his wife's desertion and an automobile purchased by him with a part of such earnings constituted his separate property, and did not constitute community property which must be shared with wife when he was granted a divorce.

Judgment and order modifying judgment reversed with directions.

1. Divorce 🔑184(4)

Where husband was granted divorce and wife appealed on ground of insufficiency of evidence to support finding that she had deserted husband but made no statement of evidence on which finding was based, it would be presumed that the evidence presented at the trial was sufficient to sustain the finding.

2. Divorce 🔑130

In wife's action for divorce on ground of husband's extreme cruelty, the evidence, including evidence that husband was electronics engineer and that wife refused his request to move with him out of Los Angeles to another place in California to which his work took him for four months, and that she refused to stay in the adequate home he provided for her when he was transferred to Texas, and that she refused his entreaties to make her home with him in Germany to which he was transferred to do electronics work for the military which would have provided living accommodations, and that after her desertion he provided $104 weekly for her support, supported finding that husband's refusal to maintain home in Los Angeles and his suggestion when he was in Germany that she agree to a divorce did not constitute extreme cruelty.

3. Divorce 🔑231, 252

Trial court awarding husband a divorce could not require him to pay support money to plaintiff and trial court was required under the statute to divide the community property equally. West's Ann.Civ. Code, § 146.

4. Husband and Wife 🔑272(1)

Husband's earnings after his wife's desertion and an automobile purchased by him with a part of such earnings constituted his separate property, and did not constitute community property which must be shared with wife when he was granted a divorce. West's Ann.Civ.Code, §§ 146, 175.

Dryden, Harrington, Horgan & Swartz and Jacob Swartz, Los Angeles, for plaintiff, cross-defendant, respondent, and cross-appellant.

Neil N. Werb, Beverly Hills, for defendant, cross-complainant, appellant, and cross-respondent.

SHINN, Presiding Justice.

This is an action wherein both parties sued for divorce, the wife charging cruelty and the husband by his cross-complaint alleging cruelty and desertion. Neither party specifically identified the community property, each alleging same to be in the possession of the other. By its findings the court sustained the husband's allegation of desertion and granted a decree to him and made a division of the community property between the parties. Both parties appeal.

[1, 2] In her appeal plaintiff wife claims that there was insufficient evidence to support the court's finding that she was guilty of desertion although she makes no statement of the evidence on which the finding of desertion is based. In that circumstance it must be presumed that the evidence presented at the trial was sufficient to sustain the finding. Hickson v. Thielman, 147 Cal.App.2d 11, 304 P.2d 122. However, in considering plaintiff's claim that she was entitled to a divorce on the ground of extreme cruelty, we have read the record in order to ascertain the basis of that contention. As nearly as we can ascertain from her brief the alleged cruelty consisted of defendant's refusal to maintain a home in Los Angeles and upon letters she received from him from Germany, in one of which he sought her agreement to a divorce. The claim of cruelty is without substance. Defendant was an electronics engineer. His work took him to Fontana, California, for about four months. He asked his wife to move there with him and she refused. In 1953 he was transferred to El Paso; plaintiff visited him there for some two weeks and although an adequate home was provided for her, she refused to stay. March 1955, defendant was transferred to Germany in electronics work for the military. At the time he left and thereafter, he entreated her to make her home with him in Germany and she consistently refused. There was abundant evidence in corroboration of the husband's testimony to the foregoing facts. The court found that plaintiff deserted defendant on March 28, 1955. From that date until the end of 1955, he sent his wife a weekly check which was never less than $104 and during that time he lived on his subsistence pay. Living accommodations in Germany were those provided for the military and defendant offered to provide others if plaintiff was not satisfied. The failure of plaintiff to mention in her brief any of the evidence relating to defendant's requests that she accompany him and her refusals is understandable. In her testimony she did not deny that defendant had asked her to accompany him to the several places to which he was transferred. Neither did she testify that her numerous refusals were due to the unsuitability of the home defendant would provide for her. The finding that she was guilty of desertion is a conclusive answer to her contention that she suffered extreme anguish because of the separation.

We turn now to the appeal presented by the defendant husband. He appeals only from that part of the judgment which divided the community property and awarded the wife the additional sum of $1,500. Paragraph VIII of the findings reads: "That the community property of the parties hereto is composed of the following items: A. Community property in possession of wife: (1). A 1953 Pontiac automobile, unencumbered; certain miscellaneous household furniture, miscellaneous electronic tools and equipment; and a portable typewriter. (2). The sum of $3,500.00 in cash which was received from the proceeds of community Savings Bonds, which sum was transferred to plaintiff's brothers, Sidney Mogol and Frederick Mogol, which sum is in the control of plaintiff/cross defendant. B. Community property in possession of husband: (1). A foreign automobile purchased by defendant/cross complainant for the sum of $700.00, from earnings since January 10, 1956. (2). The sum of $3,500.00, located in a savings account and accumulated from earnings of defendant/cross complainant since January 10, 1956. C. That there may or may not be United States Government Bonds still uncashed, but in possession of plaintiff/cross defendant which would be community property." In its Conclusions of Law based upon these findings, the court awarded the community property as follows: "A. To plaintiff/cross defendant: (1). The said $3,500.00 under her control; (2). The 1953 Pontiac automobile (3). The miscellaneous household furniture (4). The sum of $1,500.00, payable in installments of $100.00 or more per month commencing February 1, 1958. B. To defendant/cross complainant: (1). The sum of $3,500.00. (2). The automobile in his possession (3). Miscellaneous electronic equipment, a portable typewriter and an accordion, presently in possession of plaintiff/cross defendant."

The judgment reads as follows: "3. That community property of plaintiff and defendant is as follows: (a). A 1953 Pontiac automobile (b). Certain miscellaneous household furniture (c). Miscellaneous electronic tools and equipment (d). A portable typewriter (e). The sum of $3,500.00 in cash which was received from the proceeds of community savings bonds, which sum was transferred to plaintiff's brothers, Sidney Mogol and Frederick Mogol, which sum is in the control of plaintiff/cross defendant. (f). A foreign automobile (g). The sum of $3,500.00 located in a savings account and accumulated from earnings of defendant/cross complainant, since January 10, 1956. (h). That there may or may not be United States Government Bonds, still uncashed, but in possession of plaintiff/cross defendant which would be community property. *Said community property* is awarded as follows: A. To plaintiff/cross defendant: (1). The said $3,500.00 under her control (2). The 1953 Pontiac automobile (3). The miscellaneous household furniture (4). The sum of $1,500.00 in a lump sum payable at the rate of $100.00 or more per month through attorney for plaintiff, payments to begin on February 1, 1958. B. To defendant/cross complainant: (1). The sum of $3,500.00 (2). The automobile in his possession (3). Miscellaneous electronic equipment, a portable typewriter and an accordion, presently in possession of plaintiff/cross defendant." (Emphasis added.)

Subsequent to the signing and filing of the above referred to instruments, both parties moved under section 663, Code of Civil Procedure, for an order vacating the judgment; the motions were presented February 13, 1958, at which time the court amended the judgment so as to give the wife's attorneys an additional $100 and provide that the husband should pay the wife the sum of $1,500, in 10 monthly payments of $150 instead of $1,500 payable $100 per month.

[3] The court having awarded defendant a divorce could not require him to pay support money to plaintiff (Brooks v. Brooks, 53 Cal.App.2d 93, 127 P.2d 298) and under Section 146 of the Civil Code was required to divide the community property equally.

[4] The $3,500 saved from defendant's earnings after the date of the desertion and the automobile purchased with such earnings were the separate property of defendant. Section 175 of the Civil Code, as amended in 1955, reads as follows: "A husband abandoned by his wife is not liable for her support until she offers to return, unless she was justified by his misconduct, in abandoning him, and the earnings of the husband during the period of unjustified abandonment, prior to such offer, are his separate property; nor is a husband liable for his wife's support when she is living separate from him, by agreement, unless such support is stipulated in the agreement."

It was error to find that the automobile purchased by defendant and the $3,500 earned by him after the date of plaintiff's desertion constituted community property. The judgment should have declared those items to be the separate property of defendant. If the award of $1,500 was for plaintiff's support it was also in error. If it was intended by the court to be a part of the division of the community property, which we doubt, it was also in error, since the effect would have been to give plaintiff a share of defendant's savings of $3,500.

The judgment must be reversed for a redetermination of the extent and value of the community property and a distribution of the same in a manner that will give each of the parties an equal share of it.

It appears that no evidence was taken as to the value of any of the items of community property. It is stated in one of the briefs that counsel stipulated in chambers as to the disposition of some of the items. The record does not contain any such stipulation nor does it appear that the findings and judgment were based in any part upon a stipulation. If such a stipulation was entered into and if it should appear to the court to be in the interest of justice that the parties or either of them should be relieved of the stipulation, in order that the community property be equally divided, the court should grant such relief.

The judgment and the order modifying the judgment are reversed for further proceedings not inconsistent with the foregoing opinion.

PARKER WOOD and VALLEE, JJ., concur.

170 Cal.App.2d 747

Denver C. WALLER, Plaintiff and Respondent,

v.

SOUTHERN CALIFORNIA GAS CO., a corporation, Defendant and Appellant.

Civ. 23671.

District Court of Appeal, Second District, Division 2, California.

May 28, 1959.

Rehearing Denied June 25, 1959.

Hearing Denied July 22, 1959.

Automobile accident case. A jury awarded plaintiff $50,000 as damages, and defendant appealed from the ensuing judgment of the Superior Court, Los Angeles County, Otto J. Emme, J., and from an order denying defendant's motion for judgment notwithstanding the verdict. The District Court of Appeal, Ashburn, J., held that where highway had one southbound lane separated by a white line from two northbound lanes, the most easterly of which was for vehicles turning right into major intersection equipped with four traffic lights, and defendant's truck was in northbound lane next to white line and plaintiff's automobile was following the truck in the same lane and the two vehicles collided, admission of testimony of plaintiff's expert witness who assumed, without any support in the evidence, that the truck was about to make a right turn and who then proceeded, on basis of such assumption, to develop plaintiff's theory that the truck backed into automobile, without giving signal, after truck overshot the mark when it should have turned to right and while truck was getting into position to make right turn, was reversible error.

Judgment reversed and order affirmed.

1. Appeal and Error 🔑1050(1)
Evidence 🔑555

Where highway had one southbound lane separated by a white line from two northbound lanes, the most easterly of which was for vehicles turning right into major intersection equipped with four traffic lights, and defendant's truck was in northbound lane next to white line and plaintiff's automobile was following the truck in the same lane and the two vehicles collided, admission of testimony of plaintiff's expert witness who assumed, without any support in the evidence, that the truck was about to make a right turn and who then proceeded, on basis of such assumption, to develop plaintiff's theory that the truck backed into automobile, without giving signal, after truck overshot the mark when it should have turned to right and while truck was getting into position to make right turn, was error, and the error was of such nature and magnitude that it was reasonably probable that a result more favorable to defendant would have been reached in absence of such error, so that there was such a miscarriage of justice as to require reversal.

2. Automobiles 🔑242(2)

The mere presence of scattered debris does not fix the point of impact of colliding vehicles.

3. Evidence 🔑508

One who possesses expert qualifications can express an opinion as to point of impact of colliding vehicles.

4. Evidence ⚷472(1)

Generally, opinions upon the ultimate issue should not be received in automobile accident cases.

5. Appeal and Error ⚷863

Appeal from denial of motion for judgment notwithstanding verdict is governed by the same rules as appeal taken from a nonsuit or a directed verdict.

6. Appeal and Error ⚷655(1)

The District Court of Appeal must take the record as the court finds it, and the court cannot strike or disregard any evidence favorable to the prevailing party merely because it was erroneously received.

7. Appeal and Error ⚷1014

In automobile accident case, the presence in the record of the opinion of plaintiff's expert witness as to how the accident happened precluded a reversal of the order denying defendant's motion for judgment notwithstanding the verdict, even though such opinion was erroneously received and the error was of such a nature as to require reversal of the judgment for the plaintiff.

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Overton, Lyman & Prince, Fred S. Lack, Jr., Los Angeles, for appellant.

Harney, Drummond & Dorsey, Los Angeles, for respondent.

ASHBURN, Justice.

[1] A jury awarded plaintiff $50,000 as damages for injuries received in an automobile accident. Defendant appeals from the ensuing judgment and from an order denying its motion for judgment notwithstanding the verdict. Its main contentions are that plaintiff was guilty of negligence as a matter of law, that defendant as matter of law was free from negligence, that grievous error was committed in receiving opinions of an expert witness who finally expressed an opinion as to how the accident happened.

A collision occurred in the immediate vicinity of the intersection of Cahuenga Boulevard and Victory Boulevard in the San Fernando Valley. Cahuenga, about 45 feet wide, runs north and south and has two northbound lanes and one southbound. Victory, 74 feet wide, runs northwest and southeast and intersects Cahuenga at an angle of about 45 degrees. The intersection is a major one with four traffic lights. The most easterly lane of Cahuenga is apparently intended for right-turning northbound vehicles, for there is an island just north of the southeast corner of the intersection so placed that right-turning traffic goes between that corner and the island. A white line divides the second and third lanes of Cahuenga, counting from the east. The normal lane for northbound vehicles turning to the right would be the most easterly one.

On the morning of June 26, 1956, at about 10:55 a. m., defendant's 1948 Chevrolet half-ton pickup truck was northbound in the middle lane of Cahuenga, the one next the white line, and plaintiff was following it, driving a 1947 Mercury sedan. The vehicles collided and the right rear corner of the truck came into contact with the left doors of the sedan. Plaintiff's left arm was practically torn off in the accident. He fell out of his car and it went across Victory, jumped the curb and stopped on a lot at the northeast corner of the intersection.

The pretrial order stated plaintiff's contention to be: "That defendant brought the truck to a sudden and abrupt stop, forcing plaintiff to swing to the right to avoid striking the rear of the truck, and that there was a pipe or some other similar material protruding to the right and to the rear of the truck, and that said pipe or similar material, did not have any flags or other warning devices thereon; that, as a direct and proximate result of defendant's negligence, plaintiff's left arm came in contact with the pipe or other similar material and he was dragged or thrown out of his car." This order was made more than a month before the trial. By the time that hearing started plaintiff's counsel had evolved a new theory, namely, that the truck, without giving any signal, had backed into plaintiff's car after the truck had overshot the mark where it should have turned to the right and while it was getting into position to make a right turn. Plaintiff had testified upon deposition four months before the trial that the truck had stopped suddenly and he turned right in an effort to avoid it. At the trial he endeavored to follow his counsel's lead, saying: "Q. Do you remember anything else before the accident? A. Only coming—only him coming toward me and me swerving to the right trying to avoid him." Also: "Q. During this two-mile stretch that you had been following the truck, you say, how far behind the truck did you stay? A. I'd say 150 feet or so, something like that. Q. When you had gotten within a block of the scene of the accident, had you closed that distance up some, or had you— A. Well, he closed the distance up, helped close the distance up, when he was backing up. That is the reason that I tried to swerve to avoid him, because I wasn't paying much attention to the truck until I saw it in front of me like that." But he was restrained by his oath and on cross-examination testified: "Q. I believe you stated on direct examination it was coming at you. You don't know if the truck was moving backwards? A. I don't know if it was moving backwards or not. I know that all I had time to do was just to swerve my car to the right." Also: "Q. It's not your testimony now, Mr. Waller, that that truck was backing up when you hit it? A. I don't know. Q. Then, you are not testifying it wasn't? A. No. Q. It was stopped when you ran into it; isn't that correct? A. I don't know that either. Q. You know it was stopped, don't you? A. It may have been stopped." In the light of the testimony just quoted plaintiff's statements made on direct examination certainly did not constitute substantial evidence that the truck backed into his car.

Defendant's driver, Charles E. Logue, Jr., testified that the truck was stopped at the crosswalk at the time of impact and was thrown forward 10 to 15 feet. Two eyewitnesses, Mr. Pashby and Mr. McGrath, testified to the same effect. They were in a northbound United Parcel Service truck; plaintiff had passed them on the right, swinging over in front of them and into the same lane as defendant's truck. Pashby said that that vehicle was stopped at the time of impact, south of the crosswalk, and after the accident was halfway across it. McGrath said that defendant's truck was stopped at the corner and after the accident was in the crosswalk. Los Angeles Police Officer, Fred S. Schott, arrived at the scene about 20 minutes after the accident and made the customary police investigation. He expressed the opinion that defendant's truck was stopped at the time of the accident.

Officer Schott fixed the point of impact at the center of the dirt and debris on the street, approximately 39 feet south of the south curb of Victory Boulevard and 22 feet west of the east curb of Cahuenga. This means in the center lane, not the one for right-turning. The officer made a diagram at the scene; it shows the truck at the south line of the crosswalk. The map in evidence (Exhibit 12) scales a width of about 17 feet for the crosswalk measured along a north-south line; the balance of the 39 feet fairly represents the length of the truck, say 20 feet, and a 2-foot distance between its front and the south line of the crosswalk. The truck is thus placed where Logue, Pashby and McGrath said it was.

Logue testified that he had no intention of making a right turn, that his business was to the left. His route extended both east and west of Cahuenga and he said he did not know whether his orders were for locations east or west of the intersection, but he added: "I know I had to turn left. That is the direction I was going. I don't know the direction of the house I was setting forth." Under prodding from plaintiff's attorney Mr. Bradley, who was defendant's superintendent of customer service in the San Fernando Valley division, found and produced all of Logue's unfinished orders for the day of the accident and in each instance they required him to go to the west and south of the intersection.

[2, 3] There is no evidence that Logue had any occasion to turn right or that he intended so to do. Respondent claims that the evidence of Mrs. Edith Barron affords support for such an inference. She was the operator of a restaurant on the south side of Victory about 200 feet from the scene of the accident; was busy waiting on customers when she heard the crash. About 15 to 20 minutes afterward she went to the scene and saw defendant's truck which she placed near a cement embankment located on the Robert Hall property on the west side of Cahuenga, which point was designated as B 1 and coincided with the location at which Officer Schott had located it, saying it was headed south some 120 feet south of the crosswalk. Mrs. Barron then placed the truck in the center lane of the street, immediately opposite the place where both Officer Schott and Mr. Bradley had located it. On redirect examination she added that debris on the street was more or less spread out from B 2 (her location of the truck in the center lane) up to where plaintiff was lying in the street, which would be more than 120 feet away. From this respondent's counsel would deduce the inference that the accident took place some 120 feet south of the intersection. But the mere presence of scattered debris does not fix the point of an impact. Only one who possesses expert qualifications can express an opinion as to point of impact. Cf. Zelayeta v. Pacific Greyhound Lines, 104 Cal.App.2d 716, 723, 727, 232 P.2d 572; Ribble v. Cook, 111 Cal. App.2d 903, 906, 245 P.2d 593; Stuart v. Dotts, 89 Cal.App.2d 683, 686–687, 201 P.2d 820. Moreover, Mr. Bradley and Officer Schott each arrived 20 minutes after the impact and the truck had been moved at that time and there is no reason to believe that Mrs. Barron arrived before its removal. The skid marks began considerably north of the place where Mrs. Barron located the truck. There is nothing in her testimony that can be characterized as substantial evidence that defendant's truck was headed for a right turn or was backing at any time.

Plaintiff called as an expert witness Mr. Robert E. Snyder, a mechanical engineer who has had much experience in the analysis of automobile accidents. He testified to familiarity with the type of truck involved in the accident and said it would have to be 60 feet back from the intersection in order to make a right turn from the east lane or 70 feet for a turn from the center lane.[1] This evidence was received over defendant's objection that it was irrelevant and immaterial because there was nothing in the record to support the assumption of an intended right turn. The witness placed two stickers upon the map which was before the jury and there they remained throughout the trial, just as if they represented actual positions of the truck. This could only serve to confuse and mislead.

This assumption of a potential right turn was wholly unwarranted by any evidence then or thereafter in the record other than the expert's opinion. And the assumption of a prospective right turn by the truck was the sole basis for any inference that the truck was backing and thus ran into plaintiff's sedan. Without a right turn there could be no possibility of a backing by defendant's truck. But on the assumption of such an intended turn the expert witness proceeded to develop the theory of plaintiff's attorney that the truck backed into plaintiff's car.

This witness had examined the intersection a few days before the trial and was familiar with the photographs in evidence showing the damage to the two vehicles. On this basis, plus certain hypothetical questions, he expressed his opinions. Appropriate objections were made as his testimony progressed. The questions assumed that no tires had been blown out, although there was no evidence on that subject other than the photographs which do not fully support the assumption. It was further assumed that the brakes of the Mercury were applied 30 feet south of point of impact and laid down 30 feet of skid mark leading up to that point (which facts are in evidence). On this basis the witness said that *if* it was a one-wheel mark it would work very little diminution in speed of the car; that if traveling 20 miles an hour (25 miles was the lowest estimate of any witness) and *if* the other wheels were not skidding, the car would lose two to three miles per hour. Assuming a speed of 25 miles (warranted by the record) and a diminution of three to four miles (not supported by any testimony), and the Mercury going 22 miles at impact, the physical damage caused thereby was said to work a diminution of speed of five miles an hour. The witness then said the impact was a very light one, an inference which the photographs do not support. Based on *all* the foregoing hypotheses Mr. Snyder opined that the Mercury was going 15 to 18 miles at the time of impact. Then he said that if an automobile makes a right turn the rear wheels will follow inside and further to the right than the front wheels, hence, if the front wheels clear an object (the truck) so will the rear of the vehicle, and that there can be no impact with the side of it unless it makes a side skid toward the truck or the truck backs into it. The witness ruled out any side skidding and expressed the following opinions: "Q. So the only other way it could happen then, assuming the front end of vehicle No. 2 misses vehicle No. 1, is to have vehicle No. 1 backing into vehicle No. 2 at that point; correct? A. Yes. In the absence of a skid on the part of vehicle No. 2 which would rotate into it, if the front corner misses, the only other way that it can strike at that point is to have the other vehicle move in on it. Q. Is there anything about any of these pictures which is inconsistent with the theory that that truck was backing up? * * * The Witness: No, I don't find anything inconsistent with that at all. I have looked them over carefully and I don't find anything inconsistent." Thus we have an expert expressing an opinion upon the ultimate fact of how this accident happened, and it was based upon a cumulation of assumptions (some not supported by any evidence) which have no pertinency at all except as they rest upon the gratuitous one that the vehicle was backing to get into position for a right turn.

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[1] The transcript at this point is a bit obscure but the stickers placed by the witness upon the map show this is what he meant.

While there is no ironclad rule that an expert cannot express an opinion upon the ultimate question in a case, the Supreme Court said in People v. Wilson, 25 Cal.2d 341, 349, 153 P.2d 720, 725: "'We think the true rule is that admissibility depends on the nature of the issue and the circumstances of the case, there being a large element of judicial discretion involved. * * * Oftentimes an opinion may be received on a simple ultimate issue, even when it is the sole one, as for example where the issue is the value of an article, or the sanity of a person; because it cannot be further simplified and cannot be fully tried without hearing opinions from those in better position to form them than the jury can be placed in.'"

[4] As a general rule such opinions upon the ultimate issue should not be received in automobile accident cases. Some of the reasons are well stated in Fishman v. Silva, 116 Cal.App. 1, 3, 2 P.2d 473, 474: "It is needless to add, as in all such cases, there is presented a wide field for argument, the main theme of which is physical facts and the so-called immutable laws of physics. Contentions based on these foundations are usually not convincing, strange as it may seem, for the simple reason that in partisan presentation there is an ever-present temptation to forget essential facts which do not fit in. For instance, where it is argued that, where there is a contact of two bodies in a given position, the direction of the applied force will control the position of the bodies after the impact, any rule or law, in the abstract, will be found of little value when we have the additional factors of each body in motion and con-

trolled by independent agencies. Experience has shown the futility of attempted demonstration in accident cases; there are too many varying factors. Among these variants we may class indefinite rate of speed, condition of the highway, judgment or lack thereof in the drivers, a direct blow or a glancing one, and the balance or equilibrium of each car at the time of impact." Moniz v. Bettencourt, 24 Cal.App.2d 718, 725, 76 P.2d 535, 539: "It is claimed by appellants the court erred in excluding proffered testimony of expert witnesses, offering to show that at the moment of impact the semitrailer was to the east of the center of the highway. This they were attempting to do by computing the time it would take for the grain to fall from the broken sacks, the course of the trailer after damage to the axles, etc.; in other words, trying to reconstruct by expert testimony what had happened. Courts look with disfavor upon this type of testimony upon the ground that it is impossible to establish all of the necessary elements such as the reaction of the human mind under a certain set of circumstances; the impossibility of having complete knowledge of the exact speed, course of the wind, if any, and force of the impact." Williams v. Gurwitz, 99 Cal.App.2d 801, 803, 222 P.2d 673, 674: "It is elementary that it is within the province of the jury to determine which party, if either, was negligent and which party, if either, violated the right of way rules. Such a matter is not the subject of expert testimony and neither a police officer nor any other witness should be asked whether he had reached a conclusion as to which party violated the right of way or to state such conclusion if he had arrived at one." 32 C.J.S. Evidence § 522, p. 220: "Accordingly, no matter how skilled or experienced the witness may be, he will not be permitted to guess or to state a judgment based on mere conjecture; in other words, the factual foundation for the expert opinion must not be nebulous." To the same effect, see, Moore v. Norwood, 41 Cal.App.2d 359, 366, 106 P.2d 939; Shafter v. Evans, 53 Cal. 32, 33; Pacheco v. Judson Mfg. Co., 113 Cal. 541, 546, 45 P. 833; Johnston v. Peairs, 117 Cal.App. 208, 216, 3 P.2d 617; Rudat v. Carithers, 137 Cal.App. 92, 96–97, 30 P.2d 435; Linde v. Emmick, 16 Cal.App.2d 676, 686, 61 P.2d 338; Dougherty v. Milliken, 163 N.Y. 527, 57 N.E. 757, 759–760; Swink v. Colcord, 10 Cir., 239 F.2d 518, 520; 19 Cal.Jur.2d § 313, p. 44; 38 A.L.R.2d Annotation, pp. 13, 47, 51.

The soundness of this view is illustrated by the situation at bar. Mr. Snyder, viewing the photographs, said the impact was very light. The jurors, looking at the same exhibits, properly could conclude that it was quite heavy or it could not have inflicted the damage there shown. The witness rested his ultimate opinion upon the absence of sidewise skid or brush marks. The ordinary juror would be quite competent to draw the inference that when the sedan ran into the truck the impact was heavy enough to cause it to bounce to the right and for that reason leave no brush marks. The theory that an arcuate skid mark spells inability of the middle of the Mercury to hit the corner of the truck if the front wheels pass it, presupposes a mild contact and the jurors well could conclude that that condition did not exist and that plaintiff's sudden turn at the last second in order to avoid the truck precipitated the side of his car against the corner of the truck, causing the whole Mercury to bounce or fly through the air to the right.

We do not consider plaintiff's cited cases to be opposed to the views just expressed. Zelayeta v. Pacific Greyhound Lines, supra, 104 Cal.App.2d 716, 723, 727, 232 P.2d 572; Norman v. Tully, 149 Cal.App.2d 530, 532–534, 308 P.2d 875; Lynch v. Birdwell, 44 Cal.2d 839, 849, 285 P.2d 919; Wells Truckways, Ltd. v. Cebrian, 122 Cal.App.2d 666, 671, 676–678, 265 P.2d 557; Enos v. Montoya, 158 Cal.App.2d 394, 398–399, 322 P.2d 472; Colbert v. Borland, 147 Cal.App.2d 704, 708–709, 306 P.2d 53. They involve substantially different factual situations which, so far as they present ultimate questions of fact, constitute nothing more than permissible departure from the general rule above stated.

We hold that prejudicial error was committed in the case at bar. There was no factual basis for the assumption of an impending right turn of the truck and hence no predicate for the further assumption of a backing truck; the stickers placed on the map to represent the positions the truck *might* have occupied, *if* it was to make a right turn, were misleading; the hypothetical questions put to the witness incorporated facts which were not in evidence; the final explanation of the accident invaded the province of the jury because it dealt with inferences which they were competent to draw and the subject matter did not lie exclusively in the field of an expert. "The opinions of experts are admitted in matters which are not within the common experience of men so that the special knowledge of a person of skill and experience in the particular field may enable him to form an opinion, where men of common experience would not be able to do so. * * * The ultimate question to be determined in every case in which expert testimony is tendered is whether the case is one outside of the common experience of men so that a person of training and experience by reason of his superior knowledge is better able to reach a conclusion from the facts." Manney v. Housing Authority, 79 Cal.App.2d 453, 459, 460, 180 P.2d 69, 73.

The error is of such nature and magnitude that we are of the opinion "that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error," and hence a miscarriage of justice follows. People v. Watson, 46 Cal.2d 818, 836, 299 P.2d 243, 254.

[5-7] Defendant's appeal from the denial of its motion for judgment *non obstante* is governed by the same rules as one taken from a nonsuit or a directed verdict. Estate of Arnold, 16 Cal.2d 573, 581, 107 P.2d 25; Devens v. Goldberg, 33 Cal.2d 173, 177, 199 P.2d 943; Champion v. Bennetts, 37 Cal.2d 815, 820, 236 P.2d 155. But we must take the record as we find it. We cannot strike or disregard any evidence favorable to the prevailing party merely because it was erroneously received. Non-Refillable Bottle Co. v. Robertson, 8 Cal.App. 103, 105, 96 P. 324; O'Connor v. Hooper, 102 Cal. 528, 529, 36 P. 939; Wright v. Roseberry, 81 Cal. 87, 91, 22 P. 336; Gregg v. Western Pac. R. Co., 193 Cal. 212, 216, 223 P. 553. Aside from other questions the presence in the instant record of Mr. Snyder's opinion as to how the accident happened precludes a reversal of the order denying the motion for judgment *non obstante.*

The judgment is reversed. The order denying motion for judgment notwithstanding the verdict is affirmed.

FOX, P. J., and HERNDON, J., concur.

Hearing denied; GIBSON, C. J., and PETERS, J., dissenting.

171 Cal.App.2d 27

Frances (Bradley) LANE, Plaintiff and Respondent,

v.

James Parks BRADLEY, Defendant and Appellant.

Civ. 18324.

District Court of Appeal, First District, Division 2, California.

June 1, 1959.

Rehearing Denied July 1, 1959.

Proceedings on affidavit for issuance of writ of execution for money due on judgment. The Superior Court, City and County of San Francisco, John B. Molinari, J., denied a motion to quash the writ, and denied subsequent cross motions to set aside and to modify, and an appeal was taken. The District Court of Appeal, Dooling, J., held that annulment of contempt order by certiorari was determination by Supreme Court that trial judge had acted without or in excess of jurisdiction in making order of contempt, and held that every act purportedly taken pursuant to jurisdiction erroneously assumed to have been conferred by contempt affidavit was void.

Reversed.

1. Contempt ⚷67

Annulment of contempt order by certiorari was determination by Supreme Court that trial judge had acted without or in excess of jurisdiction in making order of contempt. West's Ann.Code Civ.Proc. §§ 1211, 1217–1218.

2. Contempt ⚷44

Every act of court purportedly taken pursuant to jurisdiction erroneously assumed to have been conferred on court by filing of affidavit charging contempt was a nullity. West's Ann.Code Civ.Proc. §§ 1211, 1217–1218.

3. Jury ⚷14(3)

The law abhors circuity of action, and where judgment contains precise formula by which exact amount accrued thereunder at any time may be definitely ascertained, amount due under formula may be ascertained by appropriate proceedings in same action, and execution may be ordered to issue for that amount; and since ascertainment of amount due requires an accounting and thus invokes equitable powers of court, there is no right to jury trial. West's Ann. Code Civ.Proc. § 682; West's Ann.Civ. Code, § 3538.

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Sullivan, Roche, Johnson & Farraher, San Francisco, for appellant.

Aaron N. Cohen, Sidney Rudy, Ted Finman, San Francisco, for respondent.

DOOLING, Justice.

Defendant, James Bradley, appeals by a settled statement from the minute order denying his motion to quash a writ of execution and from the order, included in a memorandum opinion, denying his motion to set aside the minute order.

In May 1946, appellant and respondent entered into a separation agreement. Respondent was granted a Nevada divorce decree in June 1946, the decree referring to the agreement and ordering the parties to fully perform all of its provisions. Thereafter, respondent obtained a judgment in the Superior Court in and for the City and County of San Francisco (by Judge Cronin) decreeing that the Nevada decree be established as a judgment of the courts of California and ordering the parties to fully perform all obligations provided for in the Nevada decree. This judgment was affirmed by this court (Lane v. Bradley, 124 Cal.App.2d 661, 268 P.2d 1092.)

The settlement agreement, among other things, provided that appellant pay to respondent 40% of his net income commencing January 1, 1947, exclusive of capital gains and losses and distributions out of capital but before deduction of income taxes and charitable contributions, less 1% of such net income for each 1000 shares of 40,000 shares of certain mining company stock sold pursuant to provisions of the agreement. None of these shares has been sold.

To enforce the 40% payment, respondent instituted a contempt proceeding. The trial court (Judge Sweigert) found that the sum of $46,900 was due and owing to respondent and on August 26, 1955, entered an order finding appellant to be in contempt for failure to pay this amount. On November 10, 1955, the court made a further order incorporating the August 26 order and setting forth the manner by which appellant could be purged of his contempt. It was ordered that if appellant failed to so purge his contempt he should be imprisoned. A writ of certiorari was issued by the Supreme Court for the purpose of reviewing the contempt order. The Supreme Court found that the evidence supported the trial court's interpretation of the settlement agreement stating that if there is conflicting extrinsic evidence "* * * the court on appeal will adhere to the interpretation placed by the trial court on the writings and conduct of the parties." Bradley v. Superior Court, 48 Cal.2d 509, 516, 310 P.2d 634, 638. However, the court held that the agreement was a contract for the adjustment of property rights and "[i]nclusion of such a contract in a judgment of divorce may furnish a basis for subsequent proceedings leading to issuance of a writ of execution but cannot support a commitment to imprisonment for failure to pay the judgment debt." 48 Cal.2d at page 521, 310 P.2d at page 641. It was held that "[f]or the reasons above stated, the order holding petitioner in contempt is annulled." 48 Cal.2d at page 523, 310 P.2d at page 642.

Respondent then filed an affidavit for the issuance of a writ of execution for moneys due on the California judgment (hereinafter referred to as the Cronin judgment). On July 1, 1957, an ex parte order was obtained for the issuance of the writ (Judge Sapiro). (The writ was issued commanding the sheriff to satisfy the amount due and owing, $61,033.38.) Appellant moved to quash the writ and after oral argument this motion was denied. In the minute order denying the motion to quash Judge Molinari stated: "The court finds that there is herein an *ascertainable judgment* in the sum of $46,900.00 rendered by Judge William T. Sweigert as of August 26, 1955 * * *" After deducting a credit for money paid by appellant and adding accrued interest to July 1, 1957, the writ of execution was amended to the sum of $36,511.01.

Appellant moved to set aside this minute order and respondent moved to modify it to strike the paragraph providing that the judgment was not ascertainable with respect to sums accruing after August 26, 1955 (the date of the Sweigert proceedings).

By a memorandum opinion dated January 3, 1957, these motions to set aside and to modify were denied. Appellant then sought a writ of mandate or "other appropriate relief" from this court compelling the superior court to strike the minute order and memorandum opinion. The petition was opposed on the grounds that these orders could not be reviewed by extraordinary writ. This court denied appellant's petition and on February 3, 1958, appellant filed a notice of appeal from the minute order and the memorandum opinion.

Appellant contends that the annulment of the contempt order voided the entire proceedings before Judge Sweigert and therefore the fact determinations therein made were voided.

[1, 2] We are satisfied with the correctness of this argument. The annulment of the contempt order by certiorari was a determination by the Supreme Court that Judge Sweigert was acting without or in excess of jurisdiction in making the order of contempt. Hume v. Superior Court, 17 Cal.2d 506, 512, 110 P.2d 669; Tripp v. Tripp, 190 Cal. 201, 211 P. 225. The order made by Judge Sweigert determining the amount then due under the Cronin judgment (which was accepted by Judge Molinari as an "ascertainable judgment") was made in the contempt proceedings which were inaugurated by the plaintiff in the Cronin action by the filing of an affidavit charging contempt. Code Civ.Proc. § 1211. It was made as a step in the trial to determine whether appellant was guilty of the contempt as charged. Code Civ.Proc. §§ 1217–1218. It is clear that since the trial court was without jurisdiction to punish appellant for contempt it was equally without jurisdiction to hear the contempt proceedings and hence had no jurisdiction to hold the hearing in which the amount then owing was determined. The affidavit charging contempt conferred no jurisdiction on the court and for that reason every act of the court purported to be taken pursuant to the jurisdiction erroneously assumed to have been conferred on the court by the filing of the affidavit charging contempt was equally without jurisdiction and therefore a nullity. This conclusion necessitates a reversal.

Appellant also argues that the Cronin judgment being for a percentage of net earnings is not for a sum certain and hence will not support execution in any event. Bank of America Nat. Trust & Savings Ass'n. v. Standard Oil Co., 10 Cal.2d 90, 93, 73 P.2d 903; Feldmeier v. Superior Court, 12 Cal.2d 302, 306–307, 83 P.2d 929, 119 A.L.R. 927; Code Civ.Proc. § 682. Respondent cites cases approving the enforcement by execution of alimony and support decrees providing for future monthly payments in fixed amounts. E.g. Foust v. Foust, 47 Cal.2d 121, 302 P.2d 11; Di Corpo v. Di Corpo, 33 Cal.2d 195, 200 P.2d 529. These cases are not determinative of the question here presented since a certain amount named in the judgment itself becomes due under the judgment with the passage of each month. Here the judgment fixes no amount but it does fix a precise formula under which the amount may be definitely ascertained. The question therefore is whether such amount may be determined by proceedings taken for that purpose in the action in which the judgment is entered and when the amount is so fixed execution may be ordered in that determined amount, or whether the plaintiff in that action is relegated to an independent action to determine the amount accrued.

[3] The law abhors circuity of action and where the judgment, as here, contains a precise formula by which the exact amount accrued thereunder at any time may be definitely ascertained we can see no good reason why the court in the same action may not in an appropriate proceeding taken for that purpose ascertain the amount then due under the formula and order execution to issue for that amount. "That is certain which can be made certain" (Civ.Code § 3538) and applying this settled axiom the judgment herein is certain since the amount due under it can be made certain at any time by applying the formula contained in the judgment itself. In Feldmeier v. Superior Court, supra, 12 Cal.2d 302, at page 307, 83 P.2d at page 932 (a case cited and relied on by appellant) the court suggests: "Only after the liquidation plan has been carried out and the court *makes a further order fixing a deficiency* for which the depositary is liable will the plaintiffs have a judgment upon which a writ of execution may issue." (Emphasis ours.) And in Bradley v. Superior Court, supra, 48 Cal.2d at page 521, 310 P.2d at page 641, the Supreme Court said of this very judgment: "Inclusion of such a contract in a judgment of divorce may furnish a basis for subsequent proceedings leading to issuance of a writ of execution * * *" Cf. Knox v. Knox, 129 Cal.App.2d 795, 277 P.2d 854.

Appellant argues that such a holding would deprive him of the right to a jury trial in determining the amount due. But the ascertainment of the amount due would require an accounting which invokes the equitable powers of the court (Bardwell v. Turner, 219 Cal. 228, 230, 25 P.2d 978; Kritzer v. Lancaster, 96 Cal.App.2d 1, 6, 214 P.2d 407) in which there is no right to a jury trial (29 Cal.Jur.2d, Jury, § 7, p. 485).

The orders appealed from are reversed.

KAUFMAN, P. J., and DRAPER, J., concur.

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170 Cal.App.2d 706

Ruth UNGER, Plaintiff and Respondent,
v.
LOS ANGELES TRANSIT LINES, a corporation, John Heprick et al., Defendants and Appellants.
Civ. 23834.

District Court of Appeal, Second District, Division 1, California.
May 27, 1959.

Action for injuries. From adverse orders the defendants appealed. The District Court of Appeal, Fourt, J., held that the appeal must be dismissed on the ground that the orders appealed from were not appealable.

Appeal dismissed.

Appeal and Error ⚿113(1, 3)

An appeal from order denying defendant's motion for orders to vacate and set aside default, to vacate order striking defendant's answer and denying defendant's motion to restore its answer must be dismissed on the ground that the orders were not appealable. West's Ann.Code Civ.Proc. § 963.

◆

Richards, Watson, Smith & Van Petten, by David S. Smith, Los Angeles, for appellants.

Frank Alef, Los Angeles, for respondent.

FOURT, Justice.

The matter before this Court at this time is the motion of the plaintiff to dismiss the appeal of the defendants.

Chronicled, the following occurred:

(1) Plaintiff filed an action on October 17, 1957, against the defendants for damages on account of personal injuries received, and arising out of an accident which occurred on June 13, 1957.

(2) Answer of Los Angeles Transit Lines was filed November 1, 1957.

(3) Plaintiff served three written interrogatories on Los Angeles Transit Lines on March 3, 1958, wherein she sought the names and addresses of the witnesses to the accident known to Los Angeles Transit Lines (not the accident reports or statements of witnesses or any writings).

The first interrogatory sought to have the defendants:

(a) state names and addresses of all persons now known to you or to any employee, agent or officer who were passengers on the bus from which plaintiff alighted on June 13, 1957, and who were in the bus at the time plaintiff alighted therefrom;

(b) state names and addresses of all persons now known to you, or to any employee, agent or officer, who saw plaintiff fall while or after alighting from the bus at the time above set forth;

(c) state names and addresses of all persons now known to you, or to any employee, agent or officer, who have any information regarding the accident and indicate the information that they have. See City and County of San Francisco v. Superior Court, 161 Cal.App.2d 653, 327 P.2d 195 [petition for hearing denied by Supreme Court].

(4) Appellant served purported answers to the interrogatories on March 24, 1958, wherein it was set forth that such matters were "privileged."

(5) On April 8, 1958, respondent served a notice of motion for an order compelling the Los Angeles Transit Lines to answer the interrogatories.

(6) On April 23, 1958, the Los Angeles Transit Lines served affidavits and points and authorities in support of its claim of privilege, and on April 28, 1958, the plaintiff filed a counter-affidavit in opposition to such claim of privilege.

(7) On April 28, 1958, the motion was heard and on May 1, 1958, the court granted plaintiff's motion as to the first two interrogatories, and denied the motion as to the third interrogatory. (The judge prepared and filed an extensive memorandum setting forth the reasons and the authorities for the order.)

(8) Thereafter Los Angeles Transit Lines gave notice of motion that it would request the court, (a) to reconsider the order, (b) to vacate the order, (c) to strike the interrogatories, and (d) order that the defendants need not answer the interrogatories. The motion was heard on June 2, 1958, and was denied.

(9) On June 16, 1958, the plaintiff gave notice of a motion for an order to strike the answer of the defendant and render a judgment by default in favor of plaintiff and against the defendant Los Angeles Transit Lines, upon the grounds that the Los Angeles Transit Lines refused to obey the order of the court made on May 1, 1958, to answer the interrogatories. The defendant opposed the motion. On June 23, 1958, the motion to strike the answer

was granted, and the default of Los Angeles Transit Lines was ordered entered.

(10) On September 5, 1958, the defendant filed a notice of motion and motion to set aside default and to vacate the order striking the answer, and to restore the answer. The motion was heard on September 22, 1958, and on November 5, 1958, it was denied. (The judge filed a comprehensive memorandum wherein, with considerable detail and statement of authorities, he set forth the reasons for his ruling.)

(11) The defendant, on November 12, 1958, filed a notice of motion to reconsider the motion to set aside the default and to vacate the order striking the answer and to reinstate such answer. The motion to reconsider was granted. On December 8, 1958, the motion to reinstate the answer was denied. (The judge filed a memorandum wherein he set forth with clarity the authorities and his reasons for making the order.)

(12) On December 10, 1958, the defendant filed a notice of motion (to reconsider motion to set aside default and to vacate order striking answer), such motion to be heard on December 26, 1958. The matter was continued to January 12, 1959, and later ordered off calendar.

(13) On December 29, 1958, the defendant filed a notice of appeal from the following orders:

(a) denying defendant's motion for orders to vacate and set aside default;

(b) denying defendant's motion to vacate order striking defendant's answer;

(c) denying defendant's motion to restore its answer.

The plaintiff-respondent asserts that the appeal is taken from orders which by law are not appealable, and that this Court does not have jurisdiction or authority to review said orders. As authority for such view, the following cases are cited: Kester Motors, Inc. v. Haddad, 109 Cal.App.2d 369, 240 P.2d 1011; Foley v. Foley, 120 Cal. 33, 52 P. 122; Sherman v. Standard Mines Co., 166 Cal. 524, 137 P. 249; Pickerill v. Strain, 196 Cal. 683, 239 P. 323. The appellant's counsel, with commendable fairness, stated at the oral argument, "I happen to think that the motion is well taken."

The defendant-appellant points out that there apparently is no appellate decision in this state holding, in effect, that where a default is ordered by a trial court under the discovery proceedings, the same rules apply with regard to appeal; namely, that the appeal is from the judgment subsequently entered, and not from the order refusing to vacate the default.

We find no statutory distinctions as to the origin of the default.

Clearly, under section 963, Code of Civil Procedure, the orders appealed from are not appealable orders.

The motion to dismiss the appeal is granted.

Appeal dismissed.

WHITE, P. J., concurs.

170 Cal.App.2d 678

Henning NEWMAN and Esther Newman, his wife, Plaintiffs and Respondents,

v.

Donald Forbes ALBERT, as Executor of the Estate of John William Forbes, et al., Defendants,

Donald Forbes Albert, as Executor of the Estate of John William Forbes, Appellant.

Civ. 6020.

District Court of Appeal, Fourth District, California.

May 26, 1959.

Rehearing Denied June 22, 1959.

Hearing Denied July 22, 1959.

Action for declaratory relief and for specific performance of a contract for the sale of real property. Judgment for the purchasers in the Superior Court of Tulare County, Frederick E. Stone, J., and the defendant executor appeals. The District Court of Appeal, Mussell, J., held that a release of future interest did not require a new consideration; that a waiver reducing the purchase price of the property was supported by consideration; that the evidence sustained the findings in favor of the purchasers; and that the suit was not barred by laches.

Judgment affirmed.

1. Appeal and Error ⚷989

Power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury.

2. Appeal and Error ⚷996

Where two or more inferences can reasonably be deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.

3. Appeal and Error ⚷994(3), 1011(1)

Questions as to the credibility of a witness and determination of conflicts of the testimony are for the trial judge.

4. Interest ⚷26

A document in writing which was a release of future interest did not require a new consideration. West's Ann.Civ.Code, § 1541.

5. Release ⚷12(1)

Where the writing is plain and explicit and given for the express purpose of effecting a complete release of the obligation, a consideration is not necessary. West's Ann.Civ.Code, § 1541.

6. Contracts ⚷237(1)
Release ⚷12(1)

An executed oral agreement will serve as modification or release of a written agreement without regard to the presence or absence of a consideration. West's Ann. Civ.Code, § 1541.

7. Vendor and Purchaser ⚷82

In action for specific performance of a contract for the sale of real property on which olive trees were planted, agreement by vendor to reduce purchase price from $60,000 to $50,000 because of poor condition of the olive trees was not without consideration where in exchange for such waiver the purchaser agreed to graft the olive trees on the property and where the grafting of such trees had been completed and fully performed by the purchaser.

8. Specific Performance ⚷121(3)

In purchaser's action for specific performance of a contract for sale of real property, substantial evidence supported finding that the fair market value of the real property was $50,000 and was a fair and adequate consideration and price for the land.

9. Contracts ⚷305(1)

All objections as to the mode of and offer of performance which a creditor has an opportunity to state at the time to the person making the offer, and which could then be obviated by him, are waived by the creditor, if not then stated.

10. Specific Performance ⚷97(3)

In purchaser's action for specific performance of a contract for the sale of real property, tender by the purchaser was not insufficient because it did not include interest on the contract and because the check made payable to defendants was disputed, where interest had been waived, and where there was no evidence that the disputed check, if presented for payment, would not have been paid in full.

11. Estoppel ⚷52

Unless clearly warranted, estoppels are not favored.

12. Estoppel ⚷118

In purchasers' action for specific performance of a contract for sale of real property, evidence did not establish that the purchasers were estopped from asserting the validity of the document reducing the purchase price of the property from $60,000 to $50,000.

13. Appeal and Error ⚿949
Equity ⚿71(2)

There is no artificial rule as to the lapse of time which will justify the application of the doctrine of laches, and each case must be determined upon the basis of its facts, and in the absence of a palpable abuse of discretion, trial court's finding upon the issue will not be disturbed upon appeal.

14. Specific Performance ⚿121(3)

In purchasers' action for specific performance of a contract for sale of real property, evidence did not establish that the purchasers were guilty of laches in bringing the action.

15. Gifts ⚿49(1)

Evidence established a valid gift by the donor of machinery and equipment on premises sold to the plaintiffs.

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Rogers & Rogers, Long Beach, for appellant.

McCormick, Moock & McCormick, Visalia, and William O. Minor, Sacramento, for respondents.

MUSSELL, Justice.

This is an action for declaratory relief and for specific performance of a contract for the purchase and sale of real property. The trial court ordered judgment for plaintiffs and ordered that a deed conveying the real property involved be delivered to plaintiffs upon payment to the defendant executor of the sum of $9,000. Defendant Donald Forbes Albert, as executor of the estate of John William Forbes, appeals from the judgment, claiming that the evidence is insufficient to support and sustain the findings.

On May 24, 1946, John W. Forbes, Henning Newman and his wife, Esther Newman, signed and executed an agreement for the sale of certain real property near Lindsay, in Tulare county, by Forbes to the Newmans, for the total contract price of $60,000. The agreement (plaintiffs' exhibit 1) provides for the payment by the buyers of $5,000 upon the execution and delivery of the agreement, $10,000 on or before July 1, 1946, and the balance of $45,000 in yearly payments of $3,500, plus interest. A copy of the agreement and a deed from Forbes to the purchasers were delivered to the Security Title Company in Visalia as escrow holder and agent for the collection of the sums becoming due under the contract. Contemporaneously with this agreement of sale, and on the same date, the parties executed an agreement in writing (defendants' exhibit A) wherein it was agreed that the Newmans shall have the use of all trucks, tractors, tools, machinery and equipment of Forbes for one year, free of cost, and at any time within sixty days after the expiration of said year, the Newmans shall have the option to purchase said machinery and equipment. It was further agreed that Forbes "may for so long as said contract is in effect, have the right to personally use the one bedroom in the dwelling house on the said olive grove that he now uses, as his own bedroom for his personal use as a bedroom, and that for the same period of time (the Newmans) will furnish (Forbes) with meals and board as ordinarily served in their family, at no cost to (Forbes)." It was further agreed that if Forbes required any extraordinary service, the Newmans would be paid a reasonable sum therefor. Forbes lived with the Newmans from May, 1946, to January 27, 1947, when he was taken to a sanitarium in Glendale, where he died on February 1, 1947.

In the summer of 1946 Forbes handed Newman a signed list of machinery and equipment then on the property and told Newman that he was giving them this property. Newman testified in this connection that Forbes "One day was sitting writing in the afternoon, and he said 'Henny, I have a surprise for you', and handed me this paper and said that he thinks we was doing so good that he would help us along and give us this equipment, and he gave it to me and handed me this paper." The list of equipment and machinery was substantially the same as that on which the Newmans had an option to purchase.

On November 26, 1946, Forbes signed a document acknowledging receipt of $20,000 paid on the contract and interest to January 1, 1947, and stating that "thereafter all interest to accrue is, for a good and valuable consideration by me received of and from the Newmans, hereby waived." At the time this document was executed by Forbes a signed copy was delivered to the Newmans and, at the Newmans' request, the following was typed at the bottom of the agreement: "In consideration of the waiver of said interest, we agree to provide John W. Forbes with a place to live in our home and home care therein for so long as he shall live." Newman and his wife signed this agreement.

During the summer of 1946 Forbes and the Newmans had many conversations with reference to the condition of the olive trees on the property. These trees were in bad condition in November, 1946, Forbes offered to deduct $10,000 from the purchase price of the property if Newman would graft the trees and put them in good condition.

On January 27, 1947, Forbes asked his attorney, James R. McBride to come out to the Newmans' house where he was staying, stating that he "had some documents for him to take care of." When McBride arrived he had a discussion with Forbes alone in Forbes' room, following which Mr. and Mrs. Newman were called in and McBride was asked by Forbes to prepare the necessary document to deduct $10,000 from the purchase price of $60,000. The document was then written out by McBride and is as follows:

> "To Henning and Esther Newman:
>
> "Because the trees in the grove are in worse condition than I expected I hereby modify the terms of my agreement of April 1, 1946 by reducing the price from $60,000.00 to $50,000 00 which is a reduction of $10,000 00 and the payment of said $10,000 00 at the end or last maturing payment or payments is hereby waived.
>
> "Date January 27, 1947.
>
> "/s/ J. W. Forbes."

This document was then signed by Forbes, who handed it to Newman and Newman gave it back to McBride, who took it with him when he left the house. Newman considered this document to contain the complete agreement and asked McBride if the piece of paper was "o. k." and McBride said, "Why not?" Forbes was preparing to go to a sanitarium in Glendale and told the Newmans that one of the matters he had to take care of before he went was putting in writing the agreement that they had about taking $10,000 off the last payment for the grafting of the trees.

From April 21, 1946, to April 1, 1954, six payments of $3,500 each were made by the Newmans to the executor of the Forbes estate, or a total of $21,000. The Newmans completed the grafting of the trees as agreed when Forbes signed the waiver of January 27, 1947. On April 26, 1955, the Newmans deposited with the Security Title Insurance Company the check of C. O. Cowles for $5,900, the check of Henning Newman for $3,100, and a United States Treasury check for $205. This last mentioned check was payable to the Newmans and the executor of the Forbes estate and was endorsed by the Newmans. The title company, on orders from the attorneys for the estate, refused to deliver a deed to the property to the Newmans and the present action followed. The Newmans have made substantial improvements to the property involved and have been in possession since May of 1946.

[1,2] The rule as to our province, where, as here, the sufficiency of the evidence to support the trial court's findings is questioned, is stated in Re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689, 690, as follows:

> "'* * * all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary * * * principle of law, that when a verdict is attacked as being unsupported, the

power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.' (Italics added.) (Crawford v. Southern Pacific Co., 1935, 3 Cal.2d 427, 429, 45 P.2d 183, 184.) The rule quoted is as applicable in reviewing the findings of a judge as it is when considering a jury's verdict."

[3] Questions as to the credibility of a witness and the determination of conflicts and inconsistencies in his testimony are for the trial judge. Dillard v. McKnight, 34 Cal.2d 209, 223, 209 P.2d 387, 11 A.L.R.2d 835.

[4] Appellant contends that there was no consideration for the waiver of interest dated November 26, 1946 (plaintiffs' exhibit 30). However, the document was in writing and was a release of future interest which does not require a new consideration. Civ.Code, sec. 1541; Hames v. Rust, 64 Cal.App.2d 70, 75, 148 P.2d 132. Moreover, there was written into the waiver as a consideration an agreement to provide Forbes with a "place to live in our home, and home care therein so long as he shall live."

[5–7] Appellant argues that there was no consideration for the waiver written by attorney McBride and signed by Forbes on January 27, 1947, reducing the purchase price from $60,000 to $50,000. This argument is likewise without merit. As is said in Crow v. P. E. G. Construction Co., Inc., 156 Cal.App.2d 271, 277, 319 P.2d 47, 50: "Since the adoption of Civil Code, § 1541, it has uniformly been held that where the writing is plain and explicit and given for the express purpose of effecting a complete release of the obligation, a consideration is not necessary. (Citations.)" There is substantial evidence in the record to support the trial court's finding that in exchange for this waiver Newman agreed to graft the olive trees on the property and that the grafting of such trees has been completed and fully performed by plaintiff. The rule is that an executed oral agreement will serve as a modification or release of a written agreement and this too without regard to the presence or absence of a consideration. Julian v. Gold, 214 Cal. 74, 76, 3 P.2d 1009; Price v. Price, 24 Cal.App.2d 462, 464, 75 P.2d 655.

Appellant argues that the evidence is not sufficient to sustain the court's findings:

> "That the fair market value of said real property at the time of the execution of the contract referred to in Paragraph I above was the sum of $49,850.00; that the agreed price for the purchase and sale of said real property as first agreed to, to wit, the sum of $60,000.00, or as reduced by the document referred to in Paragraph XIV hereof, to wit, the sum of $50,000.00, is just, fair and adequate consideration and price for said land insofar as the defendant Donald Forbes Albert, as Executor, is concerned; that the contract referred to in Paragraph I hereof together with alterations thereof, is in every sense and way, just, fair and reasonable insofar as the defendant Donald Forbes Albert, as Executor, is concerned."

[8] In this connection George Murphy, inheritance tax appraiser for Tulare county, testified that after checking the soil conditions on the property he tried to check the water conditions and formulate a schedule of sales of comparable properties; that he checked with the title company and olive growers and producers; that he checked on prices over a period of years and that he had appraised properties in the immediate vicinity shortly after the war and from then on; that it was his opinion that the value of the property involved as of April 1, 1946, was $49,850. The finding that the fair market value of the property is the sum of $50,000 and is a just, fair and adequate consideration and price for

the land involved is sufficiently supported by the record.

Appellant further contends that the evidence is insufficient to support the finding:

> "That on the 26th day of April, 1955, the plaintiffs caused certain funds representing the balance of the purchase price and escrow instructions to be deposited with the Security Title Insurance Company which said instructions and funds are reflected in Plaintiffs' Exhibits Nos. 15 and 16 herein; that at the time of the deposit of such funds and instructions, the said Security Title Insurance Company could have complied with all such instructions had they been given approval for the recognition of the validity of the waiver referred to in Paragraph XIV above and introduced into evidence as Plaintiffs' Exhibit No. 14 herein."

[9, 10] This finding also has substantial evidentiary support and cannot be disturbed. Appellant contends that the tender was insufficient because it did not include interest on the contract and that the tender included a check made payable to defendants over which a dispute existed. The waiver of interest on November 26, 1946, delivered to the title company, made it unnecessary that interest be included. Plaintiffs made six payments of $3,500 each during the years 1946 through 1954 and the representatives of the estate made no complaint as to their failure to include interest. It is claimed that there was a dispute over the Treasury check of $205. There is no evidence that this check, if presented for payment, would not have been paid in full. It was endorsed by the payees and was a valid tender of payment. Moreover, no objection was made to the tender at the time. All objections to the mode of and offer of performance which the creditor has an opportunity to state at the time to the person making the offer, and which could be then obviated by him are waived by the creditor, if not then stated. Hunt v. Mahoney, 82 Cal.App.2d 540, 546–547, 187 P.2d 43.

[11, 12] Appellant asserts that the evidence does not support the finding that plaintiffs should not be estopped from asserting the validity of the document reducing the purchase price of the property from $60,000 to $50,000. This assertion is based on testimony that appellant's attorney was told by attorney McBride in 1947 that there was an unpaid balance on the contract of $40,000. The record shows in this connection that the attorney for appellant examined the file in the office of the title company. Unless clearly warranted, estoppels are not favored. Edgington v. Security-First Nat. Bank, 78 Cal.App.2d 849, 858, 179 P.2d 640.

In Cardosa v. Fireman's Fund Ins. Co., 144 Cal.App.2d 279, 282–283, 300 P.2d 875, it is held that to make out a case of abandonment or waiver of a legal right there must be a clear, unequivocal, and decisive act of the party showing such purpose, or acts, amounting to a estoppel on his part and that waiver is ordinarily a question of fact.

[13, 14] Appellant further asserts that plaintiffs have been guilty of laches in bringing the instant action. In Williams v. Marshall, 37 Cal.2d 445, 455, 235 P.2d 372, it is said that the courts have frequently declared that there is no artificial rule as to the lapse of time which will justify the application of the doctrine of laches; that each case must be determined upon the basis of its facts, and in the absence of a palpable abuse of discretion the trial court's finding upon the issue will not be disturbed upon appeal. No abuse of discretion appears in this connection.

[15] It is further claimed that the evidence was insufficient to show that Forbes made a valid gift of the machinery and equipment to plaintiffs. The record shows that in 1946 Forbes told the Newmans that he wanted to do them a "little favor" because they were taking such good care of him and were "doing so good". He then handed Newman a piece of paper listing the machinery and equipment on the ranch and told them he was making a gift of this equipment. Under these circumstances a valid gift was established. Blonde v. Estate of Jenkins, 131 Cal.App.2d 682, 685, 281 P.2d 14.

An examination of the entire record herein leads us to the conclusion that the findings herein are sufficient to support the judgment.

Judgment affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur.

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171 Cal.App.2d 1

Eugene A. TALIAFERRO, Plaintiff and Appellant,

v.

Dorothy D. TALIAFERRO, aka Finn, aka Davis, and First to Tenth Does, inclusive, Defendant and Respondent.

Civ. 18287.

District Court of Appeal, First District, Division 1, California.

June 1, 1959.

Action wherein the Superior Court, Contra Costa County, Norman A. Gregg, J., rendered judgment that plaintiff "take nothing by" his complaint and refused to enter default judgment for plaintiff, and plaintiff appealed. The District Court of Appeal, Tobriner, J., held that since husband had been served with copy of complaint in wife's 1932 divorce action, he could not successfully urge as ground for setting aside 1943 divorce decree incorporating settlement agreement, concealment of 1932 divorce decree as fraud in procurement of settlement agreement he had allegedly been induced to sign "to persuade" his wife to proceed with 1943 divorce action, even if she had told him that she had instructed her attorney to dismiss 1932 action.

Affirmed.

See, also, 154 Cal.App.2d 495, 316 P.2d 393.

1. Divorce 🔑165(3)

Where husband was served with copy of complaint in wife's 1932 divorce action, he could not successfully urge, as ground for setting aside 1943 divorce decree incorporating settlement agreement, concealment of 1932 divorce decree as fraud in procurement of settlement agreement he was allegedly induced to sign "to persuade" wife to proceed with 1943 divorce action, even if she had told him that she had instructed her attorney to dismiss 1932 action.

2. Judgment 🔑511

That plaintiff sues a second time to determine matter already barred by doctrine of res judicata does not constitute fraud on court.

3. Judgment 🔑746

Res judicata is defense, and if not raised by defendant it is waived.

4. Appeal and Error 🔑712

Allegations not contained in proffered complaint or in transcript could not, even if true, be considered by reviewing court on appeal from judgment that plaintiff "take nothing by" his complaint.

5. Pleading 🔑34(1)

Court was not required to put on blinders and inspect complaint piecemeal or to see each count in isolation; and in considering second count, court could be advised of facts recited in first count.

6. Divorce 🔑255

Husband's rights under settlement agreement were merged into divorce decree, and his complaint, alleging that he had been misadvised, by his own and opposing counsel, that property covered by agreement was community property, and that agreement was thereby nullified, constituted a collateral attack on divorce decree and, as such, failed to state cause of action.

7. Husband and Wife ⚷278(2)

Property settlement agreement which husband has allegedly been induced to sign in order "to persuade" wife to proceed with divorce action was not violative of public policy; and, in any event, the parties were in pari delicto.

8. Declaratory Judgment ⚷389, 394

Denial of declaratory relief, as not necessary or proper at time under all of circumstances, is within trial court's discretion, and exercise of such discretion will not be disturbed on appeal unless it be clearly shown that discretion was abused. West's Ann.Code Civ.Proc. § 1061.

9. Declaratory Judgment ⚷318

Divorced husband's complaint, for declaration of rights against individual, not party to action, who was described as having made claims to some of involved property because of subsequent marriage to plaintiff's ex-wife, was fatally defective for seeking relief against one not served with process.

10. Judgment ⚷112, 129

Default admitted nothing more than was alleged in complaint; and where complaint showed no ground for relief, it was not error to enter judgment that plaintiff "take nothing by" complaint, even though defendant was in default.

11. Judgment ⚷123(1)

On plaintiff's motion for default judgment, court could properly determine whether complaint showed ground for relief and whether there was any evidence to sustain prayer for damages.

E. A. Taliaferro, San Pablo, in pro. per.

Frisbie & Hoogs, Berkeley, for respondent.

TOBRINER, Justice.

The superior court granted judgment that appellant "take nothing by" his seventh amended complaint and refused to enter a default judgment for appellant.

We consider the validity of the lower court's action as to each of the six counts of the complaint and as to its refusal to render judgment by default.

Count One seeks to vacate the "court's action" in approving a settlement agreement, entered into on December 1, 1943, which divided the community property and provided for the support of appellant's wife and minor children. Appellant claims he was induced to sign the settlement agreement "to persuade" respondent to proceed with a divorce action she filed on September 7, 1943, in Contra Costa County, and "to secure a divorce decree without contest." But, according to the complaint, appellant was induced to sign the agreement by fraud in that respondent concealed the fact that long prior to the settlement agreement she had obtained, on July 7, 1932, an interlocutory decree of divorce in the Superior Court of San Francisco which did not provide for alimony or support. The "existence" of the earlier decree was "concealed from" appellant "until the month of December, 1954," when he learned of the 1932 decree.

Three separate problems for decision lie within this count: (1) whether the alleged concealment of the 1932 decree serves as a sufficient basis for setting aside the 1943 decree; (2) whether the procurement of the 1932 decree and the subsequent filing of 1943 constituted a fraud on the court; and (3) whether an alleged "later" statement of respondent to appellant to the effect that she had instructed her attorney to dismiss the 1932 divorce action constitutes a basis for setting aside the 1943 decree.

[1] Appellant's allegations of Count One directly attack the Contra Costa decree on the basis of extrinsic fraud, and as such they must be considered in the light

of general theories applicable to this kind of situation. Two competing considerations must be reconciled: the policy which favors the termination of litigation so that "issues involved in a case be set at rest by a final judgment" (Jorgensen v. Jorgensen, 1948, 32 Cal.2d 13, at page 18, 193 P.2d 728, at page 731) and the policy that protects against the procurement of such a judgment by fraud. Whatever varying conglomeration of facts may induce a court to conclude that one or the other policy should apply in the particular instance, an overriding consideration must be the presence or the lack of opportunity to the aggrieved party to prevent the alleged deception. The importance of finality of judgment is too vital to subject it to the neglect of an idle party whose inaction induces his own misfortunes.

Appellant cites Scott v. Dilks, 1941, 47 Cal.App.2d 207, 117 P.2d 700, and Jorgensen v. Jorgensen, supra, 32 Cal.2d 13, 193 P.2d 728, for the proposition that a fraud which prevents a party from raising a defense is a valid ground upon which to levy a direct attack upon a judgment. But the Supreme Court, in Jorgensen, actually refused relief because the moving party failed to investigate the facts, relying instead upon the representations of the other. Although the husband concealed the facts as to the community property of the marriage, inducing the negotiation of a property settlement which the wife sought to avoid for fraud, the court, speaking through Justice Traynor, rules: "Plaintiff is barred from obtaining equitable relief by her admission that she and her attorney did not investigate the facts, choosing instead to rely on the statements of the husband as to what part of the disclosed property was community property." 32 Cal.2d at page 23, 193 P.2d at page 734.

Appellant's information as to the filing of the 1932 divorce and his failure to follow through on that action precludes his present plea. Appellant's own complaint does not allege any lack of service of appellant as to the San Francisco action; to the contrary appellant states in his brief, "It may be admitted that Appellant was served with a copy of the complaint and summons. * * *" He further contends that "later" respondent told him "she was going to dismiss the action" and had "instructed her attorney to dismiss." In the face of this train of knowledge appellant's opportunity to investigate and to protect his position was manifold. This failure to shield himself as to the 1932 divorce can hardly become a sword to demolish the 1943 court-approved settlement.

[2, 3] The second query which we outlined above as to the claimed fraud upon the court because of the second filing cannot advance appellant's position.

While appellant relies upon Titensor v. Titensor, 1946, 75 Cal.App.2d 206, 170 P.2d 479, that case held only that allegations of the same acts in support of a second divorce as those set forth in a previous decree would be barred as res judicata. However, the fact that a plaintiff sues a second time to determine a matter already barred by the doctrine of res judicata does not constitute fraud on the court; res judicata is a defense (Boucher v. Kriehn, 1947, 80 Cal.App.2d 437, 182 P.2d 218) and if not raised by the defendant it is waived (Dillard v. McKnight, 1949, 34 Cal.2d 209, 209 P.2d 387, 11 A.L.R.2d 835).

[4] The final query relating to appellant's contention that he was misled by respondent's promised instructions to her attorney to dismiss the 1932 divorce action does no more for him than the previous considerations. The allegations are not contained in the proferred complaint; neither are they in any transcript; they, therefore, even if true, cannot be considered by this appellate court. Newman v. Board of Civil Service Com'rs, 1956, 140 Cal.App.2d 907, 296 P.2d 41. While appellant cites Daut v. Daut, 1950, 98 Cal.App.2d 375, 220 P.2d 63, in this connection, it does not serve him. In that case defendant lacked actual knowledge of the prior divorce proceedings; she was never served; summons were mailed to her under a different name. Consequently, she was

not put on notice of the possibility of adjudication of the matter in such prior proceeding. In our case appellant admits service of summons in the prior action; he did have notice; he could have acted in the prior proceeding.

For the above reasons we conclude that Count One does not state a cause of action.

[5, 6] The second count constructs an alleged factual foundation for setting aside the 1943 property settlement as such. In substance appellant contends that he entered into the property settlement upon the mistaken belief that the property covered was community. He learned in December, 1954, of the existence of the decree of July 7, 1932, and of "the allegation of the complaint upon which it was based to the effect that there was no community property." Alerted by this late discovery appellant, after a twenty year interval, found that contrary to respondent's contention the property was "not * * * in fact community property at all." Consequently, claims appellant, he was misadvised by his own and opposing counsel and the entire contract should be nullified. Since the count asks, however, not to set aside the decree but the contract exclusively, appellant contends he makes no collateral attack upon the judgment.

Accepting, as we must, this rather unusual narration of the facts, we are nevertheless unable to find that this was not a collateral attack.

The first count obviously ties the property settlement to the decree. Indeed "it appears to be well settled, that if the agreement is presented to the court in the divorce proceeding for adjudication, and the agreement, or a part thereof, is incorporated in the decree and made a part thereof, the part so incorporated is merged in the decree." Hough v. Hough, 26 Cal.2d 605, at page 609, 160 P.2d 15, at page 17. Moreover, Count One actually alleges that the court approved the contract of December 1, 1943, and made it part of the decree by reference. We know of no reason why the court below could not in considering Count Two be advised of the facts recited in Count One. The court was not required to put on blinders so as to inspect the complaint piecemeal or to see each count in isolation. Rose v. Ames, 1942, 53 Cal.App.2d 583, 128 P.2d 65, upholds the sustaining of a demurrer to a common count of a complaint in which another and more specific count pleaded facts showing the common count rested upon the same basis as the other count. The court sustained the demurrer to the common count which was "obviously based on the set of facts specifically pleaded in the other count." 53 Cal.App.2d at page 589, 128 P.2d at page 68.

Since appellant's rights under the settlement agreement were merged in the decree, appellant's attack is collateral and the count does not state a cause of action.

[7] Count Three requests that the contract of December 1, 1943, be declared null and void as against public policy because respondent agreed collaterally in the written contract that she would procure a divorce. The count fails on these bases: (1) as the lower court stated, "[T]he parties are in pari delicto" (see Bancroft v. Bancroft, 1918, 178 Cal. 359, 173 P. 579, L.R.A. 1918F, 1029), wherein the court refused to set aside an interlocutory decree when attacked by one of the guilty parties); (2) it seeks to set aside the agreement only without setting aside the decree; the fallacy of such an attempt has been discussed under Count Two; (3) as the lower court properly pointed out, the allegation that the contract itself is "against public policy as promotive of divorce" fails because the contract as such is not violative of public policy.

[8] Count Four alleges that appellant and respondent "cannot agree on just what liens Plaintiff must pay when due, and what taxes and assessments Plaintiff is obligated to pay when levied, and just how the division of any proceeds concerning the sale of any properties should be made, and just what Plaintiff's rights of management under the terms of the contract are."

The count fails because, first, the trial judge found such relief not "necessary or proper at this time." Section 1061 of the Code of Civil Procedure, providing for declaratory relief, empowers the court to deny relief "in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." Such denial "is within the trial court's discretion and the court's discretion * * * will not be disturbed on appeal unless it be clearly shown that the discretion was abused." Herrmann v. Fireman's Fund Ins. Co., 1954, 127 Cal.App.2d 560, 565–566, 274 P.2d 501, 505. Appellant makes no showing whatever as to any abuse of discretion.

Second, the failure of appellant to show that respondent controverted the stated claim amply supports the trial judge's conclusion that no "particular dispute" is alleged. Confirmation of this position lies in the very citation of appellant: 2 Witkin California Procedure (1954) § 449, p. 1431, which quotes Maguire v. Hibernia Sav. & Loan Soc., 1944, 23 Cal.2d 719, 146 P.2d 673, 151 A.L.R. 1062, to the effect that the complaint must allege an actual controversy.

[9] Count Five attempts an impossible declaration of rights against an individual, not a party to the action, who is described as having made claims to some of the involved property because of a subsequent marriage to respondent. In addition to the defects already set out as to the previous declaratory relief of Count Four, the instant one suffers from the fatal flaw of seeking relief against one not served with process. People v. Broad, 1932, 216 Cal. 1, 12 P.2d 941.

Count Six, a common count, claims respondent is indebted to appellant in the amount of $20,000, none of which has been paid. As we have said supra, the common count rests upon the same facts as the first specific ones, and it cannot serve to raise appellant's contentions beyond the level of the previous inadequate allegations.

[10] Appellant's final contention is that the court should not have entered judgment for respondent while she was in default. Since the complaint showed no ground for relief, the default of one of the parties could not improve it. The superior court aptly noted, Williams v. Foss, 1924, 69 Cal.App. 705, at page 707, 231 P. 766, at page 767: "The default admitted nothing more than was alleged in the complaint."

[11] The judicial process has proceeded beyond the point at which a judge, like an umpire of a sporting event, records fouls or defaults of two contestants. The court's function must be to protect the legitimate interests of all the parties even in the situation where one party does not appear. Thus the court below properly determined, upon application for default judgment, that the complaint did not support a judgment. The inadequate allegations could not compose causes of action merely because of the absence of the opposing party. Even if the complaint did state a cause of action a bare prayer for $20,000 should not turn to gold because of the non-appearance of an adversary. The court could properly determine if there were any evidence to sustain such damages, and it obviously found nothing due here.

We affirm the judgment.

BRAY, P. J., and FRED B. WOOD, J., concur.

170 Cal.App.2d 811

Elsie E. COWEE, Ruth Evans and Pearl L. McNulty, Plaintiffs and Respondents,

v.

Matthew MARSH, Defendant and Appellant.

Civ. 9355.

District Court of Appeal, Third District, California.

May 29, 1959.

Action was brought for damages resulting when automobile driven by one of the plaintiffs and defendant's oncoming automobile sideswiped, and automobile driven by one of the plaintiffs went out of control and collided head on with third automobile. The Superior Court, Butte County, Arthur Coats, J., entered judgment in favor of the plaintiffs, and the defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence sustained finding that defendant's automobile crossed over onto wrong side of highway.

Judgment affirmed.

See also 50 Cal.2d 240, 324 P.2d 553.

1. Appeal and Error ⚿1011(1)

A reviewing court will not interfere with judgment, where there exists a substantial conflict in the evidence.

2. Automobiles ⚿244(10)

In action for damages resulting when automobile driven by one of the plaintiffs and defendant's oncoming automobile sideswiped, and automobile driven by one of the plaintiffs went out of control and collided head on with third automobile, evidence sustained finding that defendant's automobile crossed over onto wrong side of highway.

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Peters & Peters and Coyle E. Bybee, Chico, for appellant.

Francis T. Cornish, Berkeley, J. Adrian Palmquist, Oakland, Manwell & Manwell, Marysville, and James G. Changaris, Yuba City, for respondents.

VAN DYKE, Presiding Justice.

Defendant Marsh appeals from a judgment rendered against him and in favor of plaintiffs Cowee, Evans and McNulty for damages resulting from an automobile accident in which three automobiles were involved. Respondent Cowee was driving from Chico towards Oroville, appellant was driving from Oroville to Chico just ahead of a third car, called the Smith car. The cars being driven by Cowee and appellant sideswiped as they were passing and Cowee's car, out of control, collided head on with the Smith car. The sole question presented is the sufficiency of the evidence to sustain the trial court's finding that the negligence of appellant was the sole proximate cause of the collision between his car and Cowee's car and of the resulting collision between that car and the Smith car. If that question be resolved adversely to appellant then all plaintiffs were entitled to recover.

[1] A prior trial to a jury had resulted in a discharge of the jury for inability to agree. In the second trial, there came into evidence in one way or another, much of the testimony of witnesses at the first trial, all of the depositions of witnesses taken before trial, parts of the evidence at the coroner's inquest into the deaths of the occupants of the Smith car, and many statements made by witnesses to claims adjusters and to highway patrolmen. Under such circumstances it is not unusual to find that the evidence is not only sharply in conflict from witness to witness but also that the testimony of witnesses developed inconsistencies with their prior testimony and statements. It is appellant's contention that although there is sufficient evidence to support the trial court's findings if taken at face value, yet the evidence supporting the trial court's decision is incredible and that the conflict is apparent rather than real; that the substantial believable testimony when analyzed shows as a matter of law that appellant was free of negligence and that Cowee's negligence was the sole proximate cause of the accident.

Acknowledging the well-known rule that an appellate court will not interfere with the judgment where there exists a substantial conflict in the evidence, appellant frankly relies upon the concept of substantial support as stated in Morton v. Mooney, 97 Mont. 1, 33 P.2d 262, and referred to with approval by our Supreme Court in Herbert v. Lankershim, 9 Cal.2d 409, 471–472, 71 P.2d 220, 251. Said the Montana court:

> "While the jurors are the sole judges of the facts, the question as to whether or not there is substantial evidence in support of the plaintiff's case is always a question of law for the court (Grant v. Chicago, M. & St. P. Ry. Co., 78 Mont. 97, 252 P. 382), and, in determining this question, 'the credulity of courts is not to be deemed commensurate with the facility or vehemence with which a witness swears. "It is a wild conceit that any court of justice is bound by mere swearing. It is swearing creditably that is to conclude the judgment."'"

[2] There are material conflicts in the testimony and some of the witnesses gave testimony that directly or inferentially conflicted seriously with prior testimony and statements. Appellant has filed a voluminous brief, which painstakingly sets out all of these matters and analyzes them in accordance with appellant's point of view. It is apparent from the record that these contentions were fully presented to the trial court both during the trial and upon motion for new trial. The trial court, presided over by an experienced jurist, rejected appellant's contentions. We have carefully followed appellant in his arguments and have concluded that there is substantial support for the decision and that it must therefore be affirmed. It would be impossible within the reasonable limits of an opinion to discuss in detail the numerous conflicts presented by the record, all of which are stated, described and analyzed with copious quotations from the record in the 500 pages of briefing with which appellant's counsel have favored us. A brief introductory statement of facts and a quotation from the written opinion of the trial judge will suffice.

The accident occurred on a very stormy night. Visibility was poor and there were intermittent flashes of blinding lightning with a heavy downpour of rain. As appellant's car, which was followed closely by the Smith car, was passing Cowee's car the two vehicles came into a scraping collision. Appellant testified that at that moment he had come to a stop or nearly to a stop and to avoid a collision with the Cowee car, which was over the center line, had pulled far to his right so that his car was mostly on the shoulder of the road when it was struck by the Cowee car; that the Cowee car went on up the road about 250 feet and struck the Smith car. The occupants of the Cowee car testified that Mrs. Cowee was on her side of the road until struck by appellant's car; that the collision pulled her car to the left and into the wrong lane where, out of control, it hit the Smith car head on; that this collision happened immediately; that as one witness said, "It was just bang, bang." The decision turned upon the issue of which car, appellant's car or the Cowee car, was out of its travel lane when the two collided.

We quote the following from the trial court's decision:

> "It is the contention of Plaintiffs that the Marsh car came around the curve on the wrong side of the road; that as it was crossing back, it came into collision with the Cowee car; and that almost immediately thereafter the collision between the Cowee car and the Smith car occurred.
>
> "It is the contention of the Defendant that the Cowee car struck his car while it was stopped and on the gravel shoulder on his side of the road and then proceeded onward some 250 feet and collided with the Smith car.
>
> "It appears from the evidence that all parties and all witnesses were sober. They all appear to describe what hap-

pened as they saw it. Their testimony gives support to the stock instruction that witnesses may vary in the description of the same accident.

"The damage to the Marsh car indicates that there was a solid impact with sufficient force to change its direction in moving or to move it, if stopped. The scratches and markings on the rear tire indicate that they were caused by scraping against the fender or the fender skirt, which was not removed until some little time after the accident. The hub cap was gone and has never been located. It would appear that the Marsh car was driven some distance after the collision with the Cowee car.

"In the Cowee car were three women in the front seat and five children in the back of the station wagon. The women were keenly aware of the storm and remarked upon it from time to time. It is hardly conceivable that Mrs. Cowee would drive at a reckless rate of speed under the circumstances. It is also harder to conceive that after coming into a collision with the Marsh car, that she could have then proceeded 250 feet down the highway to the point of collision with the Smith car without any occupant of the car being aware of the interval of space and time. This distance is an appreciable distance, and to travel it takes an appreciable space of time. The testimony of the occupants of the car is either that one collision immediately followed the other or that only the one collision is remembered.

"The testimony of Mrs. Cowee, Mrs. McNulty and Arlene Evans is that the Cowee car was on its own side of the road and the first car (The Marsh Car) comes around the curve on the wrong side of the road. The witness Clark states that he saw the Marsh car in motion after the accident and saw it as its brake light went out as it came to a stop.

"The preponderance of the evidence is that the second collision followed immediately after the first collision, and that the first collision occurred very near to the place where the Cowee car and the Smith car met and came to rest.

"In the opinion of the Court the Defendant's negligence was the proximate cause of the injuries to Plaintiffs, and they are entitled to judgment."

The brief analysis of the evidence given by the trial court sufficiently demonstrates that we do not have here a case where a reviewing court can say that all of the evidence which so patently supports the trial court's decision was incredible. The occupants of the Cowee car did testify as related, although there were inconsistencies between their testimony on this trial and their previous statements. Some of the conflicts were serious. Their ability, due to circumstances, to accurately observe the position of their car on the road was subject to challenge. Yet it was for the trial court to determine whether or not in substance they stated the truth concerning the way in which the collision with the appellant's car came about. There was also the witness referred to as Clark, whose testimony was squarely in conflict with the testimony of appellant that his car was practically stopped at the time of the collision with the Cowee car and that from that point the Cowee car was driven 250 feet to the point of collision with the Smith car. We think it unnecessary to discuss the matter further.

The judgment appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.

170 Cal.App.2d 698

FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, a corporation, Plaintiff and Appellant,

v.

CONTINENTAL CASUALTY COMPANY, a corporation, Defendant and Respondent.

No. 18439.

District Court of Appeal, First District, Division 1, California.

May 27, 1959.

Hearing Denied July 22, 1959.

Action by truck owner's insurer against insurer of lessee of truck for proration of amount of judgment it had paid in action against truck owner, driver, and lessee. The Superior Court, City and County of San Francisco, William T. Sweigert, J., rendered judgment for lessee's insurer, and owner's insurer appealed. The District Court of Appeal, Bray, P. J., held that where automobile liability policies of owner and lessee of truck provided that, if insured had other valid and collectible insurance, insurer should be liable for only that proportion of loss which limit of its policy bore to limit of other company's policy, provided that as to liability occasioned by a nonowned automobile, insurance should be excess insurance over any other valid and collectible insurance, and judgment was obtained against driver of leased truck, lessee and owner, prorate clause in owner's insurer's policy was not invalidated but was inapplicable and lessee's insurer was not liable proportionately for loss but if owner's insurer's insurance had been exhausted, lessee's insurer's excess coverage would have been available to the assured.

Affirmed.

1. Insurance ⚷512½

Where automobile liability policy issued to truck owner provided that, if insured had other valid and collectible insurance, insurer should be liable for only that proportion of loss which limit of its policy bore to limit of other company's policy, provided that as to liability occasioned by nonowned automobile, insurance should be excess insurance over any other valid and collectible insurance, prorate provisions would be applicable when both policies were issued to truck owner, and excess provisions would be applicable when one policy was issued to truck owner and the other to truck hirer, there would be no double coverage as to nonowned trucks, and when liability reached full amount of policy issued to truck owner, then by reason of excess insurance provision of truck hirer's policy, liability of that policy would come into play.

2. Insurance ⚷512½

Where automobile liability policies of owner and lessee of truck provided that, if insured had other valid and collectible insurance, insurer should be liable for only that proportion of loss which limit of its policy bore to limit of other company's policy, provided that as to liability occasioned by a nonowned automobile, insurance should be excess insurance over any other valid and collectible insurance, and judgment was obtained against driver of leased truck, lessee and owner, prorate clause in owner's insurer's policy was not invalidated but was inapplicable and lessee's insurer was not liable proportionately for loss, but if owner's insurer's insurance had been exhausted, lessee's insurer's excess coverage would have been available to the assured. West's Ann.Vehicle Code, § 402.

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Bledsoe, Smith, Cathcart, Johnson & Phelps, San Francisco, for appellant. Wilbur J. Russ, San Francisco, of counsel.

Carroll, Davis, Burdick & McDonough, San Francisco, for respondent. J. D. Burdick, San Francisco, of counsel.

BRAY, Presiding Justice.

Plaintiff appeals on an agreed statement from judgment in favor of defendant.

Question Presented.

Whether the insurance policies in question create a situation of "prorate" coverage or primary and "excess" coverage.

Facts.

Plaintiff issued an "Automobile Policy" providing liability insurance coverage for trucks registered in the name of Robert Sloan, in the amounts of $25,000 for each person, $50,000 each occurrence, for bodily injury, and $10,000 for property damage. Persons operating these trucks were additional assureds. Sloan leased a truck to Nesbitt Fruit Products, Inc. Buchanan, who was operating the truck, was an additional insured under plaintiff's policy. Defendant had issued a "Comprehensive General-Automobile Liability Policy" to Nesbitt, with bodily injury limits of $300,000 each person and each occurrence, and property damage of $100,000. The policy covered hired trucks and drivers thereof. Thus Buchanan was an assured under this policy. Buchanan, driving the hired Sloan truck, was involved in an accident with Robert George. George subsequently obtained judgment against Buchanan for negligent operation of the truck, against Nesbitt under respondeat superior, and against Sloan as truck owner (under Vehicle Code, sec. 402) for $4,391.20 for personal injuries and $725.05 property damage. Plaintiff paid the judgment and then sought proration in this action. The court held that plaintiff was liable for the full amount of the George judgment. Each insurer admits that in the absence of the other it would be liable under its respective policy for the full amount of the George judgment.

Is Proration Required?

Each policy contains an "other insurance" provision. Each policy provides that if the insured has other "valid and collectible insurance" the particular company shall only be liable for that proportion of the loss which the limit of its policy bears to the limit of the other company's policy, provided that as to liability occasioned by a nonowned automobile the insurance shall be "excess insurance over any other valid and collectible insurance."

Plaintiff contends that either both "other insurance" clauses must be given effect or both clauses disregarded as conflicting, and in either event proration ordered.

There are three types of limiting clauses in "other insurance" provisions: (1) a "prorate" clause provides for apportionment of a loss with other valid and collectible insurance; (2) an "excess" clause provides coverage for loss only in excess of other valid and collectible insurance; and (3) an "escape" clause attempts to avoid all liability where there is other valid and collectible insurance. See Peerless Casualty Co. v. Continental Cas. Co., 1956, 144 Cal. App.2d 617, 621, 301 P.2d 602, for discussion of these three types. The court there held that the court must carefully examine the language of the policies to determine which type of clause was intended. Here, admittedly, we are not concerned with the third type. The solution of the problem here depends upon the proper interpretation of the "other insurance" provisions of the two policies.

There has been a great deal of confusion in the decisions of other states in passing upon "other insurance" clauses. As stated in Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co., 9 Cir., 195 F.2d 958, 959, "These decisions point in all directions." See also 5 U.C.L.A.Law Rev., p. 157, and 5 Stanford Law Rev. p. 147, for discussion of "excess" v. "prorate," "escape" v. "prorate," "prorate" v. "prorate," "excess" v. "excess" and "escape" v. "escape" cases. Even in California there has been some conflict in the decisions on the subject. However, the exact situation which appears in our case, namely, two policies which each contain a "prorate' clause and an "excess" clause, has never been passed upon in this state.

Plaintiff relies upon the following California cases: Air Transport Mfg. Co. v. Employers Liability Assurance Corp., 91 Cal.App.2d 129, 204 P.2d 647; American Auto. Ins. Co. v. Seaboard Surety Co., 155 Cal.App.2d 192, 318 P.2d 84, and Peerless Casualty Co. v. Continental Casualty Co., supra, 144 Cal.App.2d 617, 301 P.2d 602. In none of them, however, was the exact question presented that is presented here. In the Air Transport case, the Employers Liability Assurance Corp. insured the owner of the truck involved and anyone driving with the owner's permission. The only clause in its policy dealing with other insurance was to the effect that if there were other valid insurance the policy should be null and void. In other words, this was an "escape" clause. Pacific Indemnity Co. also issued a policy to Air Transport with an "other insurance" clause which provided for prorate only if there were other insurance. The court held that under the Employers' "escape" clause the only other insurance which would release it from liability would have been an unconditional coverage of the loss. As the Pacific policy afforded only a "prorate" coverage it was not an effective coverage and therefore it was not other *valid* insurance, and the Employers' policy did not become null and void. The court then held that as the limits of each policy were the same, Pacific was therefore liable for half of the coverage. Air Transport had other valid insurance to the extent of half of the loss. Hence, it held Employers liable for the coverage not afforded by Pacific, namely, one-half. Although the court was there dealing with an "escape" clause versus a "prorate" clause, rather than here a "prorate" and an "excess" clause versus a "prorate" and an "excess" clause, the ruling of the court is important here for it held, in effect, that the policies must be interpreted together, and that in order for the provision of one to be affected by the provision of the other, the other must be in a policy of *valid* insurance and the limitation in the latter policy must be considered in determining the application of the limiting clause in the first policy.

In American Auto. Ins. Co. v. Seaboard Surety Co., supra, 155 Cal.App.2d 192, 318 P.2d 84, 88, the owner of certain equipment which caused a third person injury had a policy of insurance with American; the renter of the equipment had a policy with Seaboard. The American "other insurance" clause provided for "prorate" with "all valid and collectible insurance." The Seaboard policy had an "excess" clause providing coverage only above the amount of any other "good, valid and collectible insurance." (155 Cal.App.2d at page 199, 318 P.2d 84, 88.) The court held American liable for its "prorate" portion of the loss, in that case one-half, and that to that extent it was "good, valid and collectible" other insurance within the purview of the Seaboard policy. It then held Seaboard liable for the other half of the loss, as being the "excess" over the amount of the "good, valid and collectible" insurance of the American policy. Thus, the holding is that if one policy provides for "prorate" insurance in the event of other insurance, and the other provides for "excess" insurance, the latter is liable for the amount of the loss over and above the "prorate" share of the first policy. It should be noted that this was not a case involving liability insurance on a nonowned car on which "excess" insurance was issued. It involved a conflict between two primary policies.

In Peerless Casualty Co. v. Continental Cas. Co., supra, 144 Cal.App.2d 617, 301 P.2d 602, the owner of the truck causing injury held a policy of Peerless, whose "other insurance" clause provided for "prorate" if other valid insurance. The renter was insured with Continental whose "other insurance" clause of the policy was "excess" to other valid and collectible insurance. On the authority of Air Transport Mfg. Co. v. Employers Liability Assurance Corp., supra, 91 Cal.App.2d 129, 204 P.2d 647, the court held that the two companies should prorate the loss. This was a case of "prorate" v. "excess."

Plaintiff places great reliance upon Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co., supra, 9 Cir., 195 F.2d 958. There, the policy insuring the owner of the automobile contained a "prorate" clause and an "escape" clause applying if the covered automobile were nonowned. The policy covering the nonowner contained a "prorate" and an "excess" clause if other insurance. The trial court concluded that the insurer of the owner had the primary liability and the insurer of the hirer was not liable on its policy until the limits of the primary policy were reached. The reviewing court held, however, that these provisions of the two policies were mutually repugnant and hence must be disregarded. It then applied the rule that where two policies cover the same risk and neither has an "other insurance" provision, the two insurers are liable to prorate in proportion to the amount of insurance provided by their respective policies. This, then, was a case of conflict between a "prorate" and "escape" policy and a "prorate" and "excess" policy. Concerning the decision in this case the court in Peerless Cas. Co. v. Continental Cas. Co., supra, 144 Cal. App.2d at page 623, 301 P.2d at page 606, said: "The Oregon case, supra, which involves a conflict between an escape clause and an excess clause, rejects all reasoning on the basis of which other cases grant preference to one or the other of the conflicting other insurance clauses and, holding that one cannot rationally choose between the two clauses involved, takes the position that the mutually repugnant clauses should be disregarded and prorating applied as if the policies did not contain any other insurance clauses. Although this solution seems sensible the case stands alone. The great majority of the cases treating a conflict of an excess and an escape clause give effect to the excess clause. See annotation 46 A.L.R.2d 1159, subd. (b) p. 1165 et seq.; 5 Stan.L.Rev. 147, 148. The reasonings used to justify this result may not be convincing, the fact must be noted that the decisions in general show favor of excess clauses, disfavor of escape clauses."

Pleasant Valley Lima Bean Growers and Warehouse Ass'n v. Cal-Farm Ins. Co., 142 Cal.App.2d 126, 298 P.2d 109, contains a situation closer to ours than that in any other California case. There the United States Fidelity & Guaranty Company issued a general liability insurance policy to Pleasant Valley. It contained a clause providing for "prorate" in case of "other insurance," and an "excess" clause if the loss arose from a nonowned automobile. Cal-Farm issued an automobile insurance policy to one Brucker. Its "other insurance" clause provided "prorate" but "excess" insurance if the loss was caused by substitute, newly-acquired or privately owned automobiles. Brucker's employee Nungaray, driving Brucker's truck, was injured at Pleasant Valley's warehouse due to the negligence of the latter's employee Croker. "Turning to the policies of insurance themselves, we find that both contain 'other insurance' clauses. United's 'other insurance' clause provides that its liability shall be proportionate to other valid and collectible insurance, save that in the case of loss arising out of the use of a nonowned automobile, its insurance shall be *excess* insurance only. As the truck involved in the accident was not owned by Pleasant Valley, United's insured, United's policy is excess insurance as to Pleasant Valley, and Cal-Farm's duty to defend Pleasant Valley and pay judgment in the Nungaray action is primary to the obligation of United. Cal-Farm's 'other insurance' clause likewise provides that its liability shall be proportionate to other valid and collectible insurance, save that in circumstances not applicable here, its coverage shall be *excess* coverage. Since we have already determined that Croker is an additional insured under the Cal-Farm policy, and since Croker is not insured under United's policy, Cal-Farm's obligation to defend him and pay judgment against him in the Nungaray action is also primary, for there is no other valid and collectible insurance covering him which could be prorated with the Cal-Farm insurance. Also, since United's coverage of Pleasant Valley is excess with respect to nonowned vehicles, there is no basis for apportionment with Cal-Farm's coverage of Pleasant Valley. The facts in the instant case are readily distinguishable from those in Air Transport Mfg. Co. v. Employers' Liability Assurance Corp., 91 Cal.App.2d 129, 204 P.2d 647, relied on by defendant, and that case is not authority for the proposition that Cal-Farm and United are jointly liable to defend Pleasant Valley in the Nungaray action and pay judgment therein." 142 Cal.App.2d at pages 136–137, 298 P.2d at page 115.

In the Air Transport case, supra, the court, instead of doing as the court did in the Oregon Auto. case, supra, declare the provisions of the two policies repugnant to one another, declared them consistent with one another and held that the "prorate" provision of the one policy was "other valid insurance" as to the other policy but only to the extent of half of the policy's limit of liability. Likewise in the Pleasant Valley case, supra, the court refused to declare the provisions of the two policies repugnant to one another, but reconciled them. So in our case the provisions may easily be reconciled. The policies now before us are practically identical in form with respect to the clauses which bear upon the rights of the parties, and are seemingly complementary to each other. Both appear to have been designed to avoid arguments such as arose in the Air Transport case, and to this end it appears that the ultimately liable tort-feasor was intended to have (1) if he were the owner of the truck, full coverage if no other insurance, but if other insurance the amount of loss to be proratable with the other insurance; (2) if he were the hirer of the truck, he would have full coverage if no other insurance, but if other insurance his would be "excess" over the owner's policy.

The pertinent provisions of both policies provided in effect that generally if there were other insurance, the particular company would be liable only for a proportionate share of the loss, but for loss occasioned by trucks not owned but hired by the particular insured, the particular company would only be liable for the excess of the loss over the amount payable by the company insuring the truck's owner. Here, plaintiff insured Sloan and his driver directly, and hence had the primary liability. Defendant's liability was secondary to that and "excess" because its insured's tort-feasor liability arose from the use of a nonowned car and the policy expressly provided that in that event, defendant's liability was only "excess" to that of the company insuring the car owner.

[1] There is no conflict between the clauses of the two policies here when they are interpreted to mean (and such meaning is clear from them) that the "prorate" provisions apply when both policies are issued to the truck owner, and that the "excess" insurance provisions apply when one policy is issued to the truck owner and the other is issued to the truck hirer. So far as nonowned trucks are concerned, there is no "double coverage." When the tort-feasor's liability reaches the full amount of the primary liability policy, that is, the policy issued to the truck owner, then by reason of the "excess" insurance provision of the truck hirer's policy, the liability of that policy comes into play. See American Surety Co. of N. Y. v. Canal Ins. Co., 4 Cir., 258 F.2d 934, reversing the decision in D.C. S.C.1957, 157 F.Supp. 386) in which the policies contained both "prorate" and "excess" insurance clauses and the court held the nonownership policy was "excess" to the other.

While, as we have hereinbefore stated, there is considerable confusion in the authorities elsewhere as to the proper interpretation of policies containing "other insurance" clauses, it is interesting to note that the weight of authority is to the effect that where one policy covers the automobile owner and the other the automobile hirer, the "excess" clause in the latter policy is given full effect. See Hardware Cas. Co. v. Massachusetts Bonding & Ins. Co., Sup., 129 N.Y.S.2d 304; Farm Bureau Mut. Auto. Ins. Co. v. Preferred Acc. Ins. Co., D.C., 78 F.Supp. 561; Benroth v. Continental Casualty Co., D.C., 132 F.Supp. 270; American Surety Co. of New York v. American Indemnity Co., 8 N.J.Super. 343, 72 A.2d 798; American Motorists Ins. Co. v. Weir, 132 Conn. 557, 46 A.2d 7; Manufacturers Cas. Ins. Co. v. Great American Indem. Co., D.C., 91 F.Supp. 18; United Services Automobile Ass'n v. Russom, 5 Cir., 241 F.2d 296; Travelers Indemnity Co. v. State Automobile Ins. Co., 67 Ohio

App. 457, 37 N.E.2d 198; Allstate Insurance Co. v. Urban, 15 Ill.App.2d 386, 146 N.E.2d 387.

[2] Considering both policies in our case, it seems that neither insurer contemplated that it would be liable proportionately in the event of loss arising out of the use by the insured of a nonowned vehicle, where there is other valid and collectible insurance. The "prorate" clause in plaintiff's policy is not invalidated, it is merely inapplicable. Up to the limits of its liability, there is no "other insurance" in view of the limitations of defendant's "other insurance" clause. However, defendant does not necessarily "escape" liability, for if plaintiff's coverage is exhausted, defendant's "excess" coverage will be available to the assured. This is in accord with the cases considering this particular situation. Accordingly, defendant is under no obligation to contribute any amount in respect to the judgment paid by plaintiff.

The judgment is affirmed.

FRED B. WOOD and TOBRINER, JJ., concur.

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170 Cal.App.2d 687

John C. GREEN and Gertrude F. Green, Plaintiffs and Respondents,

v.

SPRAGUE RANCHES, a copartnership composed of Norman F. Sprague and Caryl Sprague, Defendants and Appellants.

Civ. 6032.

District Court of Appeal, Fourth District, California.

May 26, 1959.

Rehearing Denied June 22, 1959.

Action for declaratory relief and reformation of certain instruments wherein owners granted defendant a right of first refusal on the purchase of certain land and subsequently, a fixed price option. The Superior Court, Kern County, R. B. Lambert, J., entered judgment for owners and defendants appealed. The District Court of Appeal, Shepard, J., held that in view of a conflict, within the terms of the documents, whatever evidence was available to explain the ambiguity between the two clauses of the contract should have been received in evidence, and refusal of court to do so was prejudicial error.

Judgment reversed and new trial ordered.

1. Contracts 🔑175(2)

Wherever an ambiguity in the wording of a document appears, and evidence of the circumstances surrounding execution of the agreement is available, it is the duty of the court to receive such evidence in aid of interpretation of the document. West's Ann.Code Civ.Proc. §§ 1856, 1860.

2. Appeal and Error 🔑1056(5)
Vendor and Purchaser 🔑80

In view of a conflict, within the terms of the document giving defendants a first refusal right on purchase of certain land, and an amendment giving them a fixed term option to purchase the land at a fixed price, whatever evidence was available to explain the ambiguity between the two clauses of the contract should have been received in evidence, and refusal of court to do so was prejudicial error. West's Ann. Code Civ.Proc. §§ 1856, 1860.

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Musick, Peeler & Garrett, Charles T. Munger, Los Angeles, for appellants.

Mack, Bianco, King & Eyherabide, Bakersfield, for respondents.

SHEPARD, Justice.

May 3, 1956, plaintiffs let to one McNally, by a written lease, certain farm land under a one-quarter gross crop rental with termination date December 31, 1957. October 5, 1956, defendants herein became the assignees of that lease and the parties hereto entered into a modification agreement whereby, among other provisions, plaintiffs as owner-lessors granted to defendants as lessees a right of first refusal on the purchase of said land should plaintiffs decide to sell. This first refusal clause, after providing for notice by plaintiffs to defendants of the price, terms and conditions of any offer received from a third party requires defendants, within 30 days from such notice, to deposit with a bank or title company the initial payment of such noticed offer, and that upon failure of defendants to make such deposit plaintiffs may sell to any third person at or above the noticed price. July 11, 1957, by letter from defendants to plaintiffs with plaintiffs' written acceptance, a second modification agreement was entered into changing the terms of the lease from crop rental to a fixed cash rental; reducing time for defendants' exercise of its right of first refusal to 15 days after receipt of notice of offer; and adding the following:

> "(4) We shall have an option, exercisable by written notice mailed to you at the address hereinabove used prior to December 1, 1958, to purchase the rented property;
>
> "(5) In the event of our exercise of the option our purchase of the property will be consummated as soon as possible after January 1, 1959 through escrow at the office of Title Insurance & Trust Company at Bakersfield, California, with costs, responsibilities and other items in connection with the sale to be borne and pro-rated in accordance with conventional California real estate practice, and we shall be entitled to possession of the property pending close of escrow. We will purchase the property subject only to the then unpaid balance of the first trust deed now a lien on the property, and the option price shall be the delivery to you of our note dated January 1, 1959, secured by second trust deed on the property, bearing interest payable annually (or monthly if you so desire) at the rate of 10% per annum, with all principal payable in a lump sum on December 31, 1968. Our note shall be in such original principal amount that the total of all interest and principal payments to be made under the note will equal the difference between:
>
> "(a) $133,000 (being $143,000 less the $10,000 in rent which will have been paid); and
>
> "(b) the then unpaid balance of the first trust deed now a lien on the property.
>
> "Except as herein modified, the terms of the existing lease between us shall remain in effect."

May 28, 1958, plaintiffs gave notice to defendants that they had received and accepted, subject to defendants' right of first refusal, an offer for the purchase of the land in question for the agreed purchase price of $150,000, with a total down payment of $15,000 and the balance of $135,000 payable $6,750 per year, with 6% interest on deferred payments. June 9, 1958, defendants gave written notice to plaintiffs that they elected to exercise their fixed price option as set forth in paragraphs 4 and 5 (above quoted) of the second modification agreement. June 19, 1958, plaintiffs filed this action for declaratory relief and for reformation. Said complaint contains certain allegations of fraud and mistake but at the time of trial those allegations were abandoned, and the trial was had entirely on the question of whether or not the fixed price option contained in the second modification agreement was or was not extinguished by the notice of offer given by plaintiffs on May 28, 1958 under the first refusal clause of the first modification agreement. During the trial defendants offered proof of the surrounding circumstances connected with the execution of the agreements, which evidence was, on objection of plaintiffs, refused by the trial court. The judgment and decree that plaintiffs have the right to sell the real property to the third party in accordance with the terms of the new offer, and that under the first refusal clause the defendants have no right or option to purchase said real property in effect, held that the right of defendants under the fixed price and term option was extinguished by the defendants' failure to meet the terms of the offer under the first refusal clause.

Defendants' first contention on appeal is that the trial court erred in construing the documents in question so as to extinguish appellants' option to buy the ranch at a fixed price. It cites two authorities which to some extent support its contention.

Butler v. Richardson, 74 R.I. 344, 60 A.2d 718, 722, involved a right of first refusal clause, together with a fixed price option in the amount of $15,000. The court, in discussing what effect the provision for a first refusal had, if any, upon the provision for an option, said:

> "As we indicated above it has no effect whatever. The right of option remains unimpaired. Until the time prescribed for its exercise expires, the respondents cannot sell for any amount without complainant's consent. However, the provision for a first refusal may nevertheless serve a useful purpose. It provides a means whereby respondents, if they desired, could induce an acceleration of complainants' decision to purchase by affording them an opportunity to purchase at a price more advantageous to them than the price fixed in the option. Of course the provision could not serve this purpose if the offer was at a higher price, and consequently it is inconceivable that the parties in agreeing to the provision could have contemplated any offer except one that was lower than $15,000. We are of the opinion, therefore, that the provision for a first refusal should be construed in that light, not so much as an alternative to the provision for an option but rather as a supplement thereto."

Barnhart v. Stern, 182 Wis. 197, 196 N.W. 245, involved the interpretation of a contract containing a first refusal clause, which was followed by the words "and the said lessee is hereby given the option to purchase the said premises for the sum of fifteen thousand ($15,000.00) dollars at any time during the continuance of this lease." The reasoning of the court in that case is identical with the reasoning expressed in the quotation from Butler v. Richardson, supra, and the court held that the first refusal clause and the fixed price option were two distinct and separate privileges, and notice of offer under the first refusal clause did not extinguish the fixed price option.

Plaintiffs, in support of their contention that the exercise by plaintiffs of the first refusal clause would extinguish defendants' rights under the fixed price option clause, cite several cases. Manasse v. Ford, 58 Cal.App. 312, 208 P. 354, involved a fixed price option in a lease followed by a first refusal clause. However, the language of the first refusal clause includes mention of the amount of the fixed price option and by its own frame-work explicitly provides for the extinguishment of the fixed price option when the procedure of the first refusal is followed and completed. Its wording is definitely different from that in the case at bar. Adams v. Helburn, 198 Ky. 546, 249 S.W. 543, involved a fixed price option and the next immediately following sentence provides a first refusal clause. The court held that under the particular wording of that contract the exercise of the first refusal rights would cut off and extinguish the fixed price option if it was not exercised before the lessor gave notice of a higher offer. Shell Oil Co. v. Blumberg, 5 cir., 154 F.2d 251, again involved a fixed price option followed by a first refusal clause, and the lessee's fixed price option was held to have been extinguished through the exercise of the first refusal clause because the lessee neglected to exercise his fixed price option until after the sale to the third person had been completed. Sinclair Refining Co. v. Allbritton, 147 Tex. 468, 218 S.W.2d 185, 8 A.L.R.2d 595, involved a lease with a fixed price option and also a first refusal clause. The lessee in that case gave notice of exercise of the fixed price option and defendant responded with notice of a third party higher offer. The court there held that the lessee was not obligated to buy under the first refusal clause and had the right to a completed purchase under the exercise of a fixed price option.

It will be seen from the foregoing that there is some apparent difference in the approach and reasoning used by the courts of different jurisdictions in the United States. However, a close examination of these cases indicates the difference to be more apparent than real, for each case has been decided under the peculiar facts there present with slight differences in the wording in each instrument construed.

Under the peculiar facts of the case at bar, in which there was an original lease with no option, the modification thereof with a first refusal clause, the exercise of which would extinguish its own privileges, and the second modification which inserted an entirely new thought in the form of a fixed price option, which by its express terms continued to December 1, 1958 and specified that it would be exercised by the giving of written notice and consummated by delivery to escrow of a trust deed and encumbrance to commence January 1, 1959 (one day after the termination of the lease), the intention of the parties would more reasonably appear to have been to create an independent and separate right not extinguishable by the exercise by plaintiffs of the first refusal clause. We are unable from the writings themselves to support the reasoning of the trial court.

Defendants also contend that the trial court committed reversible error in excluding, as an aid to construction of applicable documents, evidence of surrounding facts and circumstances and parol evidence offered by defendants. Thus the defendants offer the alternative suggestion that the document in question was ambiguous, and that because of such ambiguity the court should have aided its interpretation by evidence of surrounding circumstances.

The conflict in the position of the two parties to this action on their interpretation of the writing as it stands is in fact the conflict shown in the wording of the document itself. Plaintiffs contend that the clear wording of the first refusal clause would extinguish the fixed price option if the first refusal clause were given full force and effect. Defendants contend that the clear wording of the fixed price option would certainly override the provisions of the first refusal clause if the wording of the fixed price option is given all of its full force and effect. It is thus apparent that there is a definite conflict within the terms of the document itself, and if no extraneous evidence were available the last written expression of the parties would control and the fixed price option would override any conflict which occurred between it and the first refusal option.

[1] However, wherever such an ambiguity appears and other evidence of the circumstances surrounding the execution of the agreement is available, it is the duty of the court to receive such evidence in aid of its interpretation. Von Rohr v. Neely, 76 Cal.App.2d 713, 173 P.2d 828; Cadigan v. American Trust Co., 131 Cal.App.2d 780, 784 [3], 281 P.2d 332.

> "When a contract is in any of its terms or provisions ambiguous or uncertain, 'it is primarily the duty of the trial court to construe it *after a full opportunity afforded all the parties in the case to produce evidence of the facts, circumstances, and conditions surrounding its execution and the conduct of the parties relative thereto.*'" Walsh v. Walsh, 18 Cal.2d 439, 443 [3], 116 P.2d 62, 65.

Sections 1856 and 1860, Code of Civil Procedure, provide the basic rules of construction in this respect.

> "This rule of evidence is invoked and employed only in cases where upon the face of the contract itself there is doubt and the evidence is used to dispel that doubt, not by showing that the parties meant something other *than* what they said, but by showing what they meant *by* what they said." United Iron Works v. Outer H. etc. Co., 168 Cal. 81, 84, 141 P. 917, 920.

[2] We are satisfied that under the particular facts of this case there was ambi-

guity between the two clauses of the contract which warranted and demanded the receipt by the court of whatever evidence was available to explain what the parties meant by what they said, and the refusal to receive such evidence was prejudicial error.

The judgment is reversed, and a new trial ordered.

GRIFFIN, P. J., and MUSSELL, J., concur.

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170 Cal.App.2d 725

Orrin C. LITTLE and Virginia R. Little, Plaintiffs and Appellants,

v.

A. SPECKERT, Defendant and Respondent.

Civ. 9626.

District Court of Appeal, Third District, California.

May 27, 1959.

Action by vendors against purchaser for rescission of written contract, which was for sale of stumpage growing on vendors' land, on grounds of purchaser's alleged material breaches of the contract and of lack of mutuality. The Superior Court, Mendocino County, Hale McCowen, J., entered order granting a motion for change of venue to Yuba County in which purchaser resided, and vendors appealed. The District Court of Appeal, Warne, J. pro tem., held that the action was one ex contractu, as distinguished from one ex delicto, and, therefore, venue was properly laid in county in which contract was made in which all payments under contract were to be made, and in which vendors resided, even though purchaser resided in another county, and land was situated in a third county.

Order reversed.

1. Venue ⚷7

Action founded on contract is maintainable in county in which contract is entered into and in which it is to be performed. West's Ann.Code Civ.Proc. § 395(1).

2. Venue ⚷7

Action by vendors against purchaser for rescission of written contract, which was for sale of stumpage growing on vendors' land, on grounds of purchaser's alleged material breach of the contract and of lack of mutuality was an action ex contractu, as distinguished from one ex delicto, and, therefore, venue was properly laid in county in which contract was made, in which all payments under contract were to be made, and in which vendors resided, even though purchaser resided in another county, and land was situated in a third county. West's Ann.Code Civ.Proc. § 395(1).

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Kasch & Cook, Ukiah, for appellants.

Spurr & Brunner, G. N. Tocher, Ukiah, for respondent.

WARNE, Justice pro tem.

This is an appeal from an order granting a motion for a change of venue to the county of Yuba, the county of the respondent's residence, in an action filed in the county of Mendocino.

It appears from the complaint the action was one to rescind a written contract for the sale of timber (stumpage) growing upon lands owned by the appellants, which are situated in the county of Trinity.

The complaint is in two counts. The first alleges the agreement was made in the county of Mendocino and that all payments therein specified were to be made to appellants at their residence in the county of Mendocino. It further appears that because of various alleged material breaches of the contract appellants, by written notice of rescission, offered to restore everything of value theretofore received upon the cancellation and rescission of the agreement. The second count alleges that the agreement, which is pleaded by a reference, lacks mutuality of obligation because it was not signed or subscribed by the respondent. The prayer of the complaint is that the agreement be rescinded and cancelled by the court upon repayment by plaintiffs to the defendant of $1,000, etc., and "that the court decree that plaintiffs own the said real property and timber specified in the agreement, * * * free and clear of any claim, lien, right or interest of defendant based upon the agreement, * * *."

[1] Appellants having alleged notice of rescission and offer to restore everything of value received, the sole question is whether the action is now one "founded on a contract" within the purview of section 395 of the Code of Civil Procedure so as to be maintainable in the county of Mendocino, where the contract was entered into and where it was to be performed.

Section 395, subdivision (1), of the Code of Civil Procedure, in part, provides that "When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, * * *".

[2] In Peterson v. Sherman, 68 Cal. App.2d 706, 711, 157 P.2d 863, 866, the court said: "In seeking a determination whether an action is one in contract or in tort, the general rule is that the character of the action is to be determined by the nature of the grievance rather than by the form of pleading and when it is not clear to which class the action belongs, it will ordinarily be construed in contract rather than in tort. Nathan v. Locke, 108 Cal. App. 158, 287 P. 550, 291 P. 286; Kings Laboratories v. Yucaipa Valley F. Co., 18 Cal.App.2d 47, 62 P.2d 1054; Rushing v. Pickwick Stages System, 113 Cal.App. 240, 298 P. 150. It has been well established in this state that if the cause of action arises from a breach of a promise set forth in the contract, the action is ex contractu but if it arises from a breach of duty growing out of the contract it is ex delicto. Jones v. Kelly, 208 Cal. 251, 280 P. 942; Berning v. Colodny & Colodny, 103 Cal.App. 188, 284 P. 496. * * *" The pleading in this case alleges that the agreement was made and entered into in Mendocino County and the payments therein specified were to be made in that county. Appellants allege, at length, the various material breaches of the contract. They allege they gave notice of the rescission of the contract and offered to restore everything of value they had received. They pray that the agreement be rescinded and cancelled by the court. The action arises from a breach of the contract and is an action ex contractu as distinguished from an action ex delicto. See the many cases cited in Peterson v. Sherman, supra, 68 Cal.App. at page 712, 157 P.2d 863. The complaint states a cause of action triable in Mendocino County.

Respondent seeks to uphold the action of the trial court on the premise that appellants are not seeking equitable rescission of an existing contract but a declaration that they had rescinded and terminated the contract by unilateral action and hence the contract is no longer in existence. In support of his contention respondent cites such cases as Philpott v. Superior Court, 1 Cal. 2d 512, 36 P.2d 635, 95 A.L.R. 990, and McCall v. Superior Court, 1 Cal.2d 527, 36 P.2d 642, 95 A.L.R. 1019. The distinction lies in the relief sought. In those cases the plaintiffs simply sought recovery of money out of which they had been defrauded. The courts deciding them agreed that as no relief was sought other than a money judgment the actions were at law. Such is not true in the instant case. It is not an action for restitution of money paid but an action praying for rescission by court decree of an agreement affecting title to growing timber and that the real property and timber described in the agreement be declared free of any claim, lien, right or interest based upon the agreement. It asks that the respondent, be required to accept the return of the money paid by them, not that appellants have a money judgment. Obviously, the reluctant response of him as to whom the contract was rescinded under such circumstances may well require the equitable help of the court to secure to him the relief to which he has well become entitled. Fairbairn v. Eaton, 6 Cal.App. 264, 268, 43 P.2d 1113.

The order is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

170 Cal.App.2d 540

P. D. TETRICK, Plaintiff and Appellant,

v.

A. E. SLOAN, also known as Bud Sloan, Defendant and Respondent.

Civ. 23639.

District Court of Appeal, Second District, Division 2, California.

May 21, 1959.

Rehearing Denied June 18, 1959.

Hearing Denied July 15, 1959.

Broker's action against landowner for commission assertedly due for negotiating petroleum lease. From an adverse judgment rendered by the Superior Court of Los Angeles County, Walter H. Odemar, J., plaintiff appealed. The District Court of Appeal, Fox, P. J., held that where landowner's authorization to negotiate petroleum lease gave broker no designated time in which to procure lessee and did not give broker exclusive agency or exclusive right to lease, authorization was analogous to general listing and landowner could revoke authorization at any time before broker performed.

Affirmed.

1. Brokers ⇨86(1)

In broker's action against landowner for commissions assertedly due for negotiating petroleum lease, evidence sustained trial court's findings that parties, in agreeing that broker was to "negotiate" the lease, intended that he personally conduct the give-and-take phase of working out the terms with potential lessee rather than merely aiding the landowner in that regard.

2. Brokers ⇨54, 57(1)

Before broker or salesman is entitled to commission for sale or lease of real property, he must find a party who is ready, willing and able to purchase or lease on terms and conditions specified in contract of employment, or, if precise terms are not specified, upon terms satisfactory and acceptable to his principal.

3. Brokers ⇨56(3)

Merely introducing broker's principal to a party who comes to an agreement with principal after termination of agency but who was not ready, willing and able to consummate transaction during life of agency is, in itself, insufficient to entitle broker to commission.

4. Brokers ⇨56(3)

Where, before his authority was cancelled, broker who was authorized to negotiate petroleum lease did not secure a written lease or offer from company which ultimately entered into agreement with landowner nor did he even introduce landowner to any one willing to enter into lease on terms acceptable to landowner but, when broker met with representative of company which ultimately took lease, owner wanted a greater amount as acre bonus than company was willing to pay and broker did not reach agreement with company even as to amount of land to be leased, broker did not perform agreement and was not entitled to any commission on lease subsequently entered into directly between landowner and company.

5. Brokers ⇨10

A "general brokerage listing" is revocable at will of owner, in good faith, at any time before performance, regardless of efforts extended by broker and leaves owner free to list his property with other brokers, to sell it himself, or to withdraw it from market.

See publication Words and Phrases, for other judicial constructions and definitions of "General Listing".

6. Brokers ⟹55(3)

An "exclusive agency" type of brokerage listing is one in which terms are inserted providing that, for a stated period, owner will not deal through other brokers, though he may sell property himself without liability.

See publication Words and Phrases, for other judicial constructions and definitions of "Exclusive Agency".

7. Brokers ⟹46

"Exclusive right to sell" type of brokerage listing is one in which owner himself may not sell property during stated term without paying brokerage commission.

See publication Words and Phrases, for other judicial constructions and definitions of "Exclusive Right to Sell".

8. Brokers ⟹10

General listing, exclusive agency and exclusive right to sell type of brokerage listings are basically offers for unilateral contracts and are revocable until accepted by performance of requested acts; however where listing contains language stating that broker shall have, for stated period, exclusive right to deal with or sell property, offer becomes irrevocable for that period.

9. Brokers ⟹10

Where landowner's authorization to negotiate petroleum lease gave broker no designated time in which to procure lessee and did not give broker exclusive agency or exclusive right to lease, authorization was analogous to general listing, and landowner could revoke authorization at any time before broker performed, and revocation could not be rendered ineffective on any theory of part performance by broker in contacting company which ultimately took lease when it was not willing to enter into agreement on landowner's term before revocation of authorization or on theory of promissory estoppel.

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Jerome J. Mayo, Harriet Pugh, Los Angeles, for appellant.

Hightower, Gregg & Garland, David M. Garland, Los Angeles, for respondent.

FOX, Presiding Justice.

Judgment was entered for defendant at the conclusion of a nonjury trial in which plaintiff sought to recover for real estate brokerage services.

Defendant owns certain real property in Ventura County, known as the Bar "S" Ranch. On March 17, 1955, the following writing was signed by the defendant:

> "I Authorize P. D. Tetrick to negotiate a new lease with a Major Oil Company on my property, located in Ventura County, California, known as Bar 'S' Ranch, consisting of 2275 acres more or less. Oceanic Oil Company has now under lease the deep rights and if Oceanic *Oll* Company does not comply with its present agreement in full, then it is my desire that P. D. Tetrick is to proceed in negotiating a new deal. I am to retain ⅙ or 16⅔ land owners royalty also I am to receive ½ of any bonus paid in the consummating of this deal."

Pursuant to this authorization, plaintiff contacted various oil companies, including the Texas Company. The trial court specifically found "That it is true that plaintiff discussed with major oil companies with regard to an oil lease on the defendant's 'Bar S Ranch' property, and it is true that plaintiff contacted The Texas Company with regard to an oil and gas lease * * * prior to March 19, 1956 * * *." Defendant, by an instrument in writing, on March 19, 1956, canceled the authorization granted in March, 1955. Subsequently, on July 6, 1956, defendant signed an oil lease with the Texas Company, and received a bonus in excess of $39,000. Plaintiff thereafter commenced an action to recover one half of this bonus. Judgment was for defendant and plaintiff prosecutes this appeal therefrom.

Plaintiff's version of his activities as disclosed by his opening brief with respect to the granting of the lease to the Texas Company is as follows:

"Plaintiff * * * first contacted The Texas Company by contact with Mr. Shaefer, then Mr. Brandt, Mr. Baker, Mr. Hubble in Santa Paula, and finally, Mr. Shuey. The contact with Mr. Hubble was by telephone on or about October 7, 1955. Thereafter, he [plaintiff] went to Mr. Shuey's office around January 20, 1956. On this occason, defendant was present and Shuey told defendant that The Texas Company was interested in his property at $60.00 an acre. Defendant used the prior offer which plaintiff had arranged from the Superior Oil Company as a lever to get a deal from The Texas Company and he lied to Mr. Shuey and told him that he had an offer from Superior Oil Company of $100.00 an acre. At that time The Texas Company was willing to offer $60.00 an acre and defendant wanted $100.00 an acre. On that occasion, the only thing they talked about was the initial amount per acre. (It is to be noted that this was following the pattern theretofore set by defendant, in that on the Union Oil contract [sic] and the Superior Oil contract [sic] nothing was discussed other than the initial payment, and that when that was not proven satisfactory, defendant refused to do anything more in the premises.) During this conversation with Mr. Shuey, the 3% overriding royalty was discussed. Thereafter, at defendant's request, he [plaintiff] again contacted Mr. Hubble. Plaintiff stated that with regard to The Texas Company, as with regard to all other oil companies, he interviewed or talked with the Land Agent, and in each case told them that he was interested in leasing the Bar 'S' Ranch. * * *"

In his opening brief, plaintiff summarizes Shuey's testimony as follows:

"Mr. Shuey was called by the defendant and stated that he was Assistant Divisional Land Man for the Producing Department of the Pacific Coast Division of The Texas Company, located in Los Angeles. Mr. Shuey stated that the first time he talked with defendant, he did not talk about the entire Bar 'S' Ranch but a portion of it. He stated that The Texas Company has a system whereby prospective oil lands are processed through the company and then finally there is an authorization for The Texas Company to lease. He stated that, of course, the lands are first given to the Geological Department, and finally an authorization is made.

"Mr. Shuey stated that the Oceanic Oil Company lease mentioned in the agreement of March 17, 1955, was quitclaimed in October of 1955 and that he would not negotiate on any of the Bar 'S' Ranch property until it had been quitclaimed.

"Mr. Shuey stated that the first authorization from management * * * to enter into a lease on 673 acres of the Bar 'S' Ranch was had in June of 1956. He said that he recalled a conversation with plaintiff, but could not place the time, except that it was in early 1956, between January and June.

"Mr. Shuey's then version of the meeting with plaintiff was that plaintiff told him he was representing defendant and asked him if he was interested in a lease, and that Shuey cut him off short, telling him he would have to have written authorization. He maintained he had not seen or talked to plaintiff in 1955. Mr. Shuey, however, was not so positive later."

The defendant's version of plaintiff's activity with respect to the Texas Company lease is that plaintiff had nothing to do with this lease and, he, defendant, negotiated and entered into the lease on the sixth of July, 1956. There is no showing that defendant did not act in good faith.

As grounds for reversal, plaintiff argues that the writing signed by defendant on March 17, 1955, constituted an offer for a unilateral contract and, once partly performed by plaintiff, defendant had no legal right to cancel such offer; and, having done so, plaintiff may recover on the contract as if he had fully performed. Plaintiff also contends that he is entitled to recover under the doctrine of promissory estoppel.

Essentially, this appeal involves two questions. First, did plaintiff sufficiently perform prior to March 19, 1956, so that he was entitled to his commission before his authority was revoked? Second, was defendant free to revoke plaintiff's authority without liability after plaintiff had expended time and effort pursuant to the March 17, 1955, authorization?

[1] It is plaintiff's position that his duties did not include the actual give-and-take phases of working out the terms and conditions of a lease with a potential lessee but that he was merely to aid the defendant in this regard; also, plaintiff argues that "the word 'negotiate' * * * does not mean consummate, but means to treat with a view to coming to terms on some matter * * * to conduct communications or conferences as a basis of agreement. * * *" The trial court was of the opinion that this phase of the authorization was uncertain and on that basis received parol evidence as to the meaning of "negotiate." The defendant testified that plaintiff was "to do everything except" sign for him. The trial court found against plaintiff on this issue and such finding is supported by substantial evidence.

[2, 3] Before a broker or salesman is entitled to a commission for the sale or lease of real property, he must find a party who is ready, willing, and able to purchase or lease on the terms and conditions specified in the contract of employment, or, if the precise terms are not specified, upon terms satisfactory and acceptable to his principal. Collins v. Vickter Manor, Inc., 47 Cal.2d 875, 880, 306 P.2d 783; Lawrence Block Co. v. Palston, 123 Cal.App.2d 300, 305–306, 266 P.2d 856; Diamond v. Fay, 23 Cal.App. 566, 568, 138 P. 933. This may be accomplished, inter alia, by securing a written contract or offer signed by the potential purchaser or lessee. In Gunn v. Bank of California, 99 Cal. 349, at page 353, 33 P. 1105, at page 1107, the court pointed out that: "[t]he contract of the broker is to negotiate a sale; that is, to procure a valid contract to purchase, which can be enforced by the vendor if his title is perfect, or if he does not procure such contract, to bring the vendor and the proposed purchaser together, that the vendor may secure such a contract * * *." See also, 2 Mechem on Agency 2d ed., p. 2003, § 2431. However, merely introducing the principal to a party who comes to an agreement with him after the termination of the agency but who was not ready, willing and able to consummate the transaction during the life of the agency is in itself insufficient to entitle the broker to a commission. See Brown v. Mason, 155 Cal. 155, 158–159, 99 P. 867, 21 L.R.A.,N.S., 328; Lawrence Block Co. v. Palston, supra, 123 Cal.App.2d at pages 307–308, 266 P.2d at pages 860–861; Nelson v. Mayer, 122 Cal.App.2d 438, 445–446, 265 P.2d 52.

[4] In the instant case, plaintiff did not secure a written lease or offer to lease from the Texas Company, nor did he introduce the defendant to any one willing to enter into a lease on terms and conditions acceptable to the defendant. The evidence is clear that when the plaintiff and defendant met with Shuey, the defendant wanted $100 an acre bonus for his property but Shuey was willing to pay only $60 per acre. Furthermore, there was no agreement as to the amount of land to be leased. Under such circumstances, and based upon the authority to which reference has been made, it is clear that as of March 19, 1956, plaintiff had not performed and was not therefore entitled to any commission.

[5–8] Where, as in the instant case, there is no contract between the principal and the real estate broker or salesman "that the latter shall have some particular time within which to find a purchaser [or lessee], it is, as a general rule, entirely competent for the principal to revoke the authority without liability at any time before it is performed. * * * The only thing which would prevent revocation or withdrawal would be performance. It would make no difference that much time had been spent or that the performance was great; unless the act could be regarded as at least practically performed, the principal might revoke without liability." 2 Mechem on Agency, 2d ed., p. 2046, § 2449. In Heffernan v. Merrill Estate Co., 77 Cal.App.2d 106, 112–113, 174 P.2d 710 the court states the applicable rule as follows: "According to the great weight of authority, an owner of real property who has not contracted to employ a broker for any specified period of time may revoke the employment and terminate the agency at any time before it is consummated." The court then stated (77 Cal.App.2d at page 113, 174 P.2d at page 713), that "[t]he correspondence in the present case amounted to no more than an unilateral offer to sell on the part of the owner, which did not grant a specified time for performance by the broker. The authorities hold, under such circumstances, that the owner may revoke in good faith his offer at any time before complete performance of his broker by procuring a binding sale to one who is willing and able to purchase the property on the terms specified, and by securing the purchaser's written agreement to that effect." As previously discussed, plaintiff had not performed prior to the time he received defendant's written withdrawal of authorization. Plaintiff contends, however, that once he has commenced performance, the defendant could no longer revoke without incurring liability, citing Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 P. 1086. See generally also, Restatement, Contracts, § 45; 1 Williston, Contracts, § 60A (1936 ed.). Plaintiff also argues that the doctrine of promissory estoppel is applicable (see generally, Drennan v. Star Paving Co., 51 Cal.2d 409, 333 P.2d 757; Restatement, Contracts, § 90). The plaintiff's argument misconceives the nature of his relationship with the defendant. Generally, there are three types of brokerage listings. First, the general listing. Such is revocable at the will of the owner in good faith at any time before performance, regardless of the efforts expended by the broker. Such a listing leaves the owner free to list his property with other brokers, to sell it himself, or to withdraw it from the market. Second, the exclusive agency. Terms are inserted in the listing which provide that for a stated period the owner will not deal through other brokers, yet he may sell the property himself without liability. Third, the exclusive right to sell. This type of agency even precludes the owner himself from selling the property during the stated term without paying the brokerage commission. All three varieties are basically offers for a unilateral contract and, by generally accepted principles of contract law, are revocable until accepted by performance of the requested acts. However, where the listing contains language to the effect that the broker shall have, for a stated period, an exclusive right to deal with or sell the property, the offer becomes irrevocable for the prescribed period. It is in those situations where the listing contains these added stipulations that we find the courts speaking of the irrevocability of the offer as a consequence of the expenditure of time and money by the broker in attempting to sell the property. After noting the three different types of listings referred to above, the court in Baumgartner v. Meek, 126 Cal.App.2d 505, 509, 272 P.2d 552, 554, states: "In view of the nature of the basic transaction between the owner and the broker, that is, a listing which is no more than an offer of a unilateral contract to be accepted only by a performance of the requested act, the additional stipulations were challenged in many courts as not resulting in any contract in fact between the parties (citations). But in many states, and in this state, courts have accepted such written listings as resulting in contractual relations. Though the basic offer to pay a commission for the procuring of a purchaser ready, able and willing to buy can still be accepted only by performance, nevertheless it has been held that these restrictive stipulations bind the owner and subject him to liability if he refuses to abide by them. These holdings are sometimes based on the idea that the restrictive clauses constitute subsidiary promises resting upon the consideration that the broker agrees to and does expend time and effort to bring about a sale." After quoting from the Restatement of Contracts, section 45, the court continues: "It is unnecessary to attempt to follow the reasoning given in the many opinions of courts dealing with this subject. We think that in California the rule has been too long declared and too often enforced to leave the matter open." See Kimmell v. Skelly, 130 Cal. 555, 62 P. 1067.

[9] The authorization in the instant case was analogous to a general listing. It gave plaintiff no designated time in which to procure a lessee and manifestly did not give plaintiff an exclusive agency or exclusive right to lease. The authorization is completely silent in this respect. In Summers v. Freeman, 128 Cal.App.2d 828, 831, 276 P.2d 131, 133, the court said that "[t]he general rule on exclusive agency agreements is stated as follows: 'A real estate broker's authority to sell real property is not exclusive, unless it is made so, by the contract of employment, in unequivocal terms or by necessary implication.' (Citation.)" Had the parties contemplated such a relationship they surely would have so stated in the writing. A general listing, as noted, is revocable at any time prior to performance without liability. To apply the rule from the Wilshire case (see section 45, Restatement of Contracts), supra, or the promissory estoppel doctrine to the facts of the instant case, would be to transform that which is equivalent to a general listing into an exclusive listing. This we cannot do. Therefore, as plaintiff did not perform the requested act prior to the revocation of the offer, and as defendant was free to revoke without incurring liability, the plaintiff has no right to redress in this action.

The judgment is affirmed.

ASHBURN and HERNDON, JJ., concur.

Olive HUDSON, Plaintiff and Respondent,
v.
James HUDSON, also known as Jimmie B. Hudson and J. B. Hudson, Defendant and Appellant.*
Civ. 18079.

District Court of Appeal, First District,
Division 1, California.
May 26, 1959.
Rehearing Denied June 16, 1959.
Hearing Granted July 22, 1959.

Wife's divorce action on ground of extreme cruelty. The Superior Court, County of Santa Clara, M. G. Del Mutolo, J., entered order granting wife alimony, attorney's fees and costs pendente lite, and placing a lien therefor on community property and husband appealed. The District Court of Appeal, Bray, P. J., held that even assuming validity of husband's ex parte Idaho divorce decree, husband's obligation to support wife remained in California and hence there was no error in allowing wife pendente lite orders, and no abuse of discretion was shown in award of support in the amount by which wife's expenses exceeded her income.

Order affirmed.

1. Divorce 🔑359(2)

An ex parte decree of divorce, that is, a decree rendered by a sister state pursuant to application of only one spouse, may be attacked on ground that spouse was not a bona fide resident of rendering state. U.S.C.A.Const. art. 4, § 1.

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* Opinion vacated 344 P.2d 295.

2. Divorce ⚷390(2)

A wife has a right to support, attorney's fees and costs to prosecute an attack upon a foreign divorce where she did not personally appear in the foreign action.

3. Divorce ⚷390(2)

Where wife at time the husband left state filed action in California for divorce and subsequently husband obtained divorce decree in an ex parte action in Idaho and pleaded Idaho decree for first time in motion to set aside temporary restraining order and subsequently proffered decree in main action upon which wife stated that she would offer evidence to show that decree was based on fraudulent domicile, wife made sufficient attack upon Idaho decree to bring herself within rule that California wife has a right to support, attorney's fees and costs to prosecute an attack on foreign divorce when she did not personally appear in foreign action.

4. Divorce ⚷390(1)

Ex parte divorce decree which is based on a bona fide domicile of one spouse will be effective so as to terminate marital status of parties, but such decree may not act so as to eradicate marital obligations of respective spouses because right to support is a species of property in the wife and this property may not be taken away from her without her having appeared in a foreign action to defend her rights.

5. Divorce ⚷390(1)

Even assuming that ex parte Idaho divorce decree obtained by husband was valid so as to dissolve marital status of parties, Idaho decree could not have effect of taking away California wife's support rights because wife's rights were to be determined by the law of the state of wife's domicile at time of divorce.

6. Divorce ⚷231
Husband and Wife ⚷283

In California a wife has a right under proper circumstances to support from husband pursuant either to dissolution of marriage or separate maintenance decree. West's Ann.Civ.Code, §§ 137, 137.2, 139.

7. Divorce ⚷203

Divorce complaint of California wife praying for permanent alimony in addition to allegation that husband had filed ex parte divorce action in Idaho was adequate to put in issue wife's right to support after husband's divorce decree.

8. Divorce ⚷209, 221

Since wife had a right to permanent support her right to both temporary support, costs and attorney fees could not be denied.

9. Divorce ⚷221

If wife had a right to permanent support she of necessity must have a right to suit money to enforce such right. West's Ann.Civ.Code, § 137.2.

10. Husband and Wife ⚷295

Wife's action for support taken after husband obtained a foreign ex parte decree was likely to be in the nature of a separate maintenance suit in which wife having a right to permanent support was entitled to pendente lite awards. West's Ann.Civ. Code, § 137.2.

11. Divorce ⚷211, 223, 235
Husband and Wife ⚷295, 298(1)

Amount of support and suit money in matrimonial actions rests within the sound discretion of the trial court which in exercising discretion must be apprised of essential facts and circumstances to justify award, which includes the needs of wife and ability of husband to pay.

12. Divorce ⚷211

In wife's action for divorce there was no abuse of discretion in granting wife temporary alimony on basis of the $65 per month difference between her earnings and expenses where husband appeared to be earning or to have ability to earn substantial income in addition to a monthly pension.

◆

George Porter Tobin, Los Gatos, for appellant.

Haskell M. Goodman, San Jose, for respondent.

BRAY, Presiding Justice.

Defendant appeals from an order granting plaintiff alimony, attorney's fees and costs pendente lite, placing a lien therefor on the community property and restraining defendant from encumbering or disposing of said property.

Questions Presented.

1. The wife's right to support, attorney's fees and costs after introduction of a presumptively valid foreign divorce decree.

2. Would a valid Idaho decree bar plaintiff's right to marital support?

3. Did the court abuse its discretion in the amount of the award?

Record.

The parties married May 3, 1947, in Reno, Nevada. From 1950 to April 6, 1957, they lived together in Los Gatos, California. On the latter date defendant left plaintiff, stating that he was going to Reno to secure a divorce but would return in six weeks or so to straighten out his affairs. April 22, 1957, plaintiff filed this action for divorce on the ground of extreme cruelty. The same day the court ordered service of summons by publication. In the meantime defendant turned up in Idaho, rather than in his announced destination, Nevada. May 16, defendant was personally served in Idaho with substituted service in this action. May 21, defendant filed, in that state, action for divorce against plaintiff. Plaintiff was served in Los Gatos with substituted service in that action. June 12, defendant sued plaintiff in Santa Clara County for partition of real property located therein, allegedly held in joint tenancy. June 14, plaintiff obtained a temporary restraining order and the order to show cause upon which the order here appealed from is based. The order was returnable June 24. June 14, defendant filed a demurrer to the complaint asserting lack of jurisdiction, insufficient facts to constitute a cause of action and uncertainty and ambiguity. June 19, the Idaho court granted defendant an "absolute decree of divorce" on the ground of extreme cruelty. The decree recited that evidence had been heard in support of the complaint, that defendant's residence in Idaho had been corroborated, that plaintiff here had been regularly served with summons and had defaulted. June 24, plaintiff moved to stay proceedings in the partition action pending the husband's filing of a cost bond on the ground that defendant was a nonresident. The motion was granted upon a finding from the evidence that the husband was in fact a nonresident of this state. June 24, upon the hearing of the return of the order to show cause, defendant moved to set it and the temporary restraining order aside on the ground that the court had no jurisdiction because the Idaho divorce had severed the marriage relationship and also because no personal judgment could be rendered against defendant on substituted service. The court found that because of the grounds in defendant's demurrer additional to the attack on jurisdiction, defendant had generally appeared in the action and therefore a personal judgment would lie, and that as plaintiff was attacking the validity of the Idaho decree the validity of which would be determined in this action, the court had jurisdiction of all matters presented by the order to show cause. The hearing was continued to September 5. July 15, plaintiff filed an amended complaint, specifying more particularly the acts of cruelty, one being that on April 8 he left home stating that he was going to Nevada to obtain a divorce. Then on information and belief plaintiff alleged that he proceeded to Idaho and instituted an action for divorce there. At the hearing on September 5, plaintiff offered evidence. Defendant offered none other than the Idaho decree which was admitted "for what it is worth."

1. Effect on Right to Alimony, etc. of Introduction of the Idaho Decree.

The United States Constitution, article IV, section 1, requires that California give full faith and credit to the judicial proceedings of every other state. In Williams v. State of North Carolina, 317 U.S. 287, 63 S.Ct. 207, 87 L.Ed. 279, it was held that the spouse seeking severance of the marital relationship must be a bona fide resident of the state rendering the decree, and that where there is no personal appearance of the other spouse in the action the question of bona fide domicile may be litigated in another state, and that such state does not have to give the rendering state's decree full faith and credit. See also Knox v. Knox, 88 Cal.App.2d 666, 677, 199 P.2d 766. In Crouch v. Crouch, 28 Cal.2d 243, 249, 169 P.2d 897, 900, the California Supreme Court held: "* * * a decree of divorce rendered in one state may be impeached and denied recognition in another upon the ground that neither of the parties had domicil at the divorce forum, and this is true notwithstanding the recital in the decree from the other state of the jurisdictional fact of domicil or residence."

[1] Thus an ex parte decree of divorce, i. e., a decree rendered by a sister state pursuant to the application of only one spouse, may be attacked on the ground that that spouse was not a bona fide resident of the rendering state.

[2] It repeatedly has been held that in California a wife has a right to support, attorney's fees and costs to prosecute an attack upon a foreign divorce where she did not personally appear in the foreign action. Baldwin v. Baldwin, 28 Cal.2d 406, 417, 170 P.2d 670; Knox v. Knox, supra, 88 Cal.App.2d 666, 676, 199 P.2d 766; Ottinger v. Ottinger, 141 Cal.App.2d 220, 225, 296 P.2d 347; Kopasz v. Kopasz, 34 Cal.2d 423, 424, 210 P.2d 846.

[3] Defendant, while apparently conceding that the rule is as stated, contends that plaintiff did not make a sufficient attack upon the Idaho decree to bring herself within the rule. However, the record shows that she did. At the time she filed this action, there was no Idaho action pending. Until June 19, when the Idaho decree was rendered, there was nothing for plaintiff to attack. In his motion to set aside the temporary restraining order defendant pleaded the Idaho decree, but until his answer of September 3, defendant had not proffered the decree in the main action. At the hearing on September 5 defendant offered the decree in evidence. Thereupon plaintiff stated that she would offer evidence to show that the decree was based upon a fraudulent domicile. She then testified that defendant had stated on leaving California that he was going to Reno to get a divorce and would be back in six weeks. The "attack" was as timely as legally possible and the evidence was sufficient to raise a reasonable question about the validity of the foreign decree. The fact that in the partition action plaintiff moved for a bond on the ground that defendant was a nonresident of this state was not necessarily an admission by plaintiff that defendant had a valid residence for divorce action purposes in Idaho. The partition proceeding was completely collateral to this, and the fact that it was there shown that he was residing in Idaho would not mean that he was a bona fide domiciliary of that state. As said in Gromeeko v. Gromeeko, 110 Cal.App.2d 117, 127, 242 P.2d 41, 47: "In this state of the decisions it is difficult to formulate a precise rule as to the degree of proof of marriage required upon an application for temporary support in an action for divorce or for separate maintenance. It is clear that the evidence need not be as complete and satisfactory as at the time of trial. When, as here, a valid marriage is admitted and the issue is the validity of a foreign divorce decree, it appears that the trial court has a larger measure of discretion to grant the application than when the fact of the marriage itself is in issue." See also Nacht v. Nacht, 167 Cal.App.2d 254, 334 P.2d 275, 284, where the court held that where a wife "in good faith challenges the continued existence of the property settlement, or its validity, regardless of whether she is right or wrong" (an agreement in which she waived her right to attorney's fees), she is entitled to suit money to attack the agreement.

Moreover, as will be discussed next, if he were such a domiciliary the wife would still have the right to obtain funds in order to prosecute an action against the husband for her marital support rights.

2. A Valid Idaho Decree Would Not Bar Plaintiff's Support Rights.

At one time in California it seemed clear that once a foreign divorce decree was established, regardless of whether or not the wife had appeared in the foreign proceeding, the marital rights of the wife were completely wiped out. See Cardinale v. Cardinale, 8 Cal.2d 762, 769, 68 P.2d 351 ("The trial court, having found no invalidity in the Nevada divorce decree, properly terminated the allowance to appellant of separate maintenance as of the date that decree was rendered"); Calhoun v. Calhoun, 70 Cal.App.2d 233, 237, 160 P.2d 923. However, since the time of these decisions, the United States Supreme Court has developed the doctrine of the "divisible divorce." In Estin v. Estin, 334 U.S. 541, 68 S.Ct. 1213, 92 L.Ed. 1561, the court held that a foreign ex parte decree of divorce does not eradicate the obligations of a spouse under a former separate maintenance decree. This doctrine has been approved in California. See Worthley v. Worthley, 44 Cal.2d 465, 283 P.2d 19; Lewis v. Lewis, 49 Cal.2d 389, 392, 317 P.2d 987. The doctrine was carried one logical step further in Vanderbilt v. Vanderbilt, 354 U.S. 416, 77 S.Ct. 1360, 1 L.Ed. 2d 1456, wherein the court held that a spouse's unadjudicated right to marital support was not eradicated by a foreign ex parte divorce decree, and that a wife could bring an action for her support in the state of her domicile even after the rendering of such a valid decree. This extension of the doctrine of the divisible divorce decree has also received the approval of the California Supreme Court. See Lewis v. Lewis, supra, 49 Cal.2d 389, 393, 317 P.2d 987.

[4] The law seems clear that an ex parte divorce decree which is based on a bona fide domicile of one spouse will be effective so as to terminate the marital status of the parties, but such a decree may not act so as to eradicate the marital obligations of the respective spouses. This is true, because the right to support is considered a species of property in the wife, and this "property" may not be taken away from her without her having appeared in the foreign action to defend her rights. See Lewis v. Lewis, supra, 49 Cal.2d at page 393, 317 P.2d at page 990.

[5, 6] Even if it is assumed under the facts of the instant case that the decree of divorce obtained by the husband was valid so as to dissolve the marital status of the parties, the Idaho decree could not have the effect of taking away the wife's support rights, since the wife did not appear in the Idaho action. The wife's rights are to be determined by the law of the state of the wife's domicile at the time of the divorce, here California. Lewis v. Lewis, supra, 49 Cal.2d at page 394, 317 P.2d at page 991. In California a wife has a right under proper circumstances to support from the husband pursuant to either dissolution of the marriage or a separate maintenance decree. Civ.Code, secs. 139, 137.

[7] The form of the action to be taken by the wife after a foreign ex parte decree to enforce her California support rights in all likelihood would not differ from a separate maintenance action, or a divorce action praying for permanent support. Here the complaint does contain a prayer for permanent support (in addition to the allegation that the husband filed his Idaho action). The complaint is adequate to put in issue the wife's right to support after the husband's ex parte divorce.

[8–10] As the wife has a right to *permanent* support her right to both temporary support and costs and fees may not be denied. Certainly, these pendente lite awards are incident to her marital rights in California, which, it has been seen, may not be eradicated by the husband's Idaho ex parte decree. Further, if the wife has a right to permanent support, she of necessity must have a right to suit money to enforce such right. The Civil Code does not specifically say that a wife may receive pendente lite awards during the pendency of any action for support after the rendering of a foreign ex parte decree in favor of the husband. But in section 137.2 of the Civil Code the wife is given a right to such awards pending a separate maintenance action. The action for support taken by the wife after the husband's foreign ex parte decree is likely to be in the nature of a separate maintenance suit.

If it were construed not to be such an action, but an action of a novel nature not yet encountered in California, there would seem no reason why the wife should not be allowed pendente lite awards independent of statute. See Dunphy v. Dunphy, 161 Cal. 87, 118 P. 445, allowing pendente lite awards in an annulment action where the statute did not specifically authorize such.

In any event, it may be readily seen that even assuming the validity of the Idaho decree, and even assuming that the wife may in no event attack the granting of the divorce, the husband's obligation to support the wife remains in California, since the Idaho court may not take away the property of the wife without her appearing before that court. Thus, the trial court did not err in allowing the wife pendente lite orders for her California action.[1]

3. No Abuse of Discretion in the Award.

[11] It is well settled that the amount of support and suit money in matrimonial actions rests within the sound discretion of the trial court. Frazier v. Frazier, 115 Cal. App.2d 560, 562, 252 P.2d 698. The trial court in exercising this discretion must be apprised of the essential facts and circumstances to justify the awards, which include the needs of the wife and the ability of the husband to pay. Sweeley v. Sweeley, 28 Cal.2d 389, 390, 170 P.2d 469; Loeb v. Loeb, 84 Cal.App.2d 141, 148–149, 190 P.2d 246.

[12] Here, the trial court had before it the testimony of the wife, and the statement of her income and expenses. From this evidence it appeared that the wife's expenses exceeded her earnings by about $63 a month, with additional expenses anticipated.

The husband's counsel made no attempt to elicit any direct testimony regarding the husband's income and expenses. On cross-examination, the husband's counsel elicited testimony from the wife that the husband earned approximately $4,700 in 1956, that he had worked as a welder and had earned take-home pay of $89 a week. It also appeared that the husband had a government pension of $33 a month.

Without any further testimony as to the expenses of the husband, it cannot be deemed an abuse of discretion to award the wife the difference between her earnings and expenses totaling around $65, where the husband, by testimony elicited by the husband's counsel, appears to be either earning or to have the ability to earn a substantial income, in addition to a monthly pension.

The order is affirmed.

FRED B. WOOD and TOBRINER, JJ., concur.

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[1] There is considerable question as to whether the Idaho decree is valid in any respect in view of the fact that this action was filed prior to the filing of the Idaho action, defendant admitted personal substituted service prior to the filing of the Idaho action, and that defendant filed a general appearance in this action submitting to the jurisdiction of the California court, prior to the obtaining of the Idaho decree. See Lewis v. Lewis, supra, 49 Cal.2d 389, 317 P.2d 987; Vanderbilt v. Vanderbilt, supra, 354 U.S. 416, 77 S.Ct. 1360, 1 L.Ed.2d 1456. We deem it unnecessary to consider the question at this time as the trial court did not pass on it.

170 Cal.App.2d 673

Fred M. RIVAS, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION OF the State of CALIFORNIA, McCrea Seed & Chemical Company, Industrial Indemnity Company, a corporation, Respondents.

Civ. 23613.

District Court of Appeal, Second District, Division 1, California.

May 26, 1959.

Proceeding to review award of workmen's compensation wherein compensation insurer was allowed a credit against amounts payable by it on account of a permanent disability award, of gross amount received by claimant under compromise of a claim against a third party, after deducting payment to insurer in satisfaction of its lien rights. The District Court of Appeal, Nourse, J. pro tempore, held that Industrial Commission did not have power to deduct from credit to which insurer was entitled under the Labor Code, attorney's fee paid by claimant for legal services rendered in the prosecution and compromise of an action against a third party, where insurer contracted with claimant's attorney to represent it in the prosecution of the action and to pay it a fixed fee of one-third of its lien claim.

Award affirmed.

1. Workmen's Compensation ⚷2247

The Industrial Accident Commission does not have power to deduct from the credit to which an employer is entitled for award received by a claimant from a third party any amount expended by the employee as expense of litigation or attorney's fees, in any case in which the employer has either prosecuted an action against the third party tort-feasor or joined in participation with the employee in the prosecution of such an action, or made arrangements with the employee's attorney to represent him in the prosecution of such an action or claim. West's Ann.Labor Code, §§ 3860, 3861.

2. Workmen's Compensation ⚷2252

A compensation insurer, by either joining with claimant in prosecution of his action against a third party, or by agreeing with claimant's attorney to have him represent it in the prosecution of the action, was entitled to enforce its subrogation rights through a lien upon the judgment, and was entitled to the direct payment of the amount of its lien from the judgment debtor, and it would have been further entitled to have credited against any liability for payment of compensation not satisfied by payments received from the judgment debtor, the entire amount received by claimant from the judgment debtor, and its rights would not be deemed changed by the fact that the action was not tried but compromised where it participated in the action and made arrangements with claimant's attorney for representation in the action. West's Ann.Labor Code, § 3856.

3. Workmen's Compensation ⚷2247

Industrial Commission did not have power to deduct from credit to which compensation insurer was entitled under the Labor Code, attorney's fee paid by claimant for legal services rendered in the prosecution and compromise of an action against a third party, where insurer contracted with claimant's attorney to represent it in the prosecution of the action and to pay it a fixed fee of one third of its lien claim. West's Ann.Labor Code, §§ 3860, 3861.

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Alfred D. Haines and Zimmerman & Stevens, Santa Barbara, for petitioner.

Everett A. Corten, San Francisco, and Edward A. Sarkisian, Los Angeles, for respondent Industrial Accident Commission.

Herlihy & Herlihy, Los Angeles, for respondent Industrial Indem. Co.

NOURSE, Justice pro tem.

This is a proceeding to review, at the petition of Fred M. Rivas, an applicant for workmen's compensation, an award of the respondent commission.

The sole question presented is: Has the respondent commission power to deduct from the credit to which a compensation insurance carrier is entitled under section 3861 of the Labor Code, attorneys' fees paid by the applicant for legal services rendered in the prosecution and compromise of an action against a third party, in cases where the carrier has contracted with the applicant's attorney to represent it in the prosecution of the said action. We have concluded that this question must be answered in the negative.

The facts: Rivas, petitioner here, on November 3, 1955, sustained an injury arising out of and in the course of his employment. As a result, his employer's compensation carrier, the respondent Industrial Indemnity Company hereinafter called "Industrial," paid compensation in the form of medical treatment furnished the employee and weekly compensation disability benefits.

The injury in question was sustained in a highway accident and Rivas employed an attorney to prosecute an action against a third party to recover damages for the third party's negligence, which he alleged was the proximate cause of his injury. He entered into a contract with this attorney to pay him a contingent fee. There is no express statement in the record here as to the basis upon which that fee was to be determined.

After the action had been commenced, Industrial entered into an agreement with Rivas' attorney to represent it "in connection with subrogation recovery on subject claim." This contract was evidenced by a letter written by Industrial to claimant's attorney which reads as follows:

"You are hereby authorized to represent Industrial Indemnity Company in connection with subrogation recovery on subject claim. We hereby agree to a fixed fee of one-third of our lien claim, whether the recovery is made by settlement, or if the case goes to pre-trial.

"Our expenditures to date are as follows: Compensation $1,390.90, and our medical expenses up through January 29, 1957 are $1,871.43, our total expenditures are $3,262.33. Copies of the more recent medical bills are attached.

"In view of your fees in this matter, we are not inclined to compromise our lien. Please keep us advised of your proceedings, and forward a copy of the Complaint to us. Thank you."

Shortly after this arrangement between Industrial and applicant's attorney was made, a compromise of the action was consummated under which the third party defendant paid the sum of $8,397.82 in full settlement of the claims made against him. Of this amount $3,262.33 was paid to Industrial which in turn paid the applicant's attorney as fees $1,087.44 plus $134.10, one-third of the costs incurred in the prosecution of the action. The sum of $5,135.49 was paid to the petitioner Rivas. From this sum he paid to his attorney the sum of $1,795.16 in satisfaction of the attorney's claim for fees and costs advanced.

After the compromise was effectuated petitioner filed an application before the respondent commission. Upon this application he was awarded permanent disability compensation of $32.78 per week for 182 weeks but Industrial was allowed a credit against the amounts payable by it on account of permanent disability of $5,135.49, that being the gross amount (after deducting the payment to Industrial in satisfaction of its lien rights) received by petitioner under the compromise.

Petitioner asserts that credit should only have been allowed in the amount of $3,340.33, that being the net amount retained by him after the payment of attorney's fees and costs. In other words, it is petitioner's contention that Industrial should be charged not only with the attorney's fees which it had contracted to pay, but with the attorney's fees which petitioner had paid under his contract.

The rights of the parties are governed by sections 3860 and 3861 of the Labor Code as those sections were amended in 1957. These sections as amended in 1957 read as follows:

"§ 3860. Notice before release or settlement; employer's claim for reimbursement; attorney's fees.

"No release or settlement under this chapter is valid and binding without notice to both employer and employee and opportunity to the employer to recover the amount of compensation he had paid or become obligated to pay. The entire amount of such settlement, or of any settlement without suit, is subject to the employer's full claim for reimbursement for his compensation expenditures and liability; *provided, however, that where the employer has not prosecuted any claim or action in his own behalf or has failed to join and participate in the prosecution of any action presented by the employee or has not made arrangements with the employee's attorney to represent him in the prosecution of said action or claim, the commission shall fix a reasonable attorney's fee, which shall be fixed as a share of the amount actually received by the employer, to be paid to the employee's attorney on account of the services rendered by him in effecting a recovery for the benefit of the employer, which said fee shall be deducted from any amounts due to the employer.*

"§ 3861. Credits against employer's liability for compensation; amount of recovery by employee.

"The commission is empowered to and shall allow, as a credit to the employer to be applied against his liability for compensation, such amount of any recovery by the employee for his injury, either by settlement or after judgment, as has not theretofore been applied to reimburse the employer, or has not been applied to the payment of an attorney's fee to the employee's attorney, pursuant to the provisions of Sections 3856 *and 3860* of this code."[1]

[1] Prior to the amendments of these sections the Supreme Court in R. E. Spriggs, Inc. v. Industrial Accident Commission, 42 Cal.2d 785, 269 P.2d 876, held that the commission did not have power under section 3860 of the Labor Code to deduct from the credit to which an employer was entitled under section 3861 of the Labor Code, any amount expended by the employee as expenses of litigation or attorney's fees. We think it is self-evident that the commission remains without power so to do in any case in which the employer has either (1) prosecuted an action against the third party tort-feasor (2) joined or participated with the employee in the prosecution of such an action or (3) made arrangements with the employee's attorney to represent him in the prosecution of such an action or claim, for under section 3860 as amended it is only where none of the three elements that we have set forth exist, that the commission is authorized to deduct from the credit to which the employer is entitled, any portion of the fees paid by the employee to his attorney.

Petitioner asserts, however, that no arrangements were made with his attorney for fees with relation to anything other than the recovery by Industrial of the amount to which it would have been entitled to a lien upon a judgment against the tort-feasor had the action been tried rather than compromised. We see nothing in the facts or in the statute which will uphold this contention.

[2] At the time the contract between Industrial and petitioner's attorney was entered into, Industrial was subrogated to all of petitioner's rights against the third party which subrogation could have been enforced by individual action or by joining with petitioner in the prosecution of the

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[1] The italicized portions of the above sections are the matters which were added thereto by the amendments of 1957. The remaining portions are the statutes as they existed prior to those amendments with one minor exception which is not material here.

action and agreeing with petitioner's attorney to represent it in the prosecution of the action. In either event it would be entitled to enforce its subrogation rights through a lien upon the judgment and entitled to the direct payment of the amount of its lien from the judgment debtor (Lab. Code, § 3856). It would have been further entitled to have credited against any liability for the payment of compensation which was not satisfied by the payments received from the judgment debtor, the entire amount received by petitioner from the judgment debtor. Its rights were not changed by the fact that the action was not tried but compromised for it had participated in the action and had made arrangements with petitioner's attorney for representation in the action. By its arrangements its liability for attorney's fees was fixed at a percentage of a fixed amount, the amount expended to the date of the compromise by Industrial for compensation to or for the benefit of petitioner. If the arrangement had been to pay a fixed sum, such as $100 as fees to the attorney, the result would have been no different as the commission was without power to fix the terms of the arrangement between Industrial and the attorney. If any inequity to petitioner has resulted it arises from the application of his contract with his attorney. Petitioner was under no compulsion to compromise the action and was at liberty to refuse to compromise unless Industrial agreed to pay a proportion of the attorney's fee based upon the entire benefit received by it from the compromise or his attorney agreed to accept the fee he had contracted for with Industrial in full for his compensation. If the fact that the compromise redounded to the sole benefit of Industrial and that the attorney had agreed to prosecute the action and consequently the negotiations for the compromise for the fee fixed in his agreement with Industrial, rendered the fee fixed in the attorney's contract with petitioner unreasonable, that controversy was one to be settled between the petitioner and his attorney in a court of law and was one over which the Industrial Accident Commission had no jurisdiction.

[3] To sum the matter up, Industrial was free to either prosecute its rights through its own attorney or to prosecute them through petitioner's attorney and to make such contract for fees as it saw fit, and having done so, the commission had no authority to charge it with any further fees.

The award is affirmed.

WHITE, P. J., and FOURT, J., concur.

170 Cal.App.2d 791

Jules H. TEICH, doing business under the firm name of Tower Industries, Plaintiff and Appellant,

v.

GENERAL MILLS, INC., a corporation, Defendant and Respondent.

Civ. 23513.

District Court of Appeal, Second District,
Division 2, California.

May 29, 1959.

Hearing Denied July 22, 1959.

Action to recover upon a contract to pay the reasonable value of an idea submitted to defendant for a gadget for use as a premium on its products consisting of a children's "do it yourself" item in the photographic field. From a judgment and order of the Superior Court of Los Angeles County, Lothrop E. Smith, J., denying plaintiff's motion for a directed verdict and granting defendant's motion for judgment notwithstanding the verdict, the plaintiff appeals. The District Court of Appeal, Ashburn, J., held that the appeal from the order must be dismissed and that proof of purchase of the idea from an independent developer of an item closely similar to plaintiffs was a good defense.

Appeal from the order dismissed. Judgment affirmed.

1. Appeal and Error ⟹109

An order granting defendant's motion for judgment notwithstanding the verdict is not appealable.

2. Judgment ⟹199(3.7)

Trial ⟹139(1)

Right of trial court to render a judgment notwithstanding the verdict is the same as its right to grant a nonsuit, and it may neither grant a motion for nonsuit nor render judgment notwithstanding the verdict, if there is any substantial evidence before the court in the first instance in support of plaintiff's case, or in the second instance, in support of the verdict rendered by the jury.

3. Literary Property ⟹9

A showing of access and similarity raises an inference of copying of a composition and the standard for determining such similarity is the common knowledge of the average reader, observer, spectator or listener, and the problem of similarity is a question of fact to be determined ultimately by a comparison of the two works upon the basis of the opinion of the average individual possessing a factual understanding of the subject.

4. Literary Property ⟹9

In action to recover upon the contract to pay the reasonable value of an idea submitted to defendant for use as a premium on its products where plaintiff did not claim originality which would make the item protectible property within the common law of copyright and plagiarism, a question of fact was presented whether there was copying and use by the defendant of plaintiff's idea and its concrete expression contrary to the contract it had made with the plaintiff.

5. Trial ⟹142

Where evidence raises an inference that a fact exists and either party produces evidence of nonexistence thereof that is clear and uncontradicted and such that it cannot rationally be disbelieved, the nonexistence of the fact is established as a matter of law, and if the fact inferred is necessary to establish an essential element of the plaintiff's case, a nonsuit or directed verdict is proper.

6. Evidence ⟹89

An inference is dispelled as a matter of law when it is rebutted by clear, positive and uncontradicted evidence which is not open to doubt, even though such evidence is produced by the opposite side, though a different rule applies to a presumption.

7. Evidence ⟹588

Testimony which is not inherently improbable and is not impeached or contradicted by other evidence should be accepted as true by the trier of fact.

8. Evidence ⟹589

In action on a contract to pay the reasonable value of an idea submitted to defendant for a gadget for use as a premium on its products consisting of a new children's "do it yourself" item in the photographic field, uncontradicted evidence of defendant that the idea for appeal to children of sun pictures was discovered independently and without any knowledge of anything that plaintiff had done and was conceived by persons conducting an independent advertising agency, must be accepted.

9. Literary Property ⟹9

In action to recover upon a contract to pay the reasonable value of an idea submitted to defendant for a gadget for use as premium on its products of a new children's "do it yourself" item in the photographic field, purchase from an independent developer of an item closely similar to plaintiffs was a complete defense, where there was proof that there was no copying of the plaintiff's product.

10. Copyrights ⟹75

Literary Property ⟹9

Whether the proof of absence of copying establishes a complete defense in literary property cases is governed by the same principle, whether the action be one for infringement of a statutory copyright or a common-law copyright.

11. Copyrights ⚷53

There can be no infringement of a copyright unless there has been a copying in whole or in part of the copyrighted work.

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Max E. Gilmore, Los Angeles, Daniel A. Weber, Beverly Hills, for appellant.

Gibson, Dunn & Crutcher, Richard H. Wolford, John L. Endicott, Los Angeles, for respondent.

ASHBURN, Justice.

This case falls within the ambit of Desny v. Wilder, 46 Cal.2d 715, 299 P.2d 257. Plaintiff sued to recover upon a contract to pay the reasonable value of an idea submitted to defendant in concrete form, a gadget for use as a premium in one of its products, a "new children's do-it-yourself item in the photographic field." Plaintiff did not claim novelty and originality which would make his "premium item" protectible property within the common law of copyright and plagiarism. He relied upon contract.

[1] A jury awarded plaintiff a recovery in the sum of $35,000. Motion for directed verdict had been made and denied; this was followed by a motion for judgment notwithstanding the verdict, which was granted. Plaintiff has appealed from that order and from the judgment entered pursuant thereto. As the order is not appealable (Schramko v. Saulter, 146 Cal.App.2d 549, 553, 303 P.2d 1061), the attempted appeal therefrom must be dismissed. The merits of the ruling are reviewable upon the appeal from the judgment.

[2] The applicable rule of review is stated in Re Estate of Arnold, 16 Cal.2d 573, 581, 107 P.2d 25, 30: "The right of the trial court to render a judgment notwithstanding the verdict is the same as its right to grant a nonsuit. Card v. Boms, 210 Cal. 200, 202, 291 P. 190. It may neither grant this motion for a nonsuit nor may it render judgment notwithstanding the verdict if there is any substantial evidence before the court in the first instance in support of plaintiff's case, or in the second instance in support of the verdict rendered by the jury." Accord: Devens v. Goldberg, 33 Cal.2d 173, 177, 199 P.2d 943; Champion v. Bennetts, 37 Cal.2d 815, 820, 236 P.2d 155. We therefore accept for present purposes all evidence and inferences favorable to plaintiff-appellant.

Plaintiff's proffered premium was a kit for making sun pictures, a thing which he had done as a boy, as had many other boys. It consisted of a black opaque envelope in which were contained a collapsed cardboard holder, a negative consisting of a picture printed on cellophane and two pieces of sensitized paper. The idea was that a child could use this kit to create a picture through his own efforts. The process is simple; the sensitized paper is inserted in the holder and the cellophane printed negative superimposed over it. Upon exposure to the sun the picture of the negative is printed upon the sensitized paper.

Through expenditure of much effort and substantial monies plaintiff had brought this concrete expression of his idea to the point where he thought it marketable. So he called the Los Angeles office of defendant General Mills, Inc., and inquired whether anyone there could purchase premium items and was told to contact Mr. Otis Young of the San Francisco office, that he was the one who could purchase those items. Mr. Young was advertising and sales promotion manager of Sperry Operations, which was a geographical division of General Mills, Inc., and in no sense a separate entity although it was largely autonomous, distributing grocery products in the western portion of the United States. The headquarters of General Mills, Inc. was in Minneapolis. Mr. Young had sole responsibility of procuring premiums for Sperry products but he testified that none of them have appeal for children; that that division did not use "kids'" premiums. Mr. Young had no duty to report his premium activities to the head office, which was located in Minneapolis.

On July 6, 1955, plaintiff wrote Mr. Young advising that "I have developed a new children's do-it-yourself item in the photographic field. I feel it would make an excellent premium item for your company. * * * I have never offered this to anyone and I would like to make an appointment preferably on a Monday with you and discuss its possibilities." On the 8th he received from Mr. Young an answer, "with regard to a premium item which you have developed for us in the children's field." He also suggested that plaintiff call on him on the 18th. Before that date arrived Young telephoned plaintiff from San Francisco postponing the meeting to July 20th. In that conversation he said that if plaintiff's item was accepted some six to seventeen million of them could be bought. On July 20th plaintiff called at Young's San Francisco office. There was also present Mr. Lawrence D. Dunham who was vice president of an advertising firm which worked with the personnel of General Mills, being in constant touch with Sperry Operations and having nothing to do with General Mills national products. There were also present two other men of the defendant company, "observers or executives" whose names plaintiff could not remember at the trial. Plaintiff testified: "After the introductions I told Mr. Young that I would be willing to disclose this premium idea to him if he expressly understood that if he used my premium item I would be paid for it and he agreed. * * * Q. You say 'he agreed.' That is your conclusion. It may be stricken. What did he say? A. He said 'Yes, I would if I used it.'" Plaintiff thereupon disclosed his idea and the kit; demonstrated the making of a picture with it. Young "was quite surprised at what he saw and they all seemed to be elated with the results. They thought it would be quite a nice premium. They said it would be a nice premium for the youngsters, they would have something that they could make themselves and it would give them satisfaction that they were able to develop their own pictures." The question of permanency of the picture was raised and plaintiff said it would last possibly six hours to six months if not further exposed to light. He was asked "whether there was a probability of getting some permanency in the negative. I told them that could be obtained, that I would have to work on that when I arrived back at Los Angeles. They seemed satisfied with what they saw. I left some samples there, I was asked to, and said goodbye to the gentlemen and went on home." Young's testimony differed in some substantial respects, denying that Teich said that he wanted it understood before showing his premium item that if Young liked it he would be paid for it, or that he told plaintiff that if the item was something that he, Young, liked he would be happy to pay plaintiff for it. But he also testified: "Q. * * * Well, when he came to the office and displayed his item, did you look at it with the expectation that if you used it, you would pay him for it? A. Pay him for the premium? Q. Yes. A. Certainly." Again: "Q. And you knew at that time that he was disclosing it and demonstrating it to you with the expectation if you used it he would receive some compensation for it; isn't that true? A. I always assume that." Unquestionably plaintiff established a contract on the part of defendant to pay for his idea if used by it. However, from that day Mr. Young ignored him.

On July 22nd plaintiff wrote Young that he had achieved permanency of picture by using a different type of paper and a fixer or hypo. Receiving no response plaintiff waited about a week and then sent a night letter which was almost a duplicate of the communication of the 22nd; it met with silence. Then plaintiff tried to get Young on the telephone but was told he was "not available."

In January, 1956, plaintiff saw for the first time a package of General Mills cereal known as Trix which showed on the outside that it contained a "Magic Sun Picture." Buying and opening one he found a kit bearing marked similarity to his own. The basic principle was the same but there were differences in details. The negative and paper were smaller in size than plaintiff's;

the negative was about one-third of the thickness of his own but it was cellophane, or acetate as respondent calls it. Defendant's negative was printed by rotogravure process, while plaintiff's was done with rubber dies or plates. There were no other substantial differences. Testing showed that the sun picture produced by a Trix kit had no more permanency than plaintiff's own. So marked was the similarity of the two kits that Mr. Young, when he first learned of the Trix premium through a "planning letter" from the Minneapolis office, was amazed. He testified: "Well, I would like to give you my reaction when I got this planning letter. Q. Yes. I would appreciate it. A. I thought to myself, 'Holy smoke! Did I miss one out here?' Q. I see. Did you think that Mr. Teich had gone to Minneapolis and sold—A. That's right, yes. Q.—his idea to Minneapolis? A. That's right. And as I recall the premium itself, it was small and to me it appeared something like the one Mr. Teich had." Also: "It was, I think, alike in the approximate size of the thing, and generally in the method of handling the thing it seemed to be basically the same procedure." Young also called Dunham and "gave him the same reaction. I said, 'Do you suppose we missed one out here?'" Dunham testified: "I think I can remember his exact words. He said: 'I wonder if we passed something up here. "Trix" has a premium similar to the one we looked at last summer.'"

[3] A showing of access and similarity raises an inference of copying. Golding v. R. K. O. Pictures, Inc., 35 Cal.2d 690, 695, 221 P.2d 95; Kovacs v. Mutual Broadcasting System, 99 Cal.App.2d 56, 65, 221 P.2d 108. The standard for determining similarity is "the common knowledge of the average reader, observer, spectator or listener." Stanley v. Columbia Broadcasting System, 35 Cal.2d 653, 662, 221 P.2d 73, 78, 23 A.L.R.2d 216. The last cited case also says, 35 Cal.2d at page 660, 221 P.2d at page 77: "The problem of similarity between two compositions, whether literary, musical or dramatic, is a question of fact to be determined ultimately by a comparison of the two works upon the basis of the opinion of the average individual possessing a practical understanding of the subject. Although the majority of the decided cases involved a questioned infringement of a copyrighted work, it would seem that the test of whether or not an infringement existed would be the same as the question here involved—the determination of whether or not such similarity exists between plaintiff's and defendant's programs as to suggest to the average person the use by defendant of an idea originating with plaintiff upon proof of the other elements necessary to enable the plaintiff to recover." Kovacs v. Mutual Broadcasting System, supra, 99 Cal.App.2d 56, 65, 221 P.2d 108, 114: "The weight to be given the inference as against direct evidence of nonaccess and noncopying is a question for the trier of fact. There can be no copying in the absence of similarity. Whether there are substantial similarities sufficient to give rise to an inference of access and copying is one of fact to be determined by a comparison of the two programs upon the basis of the 'impression received by the average reasonable man.' [Citations.] The implied finding of the jury of similarity is binding upon a reviewing court if supported by substantial evidence. [Citation.]"

[4] Mr. Young's reaction to the Trix kit is enough to show that a question of fact was presented at bar, necessitating an initial assumption by the trial judge and this court that there was copying and use by defendant of plaintiff's idea and its concrete expression contrary to the contract it had made with him. Although Mr. Young denied any communication with the Minneapolis office, or anyone other than Dunham, concerning plaintiff's disclosed idea, and also denied knowing what was occurring in Minneapolis or elsewhere with reference to a sun picture premium idea and kit, his testimony and that of Mr. Dunham was so squarely opposed to plaintiff's upon the principal issue of contract that the jury, disbelieving them in that respect, was entitled to reject the further assertion that his idea was not passed on to the Minneapolis office. There were also other circumstances shown

by the transcript which would warrant rejection of the testimony of both Young and Dunham. We must recognize therefore the existence of an inference of copying and use of plaintiff's idea.

[5, 6] Respondent counters this with the argument that that inference was dispelled by evidence which showed conclusively that there was no copying. Reliance is placed upon decisions such as Leonard v. Watsonville Community Hosp., 47 Cal.2d 509, 515, 305 P.2d 36, 39; wherein it is said: "It is settled that where the evidence raises an inference that a fact exists, and either party produces evidence of the nonexistence of the fact that is clear, positive, uncontradicted and of such a nature that it cannot rationally be disbelieved, the nonexistence of the fact is established as a matter of law. See Blank v. Coffin, 20 Cal.2d 457, 461, 126 P.2d 868. In these circumstances the inference is dispelled as a matter of law, and, if the fact inferred is necessary to establish an essential element of the plaintiff's case, a nonsuit or directed verdict is proper." Engstrom v. Auburn Auto. Sales Corp., 11 Cal.2d 64, 70, 77 P.2d 1059, 1063, also says that "an *inference* is dispelled as a matter of law when it is rebutted by clear, positive, and uncontradicted evidence which is not open to doubt, even though such evidence is produced by the opposite side." A different rule applies to a presumption (see Leonard decision, supra 47 Cal.2d at page 517, 305 P.2d at page 41), but we here deal with an inference. We have concluded that respondent's position in this regard is soundly taken.

[7, 8] Defendant's proof shows that the idea of sun pictures is an old one; that its adaptation to a premium for cereals and like products because of appeal to children was developed independently and without any knowledge of anything that plaintiff had done or of anything that had passed between plaintiff and Young; that the idea and the kit which were adopted for use in Trix packages were independently conceived and developed by Messrs. Herbert S. Valentine, Jr. and Earl K. Radford, Jr., who conducted an advertising agency in Kansas City under the name Valentine-Radford; neither of them had had any contacts with General Mills prior to writing to the Minneapolis office on May 27, 1955. Defendant produced as witnesses at the trial the following persons who supported the defense thesis, were not contradicted, nor were they impeached by cross-examination or in any other manner, viz., Lowry H. Crites of Minneapolis, who was advertising manager of General Mills for all nationally marketed cereals; James Street of St. Louis (by deposition), who was premium manager of General Mills in Minneapolis throughout 1955; Herbert S. Valentine, Jr. of Kansas City, partner in Valentine-Radford advertising agency, who developed and sold to General Mills the Trix premium. This uncontradicted evidence could not be rejected. In re Estate of Kuttler, 160 Cal.App.2d 332, 337, 325 P.2d 624, 627: "'While no universal and immutable formula can be prescribed for determining the weight to be accorded testimonial evidence, it has frequently been said that testimony which is not inherently improbable and is not impeached or contradicted by other evidence should be accepted as true by the trier of fact.' Gomez v. Cecena, 15 Cal.2d 363, 366, 101 P.2d 477, 478. 'It is the general rule that "the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted as proof of the fact." 10 Cal.Jur. § 362, p. 1143; In re Estate of Warner, 167 Cal. 686, 690, 140 P. 583; Hynes v. White, 47 Cal.App. 549, 552, 190 P. 836.' Joseph v. Drew, 36 Cal.2d 575, 579, 225 P.2d 504, 507." In Hicks v. Reis, 21 Cal.2d 654, 659, 134 P.2d 788, 790, the court stated the general rule that: "Provided the trier of the facts does not act arbitrarily, he may reject *in toto* the testimony of a witness, even though the witness is uncontradicted." But it was further said, 21 Cal.2d at page 660, 134 P.2d at page 791: "To these well settled rules there is a common sense limited exception which is aimed at preventing the trier of the facts from running away with the case. This limited

exception is that the trier of the facts may not indulge in the inference when that inference is rebutted by clear, positive and uncontradicted evidence of such a nature that it is not subject to doubt in the minds of reasonable men. The trier of the facts may not believe impossibilities. When the rebutting testimony is of such a nature that the minds of reasonable men cannot differ on the subject, then the trier of the facts cannot, and should not be permitted to, indulge in the inference."

The testimony of Messrs. Crites, Street and Valentine was buttressed by a line of correspondence which plaintiff's attorney stipulated to be genuine, the letters having been sent by the respective writers on or about the dates they bear and received in due course of mail by the respective addressees.

On May 27, 1955, Mr. Valentine wrote to "Premium Manager, Sales Division, General Mills, Inc." at Minneapolis, concerning the sun picture kit which he ultimately sold to that company and which was used in Trix cereal. He said: "A client of ours is about to market a new idea for children that would appear to have real potential as a premium for a cereal manufacturer. I am not at liberty to send you a sample at this time, but would appreciate some general information for our guidance." (Incidentally, he was his own "client.") On June 17 Mr. Street replied, saying in part: "Perhaps the easiest way to tell whether your client's item is a satisfactory cereal premium, would be to brief me on a non-confidential basis with a few more details. * * * If you would be kind enough to let your hair down and tell me what I'm evaluating, I would be glad to do it. Hoping to hear from you again." On June 22nd Valentine wrote Street for more information concerning General Mills' use of premiums. This information was sent him by Street on June 29th. A month later, on July 29th, Valentine sent to Street a brochure disclosing the details of his sun pictures, also a negative and some film. This was his first disclosure. This was followed by additional correspondence of August 11th and August 18th. Mr. Street evaluated Valentine's product, which was called "Sun Pix", and concluded that it was a good item, not new, but met all requirements, and that he would recommend it for use if the opportunity came along. Then there was an agreed "option", extending for a reasonable time, to enable General Mills to decide whether to buy; this by letter of August 19th. After more letters extending through the rest of the year, a sale was made by Valentine to General Mills and the first purchase order was received by him on January 16, 1956. It was an order for 6,250,000 "Sun Pix" premium packages. Sales of kits were then made to General Mills in an aggregate amount of $70,000 to $72,000.

Though the differences between plaintiff's kit and that found in Trix packages were insignificant, that portion of the stipulated correspondence which relates to minutiae of "Sun Pix" has a definite probative bearing upon the question of independent development by the firm of Valentine-Radford. Before plaintiff's disclosure to Young on July 20, 1955, the following letters passed between Valentine-Radford and third parties.

On June 1, 1955, Valentine-Radford wrote to Walt Disney Enterprises inquiring about the use of Disney characters and the Disney name on their package. In this letter it is stated: "I have worked out a novel kit for children that enables them to reproduce photographs from film. The kit will probably contain five films and will retail for 50¢." [This ties in with their first letter to General Mills, dated May 27, 1955, in which they do not disclose what their suggested premium item is, other than that it is a new idea for children, approximately 2″ x 2″, which would retail for 50¢.]

On the same date, June 1st, they also wrote to Holiday Plastics, Inc. asking for prices on different quantities and weights of acetate. The letter indicates a prior meeting between these parties at which the "project" was discussed.

On June 9, 1955, Valentine received a letter from Eastman Kodak Company (a follow-up to its letter of June 1) advising that they had referred "your problem of a suitable method for packaging 2″ x 2″ Kodak Studio Proof Paper along with a film negative to our Paper Division Laboratories for investigation," and requesting further information.

On June 13, 1955, Valentine-Radford was advised by letter that a search of the Patent Office records had been made with regard to the trade-mark "Sun Pix" and that same was open for use.

June 22, 1955, Valentine-Radford wrote to Highland Supply Company requesting prices for printing on acetate, stating "I am interested in printing on acetate photos similar to the attached sample. These halftones would be printed in black ink at least 120 line screen and trimmed 2″ square. They would be printed on Dupont acetate film No. 200 in the rigid variety to equivalent in some other make. * * * This printing could be done either rotogravure or letterpress, depending upon the quality and your equipment. * * * I would also like to receive from you samples of the acetate on which you make your estimates."

On July 7, 1955, Milprint, Inc., of Milwaukee, Wisconsin, a company engaged in packaging materials, lithography and printing, wrote to Valentine & Radford, per request, quoting prices on three different gauges of Acetate, to be "printed 1 color 1 side * * * trim size 2 inches by 2 inches. * * * It is our understanding that a retouched photograph will be furnished to us. The plates would be charged extra at $85."

We are satisfied that defendant proved conclusively the fact of independent development of "Sun Pix" by Valentine and his partner, and an independent sale of same to General Mills; that this business was conducted entirely through the Minneapolis office without knowledge of plaintiff's idea, kit or contract with Young of the Sperry division.

[9] Our problem is thus narrowed to the question whether the defense of purchase from an independent developer of an item closely similar to plaintiff's is a good defense. In other words, does proof that there was no copying of plaintiff's product make a complete defense, although the thing actually used by defendant was closely similar to the one which plaintiff had presented to it? The authorities require an affirmative answer.

Respondent calls attention to this language of the Desny case, supra, 46 Cal.2d 715, 743, 299 P.2d 257, 272: "Defendants had an unassailable right to have their own employes conduct the research into the Floyd Collins tragedy—an historical event in the public domain—and prepare a story based on those facts and to translate it into a script for the play." This was part of a general discussion of "The Law Pertaining to Literary Property" and seems to recognize the rule established by the authorities hereinafter cited. At page 749 of 46 Cal.2d, at page 277 of 299 P.2d, it is also said: "For the purposes of appellate review of this summary judgment proceeding it is apparent from the comparisons above tabulated, and from the outlines which are set out in the margin, that a factual issue, rather than one of law, is presented as to whether defendants used plaintiff's synopsis or developed their production independently thereof."

Golding v. R. K. O. Pictures, Inc., supra, 35 Cal.2d 690, 696, 221 P.2d 95, 98: "If it is established that the plaintiff has a protectible property in his literary work, and there was copying, the elements of liability for infringement or piracy are established and all that remains is the determination of damages." Of course, plaintiff's contract supplied a substitute for the missing element of inherent protectibility which was under discussion in the Golding case.

[10] The solution of the question of whether proof of absence of copying establishes a complete defense is governed by the same principle whether the action be one

for infringement of a statutory copyright or a "common law" copyright. See, Golding v. R. K. O. Pictures, Inc., supra, 35 Cal. 2d 690, 695, 221 P.2d 95; dissent of Mr. Justice Traynor in Stanley v. Columbia Broadcasting System, supra, 35 Cal.2d 653, 683, 221 P.2d 73, 23 A.L.R.2d 216.

[11] Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 561, 90 P.2d 371, 374: "If such similarities be shown as to justify an inference of copying of protectible material it is necessary to prove only that a substantial part of plaintiffs' manuscript was copied to sustain liability on the part of appellants." Concerning the instructions the court said, 32 Cal.App.2d at page 565, 90 P.2d at page 376: "[I]n numerous other instructions it was made clear to the jury that if appellants had independently conceived and prepared a composition which was not taken or copied from plaintiffs' work they would not be liable to plaintiffs for damages. * * * They would have been more than stupid if they believed that they could return a verdict for plaintiffs without a finding on their part that appellants had used plaintiffs' composition in the preparation of the photoplay." The judgment was affirmed.

Harold Lloyd Corporation v. Witwer, 9 Cir., 65 F.2d 1, 4: "That there are similarities between the play and the story is manifest and we proceed to consider the legal significance of such similarities. The primary question is whether these similarities resulted from copying the story; if not, the similarities are without legal significance. The secondary question is whether the similarities are themselves so marked as to prove by such circumstantial evidence the fact of copying, in the teeth of a denial thereof by those who produced the play.

"'There can be no infringement unless there has been a copying either in whole or in part of the copyrighted work. Some copying is necessary to constitute infringement.' 13 C.J. § 277, note 41, and cases.

"'Since there can be no infringement of copyright without some copying the mere fact of similarity or even identity between two works does not of itself make one an infringement of the other.' 13 C.J. § 278.

"The rule is well stated by Judge Learned Hand in the case of Fisher, Inc., v. Dillingham, D.C., 298 F. 145, 147: 'To sustain it [an infringement suit], however, more must appear than the mere similarity or even identity, of the supposed infringement with the part in question. In this lies one distinction between a patent and a copyright. One may infringe a patent by the innocent reproduction of the machine patented, *but the law imposes no prohibition upon those who, without copying, independently arrive at the precise combination of words or notes which have been copyrighted.*'" (Emphasis added.)

18 C.J.S., Copyright and Literary Property § 94b, page 216: "There can be no infringement unless there has been a copying, either in whole or in part, of the copyrighted work, and hence the mere fact of similarity, or even identity, between two works does not of itself make one an infringement of the other. * * * As stated supra § 25, both works may be entitled to copyright, although identical, if each is an original and independent production, and similarity or identity is merely evidence of copying—more or less strong according to circumstances and the explanations which may be made of it, as shown infra § 156. It is only where the similarity or identity is due to copying from the copyrighted work that the later work may be deemed an infringement." Id. § 111, page 227: "*Test of piracy.* It has been laid down as the clear result of the authorities in cases of this nature that the true test of piracy is to ascertain whether the author of the alleged piratical work has in fact used the plan, arrangement, and illustrations of the copyrighted work as the model of his own work, with colorable alterations and variations only, to disguise the use thereof, or whether the work is the result of his own labor, skill, and use of common materials and common sources of knowledge open to all men, and whether the

resemblances are either accidental or arising from the nature of the subject. The question is always simply one of fact, whether defendant copied the matter from complainant's book or obtained it by his own skill and labor from the common source."

23 A.L.R.2d 244, 369, par. 42: "Anno: Literary or Artistic Property Rights": "If defendant created his work by independent effort or bought a work created independently of any other work, the fact that the work strongly resembles plaintiff's work does not amount to an infringement, for there is no copying. See § 28, supra." See, also, § 29, at page 340.

To the same effect are: Moore v. Ford Motor Co., 2 Cir., 43 F.2d 685, 687–688; O'Rourke v. R. K. O. Radio Pictures, D.C. Mass, 44 F.Supp. 480, 482–483; Chautauqua School of Nursing v. National School of Nursing, 2 Cir., 238 F. 151, 153; Christie v. Harris, D.C., 47 F.Supp. 39, affirmed Christie v. Cohen, 2 Cir., 154 F.2d 827; 329 U.S. 734, 67 S.Ct. 97, 91 L.Ed. 634; Greenbie v. Noble, D.C.S.D.N.Y., 151 F.Supp. 45, 68; Fred Fisher, Inc. v. Dillingham, D.C.S.D.N.Y., 298 F. 145, 151–152; Wilkie v. Santly Bros., 2 Cir., 91 F.2d 978, 979; Smith v. Berlin, 207 Misc. 862, 141 N.Y.S.2d 110, 114–115; Vernon v. Sam S. & Lee Shubert, D.C.N.Y., 220 F. 694, 695–696; Bachman v. Belasco, 2 Cir., 224 F. 817, 818; Walling v. American Rolbal Corporation, 2 Cir., 135 F.2d 1003.

In the instant case it follows from the absence of copying that plaintiff has no cause of action. As the Supreme Court said in Dun v. Lumbermen's Credit Ass'n, 209 U.S. 20, 22, 28 S.Ct. 335, 336, 52 L.Ed. 663: "Here seems to be no attempt to coin money out of another's labor." The granting of the motion for judgment non obstante was not erroneous.

Appeal from order dismissed. Judgment affirmed.

FOX, P. J., and HERNDON, J., concur.

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170 Cal.App.2d 729

Vernon S. DALLMAN, Plaintiff, Cross-Defendant and Appellant,
v.
Etta H. DALLMAN, Defendant, Cross-Complainant and Respondent.

Vernon S. DALLMAN, Plaintiff, Cross-Defendant and Respondent,
v.
Etta H. DALLMAN, Defendant, Cross-Complainant and Appellant.
Civ. 18242, 18246.

District Court of Appeal, First District, Division 1, California.

May 28, 1959.

Divorce action. The Superior Court, City and County of San Francisco, Orla St. Clair, J., granted wife a divorce and awarded her alimony of $750 per month, but subsequently modified interlocutory decree by reducing alimony to sum of $1 per year. Both parties appealed. The District Court of Appeals, Hanson, J. pro tem., held, inter alia, that absent provision in property settlement agreement that community property was to retain that character for purpose of court's power to award alimony, property which agreement gave to wife was in her "separate estate" at time of interlocutory decree, for purposes of statute depriving court of discretion to award alimony where there are no children and wife has separate estate sufficient for her proper support.

Affirmed.

1. Divorce 🔑235

1943 amendment is mandatory and deprives divorce court of any discretion to award alimony where there are no "children" and spouse has separate estate sufficient for his or her support; and where parties' children had already reached majority before divorce suit was commenced, case could be treated as one where there were no children. West's Ann.Civ.Code, § 142.

See publication Words and Phrases, for other judicial constructions and definitions of "Children".

2. Divorce ⚷235

Absent provision in property settlement agreement that community property was to retain that character for purpose of court's power to award alimony, property which agreement gave to wife was in her "separate estate" at time of interlocutory decree, for purposes of statute depriving court of discretion to award alimony where there are no children and wife has separate estate sufficient for her proper support. West's Ann.Civ.Code, § 142.

See publication Words and Phrases, for other judicial constructions and definitions of "Separate Estate".

3. Divorce ⚷231

A husband is not required to enable wife to continue to enjoy every luxury to which she has been accustomed but only such luxuries as habit has made apparent necessities. West's Ann.Civ.Code, § 142.

4. Divorce ⚷239

In divorce action, evidence would not sustain finding that wife's separate estate of almost one half million dollars was insufficient for her proper support and that husband was financially able to pay sum of $750 per month alimony to wife. West's Ann.Civ.Code, § 142.

* * *

J. W. Ehrlich, Edward F. Dullea, San Francisco, Duncan Davidson, San Francisco, of counsel, for Etta H. Dallman.

David Livingston, Harold R. Farrow, James R. Mansfield, Robert R. Barton, San Francisco, for Vernon S. Dallman.

HANSON, Justice pro tem.

This is a controversy over alimony allowed by the court in a divorce suit in which the husband was the plaintiff and the wife the cross-complainant. After 28 years of married life when the two children of the parties had attained their majority, the husband and father filed his action for divorce alleging as grounds desertion and extreme cruelty. The wife by her cross-complaint sought a divorce on the ground of extreme cruelty.

Approximately a year thereafter was spent by the parties, their counsel, and accountants in the examination of books and records and negotiations aimed at achieving a property settlement agreement. On June 27, 1957, such an agreement was signed by the parties, but the agreement reserved for the determination of the court what, if any, alimony should be awarded to the wife. The husband claimed no alimony was allowable while the wife claimed it was. By virtue of this property settlement agreement the wife became the vested owner of property which represented one-half of the value of the community property; that is, she became owner of property of the value of $455,965.28 after the payment of costs and counsel fees. Most of the property had been divided equally. However, the wife had refused to accept in kind one-half of the husband's interest of 34% of the stock of a corporation owned by his family partnership and had required that her husband pay her the sum of $150,000 in lieu of such one-half interest. The corporation has, since the war, been losing money and beginning with the calendar year 1953 continued to lose the sum of approximately $156,000 annually.

In classifying this property, the agreement provided that the "wife shall receive as her share of the community property of the parties the following items, and the husband hereby relinquishes to the wife all right, title and interest therein, and *the same shall hereafter be her separate property.*" (Emphasis added.)

The parties then agreed that the wife would present her case for divorce on the cross-complaint and that the husband would not seek to evidence his alleged grounds for divorce as set forth in his complaint.

On September 6, 1957, the court ordered that a divorce be granted to the defendant and cross-complainant and further provided for alimony in the sum of $750 per month to be paid by the husband to the wife. The order allowing alimony was set aside on November 22, 1957. On the same day, Mr. Dallman made a formal motion to reopen the case. The motion was granted.

For the purpose of avoiding a protracted trial of the divorce issue as well as the determination of property rights, the parties entered into a stipulation which contained the following: "Nothing herein shall be deemed an admission by Dallman that Mrs. Dallman is entitled to a divorce or alimony and Dallman hereby objects to any adverse findings of fact or provisions in the interlocutory decree in that respect and if such objection shall be overruled by said court they shall be preserved and exception to said rulings, if any, shall be deemed taken. On the other hand Mrs. Dallman contends that she is entitled to a divorce and to alimony."

On December 27, 1957, the court again rendered judgment in favor of defendant and cross-complainant on her cross-complaint and awarded her $750 per month for her maintenance and support commencing as of June 16, 1957. The court reserved jurisdiction to reduce the alimony. From this award of alimony, the husband appeals.

On February 24, 1958, pursuant to plaintiff's motion to terminate said alimony, the court modified the interlocutory decree of divorce by reducing the alimony to the sum of $1 per year. From this modification, the wife appeals.

These two appeals have been consolidated for hearing and we shall view them as one case with the understanding that any references by us to the records and briefs are to the ex-husband's appeal unless otherwise noted by us.

Upon this narrative of the facts the *first* question with which we are presented is whether the court had the authority and power to allow alimony at all and second whether, if it did, was it justified in reducing the allowance of $750 per month to $1 per year.

The trial judge in ordering the alimony payments in the interlocutory decree of December 27, 1957, relied on the holding in Scheibe v. Scheibe, 57 Cal.App.2d 336, 134 P.2d 835, 839, in which the court stated: "[T]he award made under said section 139, properly speaking, is not alimony, nor is it merely a substitute for the wife's interest in the community or separate property of the husband. *It is an allowance authorized to be made by way of compensation for a wrong done to the wife, and in that sense is regarded as a penalty imposed upon the husband.*" (Italics ours.)

However, it is to be noted that the cited case arose before the 1943 amendment to section 142 of the Civil Code. Said section provides: "When the prevailing party in the action has either a separate estate, or is earning his or her own livelihood, or there is community property sufficient to give him or her alimony or a proper support, or if the custody of the children has been awarded to the other party, who is supporting them, the court in its discretion, may withhold any allowance to the prevailing party out of the separate property of the other party. *Where there are no children, and either party has a separate estate sufficient for his or her proper support, no allowance shall be made from the separate estate of the other party.*" (The italicized portion of the section is the 1943 amendment.)

[1] By the wording of the 1943 amendment, which is mandatory, the court is deprived of any discretion to award alimony from the separate estate of the other party "[W]here there are no children, and either party has a separate estate sufficient for his or her proper support." Because the parties' children had already reached majority before this suit was commenced, the case may be treated as one "where there are no children."

[2] It is to be noted that the said amendment to the code does not require that the separate estate should have come from any particular source. The only requirement is that there be a separate estate, without regard to the origin of that estate, which is sufficient for his or her, as the case may be, proper support. The question then is, what

was the status of the property at the time the court made its award. "The utmost freedom of contract respecting property exists between husband and wife. They may by contract change the status of their property, or the property of either, from separate to community or from community to separate." And "A husband may make a transfer of property to his wife whether it be his separate property or community property, and thereby vest the property in her as her separate property." 26 Cal.Jur.2d 124, 126.

By the terms of the property settlement agreement, Mrs. Dallman's share of the community property became her separate property and was her separate property at the time the interlocutory decree was entered. The wife argues that if we construe the 1943 amendment as operating upon this particular kind of separate property, then it would discourage parties from entering into property settlement agreements because it would give the parties a separate estate before the interlocutory decree is entered and thereby deprive the court the power to award alimony. The answer to this is twofold: First, the parties could stipulate in the property settlement agreement that the community property is to retain that character for the sole purpose of the court's power to award alimony, and secondly, the mere fact that a party has a separate estate will not prevent the court's awarding him or her alimony. It is only when such a party has a separate estate sufficient for his or her *proper* support that the court is denied the power to make such an award.

[3, 4] That leads to the final question, so far as the initial award is concerned, which is: Was Mrs. Dallman's almost half-million dollar separate estate sufficient for her *proper* support?

Although Mrs. Dallman has cited many cases in support of her argument that the trial court had the power to make the alimony award in question, an examination of those cases discloses that most of them are not in point because they are not dealing with the 1943 amendment to section 142. However, one case cited should be distinguished.

The case of De Leshe v. De Leshe, 1947, 80 Cal.App.2d 513, 181 P.2d 929, 930, was an appeal from an order modifying an interlocutory decree of divorce by requiring defendant to pay plaintiff the sum of $125 per month for her support and maintenance. The parties had entered into a property settlement agreement whereby the wife received community property worth $20,000 and alimony of $250 per month until the husband's retirement from the Navy, at which time it was agreed she was to receive "such sums per month as may be fixed by the Court." Upon his retirement, the wife petitioned the court to fix a reasonable sum for her support which sum was fixed at $125 per month, from which award an appeal was taken on the ground, among others, that the award violated the provisions of section 142 of the Civil Code. In affirming, the court held that there was no violation of section 142 because the $20,000 did not produce any considerable income and from the evidence it was held the trial court could have concluded that such income was not sufficient for her support. At page 515 of 80 Cal.App.2d, at page 931 of 181 P.2d, the court said: "Under such circumstances a wife is not required to exhaust her separate estate before a court can require the former spouse to contribute to her support."

It is to be noted, however, that the court was merely carrying out the terms of the property settlement agreement entered into between the parties and this was in fact one of the grounds upon which the court rested its decision. Assuming the wife in the cited case would require between $3,000 and $4,000 per year for her proper support, the $20,000 would last only five or six years; while at $1,600 per month, the amount Mrs. Dallman contends was needed for her proper support, her separate property disregarding any income it might produce, would support her for more than 25 years.

Baldwin v. Baldwin, 1946, 28 Cal.2d 406, 170 P.2d 670, was an action for divorce brought by the wife after a Nevada decree had already been granted to the husband who had established a bona fide residence in Nevada. From a judgment denying the divorce, support, and a share of the alleged community property, the plaintiff appealed. Defendant also appealed from an order requiring him to pay plaintiff's attorneys' fees and costs on appeal. Both the judgment and order below were affirmed. At page 413 of 28 Cal.2d, at page 674 of 170 P.2d of the opinion, the court stated: "* * * it is apparent that the trial court was justified in its determination that plaintiff possessed sufficient means with which to support herself and was not entitled to an allowance for * * * support from the separate estate of defendant. It is provided by section 142 of the Civil Code that where, as here, 'there are no children [of the marriage], and either party has a separate estate sufficient for his or her proper support, no allowance shall be made from the separate estate of the other party.'"

At this point, in its opinion the court is ruling that by virtue of the 1943 amendment the lower court was without power to make an award of alimony. But then it added the following language, apparently only as a second ground upon which to deny relief and not as modifying the rule set forth above: "The rule has also been declared that 'The granting and refusing of alimony in actions for divorce is a matter which lies largely in the discretion of the trial court. * * * Before the appellate courts will interfere, it must be made clearly and affirmatively to appear upon the face of the entire record in the case that this discretion has been abused.'"

The property in the Baldwin case with which the court was dealing was never community property and the defendant here argues that this is a sufficiently distinguishing feature to make the rule of that case inapplicable to the present case. But from the language of the court it is apparent that the attempted distinction is without merit.

Because evidence must be taken so that the court may determine what amount is necessary for one's proper support, the issue is one of fact. In the present case, the trial court expressly found that the wife did not have a separate estate sufficient for her proper support "to maintain her station in life and standard of living," and it further found that the husband was financially able to make the alimony payments. Because the trial court so found, this court must affirm that finding if it is supported by any substantial evidence in the record.

The stipulation entered into between the parties contained the following provisions:

> "(1) Any and all testimony adduced in open court at hearings in the above entitled action shall be deemed evidence in the cause.
>
> "(2) Any and all affidavits and schedules attached thereto and incorporated therein heretofore filed and presented to Honorable Orla St. Clair shall be deemed evidence of aforesaid with the same force and effect as if the original records containing the data supporting the facts set forth therein had been introduced in evidence and said documents shall be marked as exhibits and become a part of the record in this action."

The stipulation also provided for the submission of the issues on the basis of the record as to divorce, alimony, and source and amount of costs, expenses, and counsel fees of the respective parties.

However, it is to be noted that no testimony was given or other evidence adduced as to Mrs. Dallman's needs. It is true that her counsel in his letter of July 1, 1956, to Judge St. Clair which was submitted in lieu of an affidavit did include a list of Mrs. Dallman's alleged monthly expenses, which list he also read at the trial, but this was not competent evidence. In opposition to the husband's motion to terminate the alimony payments, Mrs. Dallman did file an affidavit in which the same expenses were again set forth, but such affidavit was not presented to the trial court in the divorce proceeding and cannot accordingly be considered evidence in support of the court's finding.

Mrs. Dallman claimed that she needed $1,600 per month in order to maintain her standard of living. A large portion of this amount is required for the upkeep of the house alone which was awarded to her in the property settlement agreement.

Her list of monthly expenses also included the following items:

Telephone	$ 50.00
Beauty parlor	45.00
Doctor bills, including physiotherapy	250.00
Recreation and incidental expenses	200.00

as well as others. No competent proof at all was made in support of these items.

In view of this state of the record, we conclude that the trial court's finding to the effect that Mrs. Dallman's separate estate was not sufficient for her proper support was not supported by any evidence whatsoever. A husband is not required to enable a wife to continue to enjoy *every* luxury to which she has become accustomed, but only to "many luxuries which habit has made apparent necessity" (16 Cal.Jur.2d 470). Mrs. Dallman became the owner of a half-million dollar estate and a net income therefrom in the amount of $978 per month. Nevertheless it is her contention that her husband should continue to support her, even if it means exhausting his own separate estate, on the same standard of living to which she had become accustomed and that she should not in any way have to use her separate estate to help meet that standard. As can be seen from the above quotation from Cal.Jur.2d such is not the law.

The evidence showed that Mr. Dallman's net income from July 1, 1957, to June 30, 1958, would be $22,576. Yet during that year, he was obligated as follows:

Interest payable to Mrs. Dallman	$7,010
Cash to Mrs. Dallman pursuant to agreement	2,415
Installment payable to Mrs. Dallman on promissory note (payment for stock)	4,950
Interest payable to Wells Fargo Bank	670
Accountants' fees	900
Total	$15,945

This left him a balance of $6,631 or $552.58 per month for his living expenses, life insurance premiums, and medical expenses. Yet, he was required to pay $750 per month alimony and the court found he was able to do so. In view of the above, which was not contradicted, it is seen that said finding is not supported by the evidence.

In Hall v. Hall, 1954, 42 Cal.2d 435, 267 P.2d 249, the wife had sued for divorce. From that part of the interlocutory decree which ordered him to pay alimony and attorney's fees, Mr. Hall appealed. The amount of alimony was $350 per month. He was also required to pay $200 per month child support for his two unmarried daughters, aged 16 and 21. After deducting these amounts, plus premiums on life insurance policies, taxes, and other fixed charges, all that remained to Mr. Hall from his salary of $1,250 per month was $270 while he testified that he needed $410 per month to meet his current living expenses. The court reversed the alimony award though it affirmed the judgment in all other respects. The case came up again on a writ of mandate (1955, 45 Cal. 2d 377, 289 P.2d 431) and in referring to the prior litigation, the court at page 385 of 45 Cal.2d, at page 436 of 289 P.2d stated:

> "The reversal of the judgment was predicated upon the conclusion that the circumstances did not justify the award; but this court did not decide nor infer that the wife would be entitled to some lesser amount when evi-

> dence was again presented in regard to her rights. On the contrary, and particularly in view of other circumstances which might be shown, justification might be found for awarding *no* amount for support and maintenance."

On this appeal, Mrs. Dallman argues that we should consider not alone the present income of Mr. Dallman but also his past and future income. The implication is that it will increase because it has been higher in the past. In making this argument, she fails to give weight to the fact that the evidence showed the family corporation had been steadily losing money for several years and apparently, though not at the trial or on this appeal, she recognized that fact since in the property settlement she refused to accept half of the husband's stock in said corporation, but instead insisted upon his keeping the stock and giving her $150,000 instead, which sum he gave in the form of a promissory note and on which he is obligated to pay interest.

In conclusion we find that the evidence does not sustain the finding (1) that the wife did not have a separate estate sufficient for her proper support, and (2) that the husband was financially able to pay the sum of $750 per month alimony to the wife. Accordingly, as it seems clear to us on the evidence in the record that the wife had ample means with which to properly support herself, the court, by virtue of the mandatory language of Civil Code, section 142, erred in awarding in the judgment alimony in the sum of $750 per month. Therefore, the interlocutory judgment in the appeal, Civil No. 18242, to the extent it awards alimony in the sum of $750 per month, is reversed.

However, as to the order modifying the award by reducing alimony to $1 per year on the husband's petition to terminate alimony, it is to be noted that the wife only appealed (Civil No. 18246); that is to say, the husband did *not* appeal. Consequently, we are not called upon to determine the power of the lower court to enter such an order in the first place but only to determine whether the court erred in reducing the alimony originally awarded. From what has been hereinabove said with respect to the appeal by the husband, we conclude that it was not error to reduce said alimony and the order must therefore be affirmed.

BRAY, P. J., and FRED B. WOOD, J., concur.

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170 Cal.App.2d 584

PEOPLE of the State of California, Plaintiff and Appellant,

v.

Lloyd Clinton ALLEN, Defendant and Respondent.

Cr. 6566.

District Court of Appeal, Second District, Division 2, California.

May 22, 1959.

As Modified June 19, 1959.

Prosecution for violation of statute prohibiting any person from selling or offering to sell any naturopathic degree. The Superior Court, Los Angeles County, J. Howard Ziemann, J., entered judgment for defendant on demurrer to information and People appealed. The District Court of Appeal, Herndon, J., held that statute prohibiting sales of medical degrees, osteopathic degrees, naturopathic degrees, etc., prohibits selling of degree regardless of whether or not degree was purportedly issued pursuant to laws regulating the licensing of practitioners of any healing art or science.

Reversed.

1. Physicians and Surgeons 🔑10

Statute prohibiting sale or barter of any medical degree, osteopathic degree, naturopathic degree, etc., prohibits sale of a naturopathic degree regardless of whether such degree was purportedly issued pursuant to laws regulating licensing of practitioners of any healing art or science. West's Ann.Bus. & Prof.Code, § 580.

2. Physicians and Surgeons ⚿2

Amendment to statute abolishing classification of a drugless practitioner abolished classification only in the sense that for purpose of future licensing it ceased to be recognized as a separate classification, amendment did not impliedly repeal that portion of statute prohibiting the selling of medical and certain other degrees including drugless practitioner's degree or naturopathic degree. West's Ann.Bus. & Prof. Code, §§ 580, 2230–2232.

3. Statutes ⚿158, 159

Repeal of statutes by implication is not favored and it will be presumed that Legislature did not intend by a later act to repeal a former one if by a fair and reasonable construction effect can be given to both.

4. Physicians and Surgeons ⚿10

In prosecution for violation of statute prohibiting selling of degrees including naturopathic degrees, each count of information would have stated sufficient facts to constitute a public offense had it gone no further than to allege that defendant had sold a naturopathic degree to a designated individual and any additional language could be properly treated as surplusage. West's Ann.Bus. & Prof.Code, § 580.

5. Indictment and Information ⚿161(1)

In prosecution for violation of statute prohibiting sale of naturopathic degrees, even if surplus language in information were deemed to render information defective, defect could be readily remedied by an amendment. West's Ann.Bus. & Prof. Code, § 580; West's Ann.Pen.Code, § 1007.

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Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., William B. McKesson, Dist. Atty. of Los Angeles County, Jere J. Sullivan, Lewis Watnick, Robert Lederman, Deputy Dist. Attys., Los Angeles, for appellant.

Jackson S. Niebrugge, Frank G. Brookings, Pomona, for respondent.

HERNDON, Justice.

The People have appealed from a judgment for the defendant which followed the sustaining of his demurrer to the information without leave to amend. Count I of the information charges that defendant violated section 580 of the Business and Professions Code in that on or about June 6, 1956, he "* * * did willfully, unlawfully and feloniously sell, barter, and offer to sell to A. Arthur Lasky a Naturopathic degree and certificate made and purporting to be made pursuant to laws regulating the licensing and registration or issuing of a certificate to Naturopathics." In identical language Count II charges defendant with another violation of the same statute.

Section 580 provides as follows: *"No person, company or association shall sell or barter or offer to sell or barter any medical degree, or osteopathic degree, or chiropractic degree, or drugless practitioner degree or naturopathic degree,* or any degree, certificate or transcript made or purporting to be made pursuant to any laws regulating the licensing and registration or issuing of a certificate to physicians and surgeons, drugless practitioners, chiropodists, midwives, osteopathic physicians and surgeons or drugless practitioners, naturopaths, chiropractors or persons lawfully engaged in any other system or mode of treating the sick or afflicted." (Emphasis added.)

Defendant successfully advanced in the court below, and now urges in support of the judgment, the following contentions: (1) that the clause "made or purporting to be made pursuant to any laws regulating the licensing and registration or issuing of a certificate, * * *" modifies and limits the prohibitive language of section 580 which we have italicized above; (2) that in 1949 the Legislature repealed sections 2230 and 2231 of the Business and Professions Code relating to the regulation, licensing, registration and issuance of certificates to "drugless practitioners" and enacted section 2232 in such form as to abolish the classification of "drugless practitioners"; (3) that "[t]his legislative action [in 1949] made it impossible for a degree in naturopathy to be sold 'pursuant to any laws' for there were no longer any such laws in effect in the State of California;" (4) that since the modifying clause "made or purporting to be made pursuant to any laws regulating the licensing and registration or issuing of a certificate to * * * naturopaths" in effect prescribes "an element of the *corpus delicti* under Section 580" and "[s]ince there are no laws regulating the naturopathic profession, then no public offense can be stated as to violation of Section 580 as to naturopathic classification, said classification having been abolished by passage of Section 2232."

In short, defendant's position is wholly premised upon the contention that the sale of a degree mentioned in section 580 constitutes a criminal offense if, *and only if*, such degree possesses, or purports to possess, some legal significance under a law regulating the licensing and registration of a recognized class of practitioners. And as he states in his brief: "Respondent contends that the action of the legislature in 1949 in repealing sections 2230 and 2231, and passage of 2232 of the Business and Professions Code,[1] had the effect of repealing by implication that portion of section 580 Business and Professions Code insofar as the application of section 580 to the naturopathic classification or the drugless practitioner classification is concerned."

[1] In our recent decision in People v. Tawney, 168 Cal.App.2d 599, 336 P.2d 659, 667, we rejected the contention which is the keystone of defendant's argument. We there held that section 580 prohibits the sale of an osteopathic degree "even though such degree is neither made nor purports to be made to deceive licensing authorities". We held, in other words, that the sale of the degree in this state constituted a violation of the statute regardless of whether or not the degree was purportedly issued pursuant to laws regulating the licensing of practitioners of any healing art or science. Manifestly, the same logic applies to the sale of a naturopathic degree.

[2] As respondent correctly points out, after the enactment in 1949 of the legislation to which he has referred, naturopaths could not be licensed as such. Oosterveen v. Board of Medical Examiners, 112 Cal.App.2d 201, 205–206, 246 P.2d 136. However, it should be emphasized that while section 2232 of the Business and Professions Code declares that "[t]he classification of drugless practitioner is abolished" it authorizes persons holding licenses in that classification to "continue to engage in practice and to renew their licenses annually." Hence, it is plain that the 1949 legislation "abolished" the classification only in the sense that for purposes of future licensing it ceased to be recognized as a separate classification. As indicated in the Oosterveen decision, supra, (112 Cal.App.2d at page 205, 246 P.2d at page 139) "[t]he use of natural methods of healing is not forbidden by law" and duly licensed practitioners possessing diplomas as naturopaths could continue to display them. Manifestly, therefore, the 1949 legislation did not destroy the significance of the naturopathic degree or diploma. Nor did it eliminate the purpose which presumably motivated the Legislature in prohibiting the sale of such degrees.

[3] Moreover, respondent's argument that the 1949 legislation by implication repealed section 580, insofar as it prohibited the sale of a naturopathic degree, runs counter to well settled rules of statutory construction. The repeal of statutes by implication is not favored, and it will be presumed that the Legislature did not in-

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[1] Section 2232. "The classification of drugless practitioner is abolished but all persons holding licenses as drugless practitioners may continue to engage in practice and to renew their licenses annually."

tend by a later act to repeal a former one, if by a fair and reasonable construction effect can be given to both. See 45 Cal.Jur. 2d 597, § 79. As stated in People v. Martin, 188 Cal. 281, 285, 205 P. 121, 123, 21 A.L.R. 1399, "Courts do not favor repeal by implication. People v. San Francisco & S. J. R. Co., 28 Cal. 254. 'The presumption is always against the intention to repeal where express terms are not used. To justify the presumption of an intention to repeal one statute by another, either the two statutes must be irreconcilable, or the intent to effect a repeal must be otherwise clearly expressed' (36 Cyc. vol. 36, 1071), * * *"

In the instant situation it is more reasonable to conclude that the Legislature intended to continue in effect the existing law prohibiting the sale of a naturopathic degree notwithstanding the fact that such a degree could not be used to obtain a license to practice naturopathy in California. As we stated in People v. Tawney, supra, 168 Cal.App.2d 599, 336 P.2d 659, 667:

> "Our interpretation of section 580 is fortified by considerations of public policy. The obvious purpose of the section is to protect the public against the deception and chicanery of persons who, by reason of such fictitious degrees, would hold themselves out as possessing learning and skill which they did not in fact have. The spurious parchments denounced by the statute represent that the learning and skill apparently possessed by the holder thereof equip him to administer to the needs of mankind. While the illegitimate character of these 'sheep skins' ordinarily would be readily detected by the licensing authorities so that the chances of the holders becoming ostensibly legitimate practitioners are relatively slight, the general public does not make it a practice of inquiring into the genuineness of a diploma nor whether one who has achieved such recognition is duly licensed to practice the particular healing art. It would thus be a simple matter for the holder of a fake diploma or degree to impose upon members of the public, either by carrying on a clandestine practice of a particular healing art for which he was neither licensed nor trained, or on a non-professional basis. The latter situation would arise where the holder of such a degree does not claim to be a licensed practitioner, but holds himself out to be better equipped, because of his apparent specialized training, to deal with a particular problem. Illustrative of this is where the holder of a fictitious osteopathic degree uses it to aid in deceiving the public into believing that shoes made by him possess certain 'special' features because of his specialized training in this field. Such conduct would be detrimental to the public interest. Section 580 was adopted to prevent such imposition and frauds upon the public."

Our conclusion as to the manifest intent of section 580 is fortified by a consideration of its legislative history. Based on a statute first enacted in 1927, St.1927, c. 79, the material provisions of the section read as follows prior to its amendment in 1937 and 1939: "Any person * * * shall be guilty of a felony * * * who (1) shall sell or barter or offer to sell or barter any medical degree, or osteopathic degree, or chiropractic degree, or any degree, certificate or transcript, made or purporting to be made pursuant to any laws regulating the licensing and registration or issuing of a certificate to physicians and surgeons, drugless practitioners, chiropodists, midwives, osteopathic physicians and surgeons or drugless practitioners, chiropractors or persons lawfully engaged in any other system or mode of treating the sick or afflicted * * *"

The 1937 amendment apparently effected no substantial change in the law. The only changes effected by the 1939 amendment were the addition of the words "or drugless practitioner degree or naturopathic degree" after "chiropractic degree" and the addition of the word "naturopaths" after "drugless practitioners". It seems most reasonable to conclude that the 1939 amendment was intended specifically to prohibit the sale of naturopathic degrees. "The Legislature is not to be presumed to have used any word idly and a statute should be construed to give effect to every word used." Consolidated Rock Products Co. v. State of California, 57 Cal.App.2d 959, 965, 135 P.2d 699, 702; Pierce v. Riley, 21 Cal.App.2d 513, 519–520, 70 P.2d 206.

[4, 5] It is evident from what we have said that each count of the information would have stated facts sufficient to constitute a public offense had it gone no further than to allege that defendant had sold a naturopathic degree to the designated individual. According to our view, the additional language of the information may properly be treated as surplusage. People v. Perez, 87 Cal. 122, 123, 25 P. 262. However, even if it were to be assumed, *arguendo,* that the additional words of the information rendered it defective, it is manifest that the assumed defect could readily be remedied by amendment. Pen.Code, § 1007; People v. Bailey, 72 Cal.App.2d Supp. 880, 884, 165 P.2d 558.

Reversed.

FOX, P. J., and ASHBURN, J., concur.

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170 Cal.App.2d Supp. 842

William A. TWINING, Plaintiff and Respondent,

v.

Donald TAYLOR, Defendant and Appellant.

Civ. A. 71.

Appellate Department, Superior Court,
County of Kern, California.
May 27, 1959.

Proceeding on affidavits by judgment debtor claiming exemption from execution levied by judgment creditor on tractor with a bucket "dozer attachment". The Municipal Court of Bakersfield Judicial District, Frank Noriega, J., entered judgment denying claim of exemption and debtor appealed. The Superior Court, Appellate Division, Howden, J., held that debtor engaged in applying gypsum and fertilizer in the fields for farmers was entitled to a claim of exemption with respect to tractor which was necessary in carrying on debtor's trade, under statute providing an exemption for tools or implements of a mechanic or artisan necessary to carry on his trade.

Reversed with directions.

1. Exemptions ⚷45

Judgment debtor engaged in the occupation of spreading gypsum and fertilizer in fields for farmers was entitled to claim of exemption with respect to tractor with a bucket "dozer attachment", under statute giving exemption for tools or implements of a mechanic or artisan necessary to carrying on his trade. West's Ann.Code Civ. Proc. §§ 690.3, 690.4, 690.26(14).

2. Appeal and Error ⚷991
Exemptions ⚷150

Whether use of a particular implement is necessary in carrying on debtor's trade within meaning of statute providing exemption from execution for tools or implements of a mechanic or artisan necessary to carry on his trade, is usually a question of fact and determination of trial court in this regard will not generally be disturbed. West's Ann.Code Civ.Proc. § 690.4.

3. Exemptions ⚷4, 148

While burden of proof lies on judgment debtor claiming exemption from execution with respect of certain tool or implement, exemption statute should be fairly and liberally construed, and as far as practicable beneficially to the debtor. West's Ann.Code Civ.Proc. § 690.26(10).

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George E. Steele, Bakersfield, for respondent.

T. R. Claflin, Bakersfield, for appellant.

HOWDEN, Judge.

This is an appeal by defendant from a judgment denying a claim of exemption from execution. The judgment is appealable (Code of Civil Procedure, § 690.26, Subd. 14). The facts material to this proceeding are not in dispute. Plaintiff recovered a judgment against defendant and thereafter levied execution on a "D–2 Caterpillar tractor with a bucket 'dozer' attachment." Defendant filed an affidavit of exemption which stated no facts. Plaintiff submitted a counter-affidavit consisting solely of a lament that defendant had alleged no facts. Defendant thereafter submitted a supplemental affidavit averring that the tractor was of a value of less than $4,000. However, this latter document is now of no consequence since, on oral argument, defendant abandoned his contention that the tractor was a farming utensil or implement of husbandry as defined in CCP § 690.3. Defendant now places sole reliance upon § 690.4 providing exemption for "the tools or implements of a mechanic or artisan, necessary to carry on his trade."

Defendant was the sole witness at the time of the hearing. His testimony cured the defects in his affidavit. He testified that his occupation or business was that of spreading gypsum and fertilizer in the field for farmers. He acquired the tractor in 1951 or 1952 and at the time of the levy (in September 1958) the equipment was in the yard of his home at Wasco. He has followed his particular occupation for 10 or 12 years. Without the use of the tractor he cannot engage, profitably, in his occupation. He had not used the tractor within 60 days of the levy since it was the slow season in agriculture. He engages in this particular occupation from the end of cotton harvest until late spring. He sells gypsum and other soil conditioners to farmers and also bids for the application of the materials. On the basis of this evidence, the trial court denied the claim of exemption. Defendant appeals.

By the terms of the Statute (CCP § 690.4) the party seeking the exemption here involved must meet three requirements. (1) He must be a "mechanic or artisan". (2) The equipment involved must be a tool or implement. (3) The equipment must be "necessary to carry on his trade."

Respondent urges that appellant is not a "mechanic or artisan" and in support of his position presents several dictionary definitions of the words in question. In Re Estate of Nelson, 132 Cal. 182, 64 P. 294, 298, it was said: "Philology is at best an unsafe criterion for ascertaining the meaning of words which are in common use, and the definition thus obtained is always subordinate to the meaning derived from the context, or from the circumstances under which the word is used." See also, Myers v. Alta Construction Co., 37 Cal.2d 739, 235 P.2d 1.

The language in question ("mechanic or artisan") appeared in the statute when first enacted in 1872. In re Petersen, D.C., 95 F. 417, decided in 1899, held a baker to come within the provisions of the section although the specific exemption for the "tools or emplements of a cook" was not added until 1941. In re Robb, 1893, 99 Cal. 202, 33 P. 890, held a machinist to be a mechanic, not a manufacturer, even though he produced a finished product for sale to others. By dictum in the same case, a tailor is a mechanic. Peebler v. Danziger, 104 Cal.App.2d 490, 231 P.2d 894 held a gravedigger, self-employed, to be a mechanic or artisan. In re Mitchell, 1894, 102 Cal. 534, 36 P. 840 conceded, arguendo, that the manager of a printing shop, not himself a printer, was a mechanic or artisan but held that not all of the equipment involved was necessary to his trade.

Peebler v. Danziger, supra [104 Cal.App.2d 490, 231 P.2d 895], defines a tool or implement as "any implement needed and used for the purpose of carrying on one's trade or business." In re McManus' Estate, 1890, 87 Cal. 292, 25 P. 413, 10 L.R.A. 567, held a jeweler and watch-repairer's safe to be an implement and cited with approval, other cases involving a barber's chair and a sewing machine. In Security-First National Bank of Los Angeles v. Pierson, 2 Cal.2d 63, 38 P.2d 784, 786 it was said: "Considering the beneficent and humane purpose of exemption statutes, such a policy of liberal construction may be said to apply when there is doubt whether the particular personal property is a tool or implement."

[1, 2] Whether the use of the particular implement is "necessary" in carrying on the debtor's trade is usually a question of fact (In re Mitchell, supra) and the determination of the trial court in this regard will generally not be disturbed on appeal. Development Bldg. Co. v. Woodruff, 31 Cal.App. 732, 161 P. 754. Here, the evidence was undisputed that appellant could not profitably carry on his business without the use of the equipment in question.

In Robert v. Adams, 38 Cal. 383, the court was called upon to construe the provisions of what is now CCP § 690.3 relating to "the farming utensils or implements of husbandry of the judgment debtor." It was there said: "The act (section 690) does not in express terms make this exemption applicable only to such judgment debtors as were engaged in the business of farming at the date of the levy; but it is obvious that such was the intention and we so held in Brusie v. Griffith, 34 Cal. 302. That this is the correct interpretation of the act we entertain no doubt whatever." A similar holding is found in Howell v. Boyd, 2 Cal.App. 486, 84 P. 315, although the evidence there indicated, affirmatively, that the judgment debtor had abandoned his farming efforts. Assuming, without deciding, that the foregoing rule is applicable to proceedings under CCP 690.4, we are nevertheless of the opinion that appellant was, in fact, engaged in his particular occupation but was temporarily prevented from following it actively by reason of the crop cycle.

[3] Although the burden of proof lies with the party claiming the exemption (CCP § 690.26, subd. 10), the exemption statutes should be fairly and liberally construed and, as far as practicable, beneficially to the debtor. White v. Gobey, 130 Cal.App.Supp. 789, 19 P.2d 876. For the reasons stated, the judgment is reversed with directions to the trial court to enter its judgment granting the claim of exemption. Appellant will recover his costs.

LAMBERT, P. J., and MAIN, J., concurred.

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170 Cal.App.2d Supp. 840

PEOPLE of the State of California,
Plaintiff and Appellant,
v.
Winona Lucille ANDREWS, Defendant
and Respondent.
Cr. A. 4026.

Appellate Department, Superior Court,
Los Angeles County, California.
May 19, 1959.

Prosecution for driving while under the influence of intoxicating liquor. The Municipal Court, Long Beach District, Martine DeVries, J., after pronouncing sentence entered an order arresting a mandatory jail sentence of five days for a second conviction, and the State appealed. The Superior Court, Appellate Department, Swain, Acting Presiding Judge, held that a 1957 amendment of the Vehicle Code making a jail sentence of at least five days mandatory upon a second conviction applied to a 1959 conviction even though prior conviction was in 1953, and attempted suspension of execution of five day sentence for 1959 conviction was improper.

Order reversed.

1. Criminal Law 🔑1023(8), 1081

An order arresting judgment is appealable, and fact that notice of appeal did not refer to the correct section of the Penal Code was immaterial. West's Ann. Pen.Code, §§ 1238, 1466.

2. Criminal Law ⚿1081

It is not necessary that a notice of appeal state whether it was from an order arresting judgment or an order made after judgment.

3. Criminal Law ⚿1201

A 1957 amendment to drunken driving section of Vehicle Code making a jail sentence of at least five days mandatory upon a second conviction for a violation of the section did not increase the penalty for any violation prior to its enactment, but merely established a more severe penalty for any violation following enactment of the amendment. West's Ann.Vehicle Code, § 502.

4. Criminal Law ⚿1202(1)

1957 amendment of the drunken driving section of Vehicle Code, making a jail sentence of at least five days mandatory upon a second conviction, applied to a 1959 conviction even though prior conviction was in 1953, and an attempted suspension of execution of five-day sentence for 1959 conviction was improper. West's Ann. Vehicle Code, § 502.

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James T. Starr, City Prosecutor, Long Beach, for appellant.

Floyd H. King, Long Beach, for respondent.

SWAIN, Acting Presiding Judge.

The complaint charged that on February 3, 1959, the defendant violated Vehicle Code, § 502 (driving while under the influence of intoxicating liquor). It further charged that on February 3, 1953, she was convicted of violating the same section. The prior was admitted and upon trial the defendant was convicted. She was sentenced to five days in jail and to pay a fine of $300 plus a $15 penalty. The fine was paid. After pronouncing sentence the court made the following order: "It is further ordered by the Court that the above mandatory jail sentence of 'five days in the County Jail upon a second or any subsequent conviction by imprisonment in the County Jail for not less than five days' is not applicable in this case and need not be served in view of the fact that defendant's admission of a prior conviction was on or about February 3, 1953, and previous to the enactment of the amendment to 502 of the Vehicle Code effective September 7, 1955, and thus said 5 days sentence is ordered arrested." Both the judgment as pronounced and the above-quoted order were entered in the minutes, the judgment first and the order immediately thereafter. The People appeal from the order arresting the five days' sentence on the ground that it is an order arresting judgment and an order after judgment affecting the substantial rights of the People. Pen. Code, § 1466(d) and (e).

[1,2] The respondent claims that the order is a part of the judgment and that an appeal by the People after trial on the merits is not authorized by the above section of the Penal Code. Inasmuch as the order was one arresting judgment and is therefore appealable, it is immaterial whether it was an order made after judgment. The fact that the notice of appeal refers to section 1238 of the Penal Code instead of section 1466 is immaterial. A notice of appeal is to be liberally construed and there is no uncertainty as to what order is appealed from. It was not necessary that the notice state whether it was an order arresting judgment or an order made after judgment.

[3] The trial court erred in holding that the 1957 amendment of Vehicle Code, § 502 making a jail sentence of at least five days mandatory upon a second conviction of violating said section did not apply because the defendant's prior conviction was February 3, 1953. Prior to February 3, 1959, the day the defendant committed the present offense, the legislature had made a jail sentence mandatory if it was a second offense. This did not increase the penalty for the 1953 violation but established a more severe penalty for a 1959 violation.

People v. Atkinson, 1953, 115 Cal.App.2d 425, 252 P.2d 67.

[4] In arresting judgment the court attempted to suspend the execution of the sentence. This was error, for the 1957 amendment of Vehicle Code, § 502 provides: "(c) Any person convicted of a second or subsequent offense under this section shall not be granted probation by the court, nor shall the court suspend the execution of the sentence imposed upon such person."

The order is reversed.

HULS and DAVID, JJ., concur.

52 Cal.2d 162

Ted CHAVEZ, Appellant,

v.

O. E. SARGENT et al., Respondents.

S. F. 19863.

Supreme Court of California,
In Bank.

May 19, 1959.

Action by employer against union and its secretary for injunctive relief from activities designed to induce employer to enter into union shop agreement with union. The Superior Court, San Benito County, Stanley Lawson, J., sustained general demurrer to complaint and plaintiff declined to amend. Judgment of dismissal was entered and the plaintiff appealed. The Supreme Court, Schauer, J., held that county "right to work" ordinance is invalid as contravening the state-wide policy, as disclosed in the statutory Labor Law, that employees have full freedom for self-organization and for voluntarily selecting and negotiating agreements through their own employee committees or agencies.

Affirmed.

Opinion, 329 P.2d 579, vacated.

1. Labor Relations 🔑47

The statutory law which concerns the relations between labor and management and which regulates relationships and activities between competing labor organizations and between those organizations and their own members, and the members of other organizations, and unorganized workmen, and the rights, if any, of the individual workmen to participate in the selection of their bargaining agents and in the determination of objectives of collective negotiations and ultimate terms of agreement must be interpreted in the light of the earlier decisions of the Supreme Court as they, in turn, have been affected by developing law, both statutory and decisional. West's Ann.Labor Code, §§ 920–923, 1115–1122, 1126, 1131–1136.

2. Labor Relations 🔑45

The Taft-Hartley Act applies only to matters relating to interstate commerce and has no application to commerce purely local in character and would not invalidate county "right to work" ordinance where it was not claimed that interstate commerce was involved or affected. National Labor Relations Act, § 1 et seq. as amended by Labor Management Relations Act of 1947, 29 U.S.C.A. § 141 et seq.

3. Counties 🔑21½

Municipal Corporations 🔑592(1)

Even in matters of state-wide concern, the city or county has police power equal to that of the state so long as the local regulations do not conflict with general laws. West's Ann.Const. art. 11, § 11.

4. Municipal Corporations 🔑592(2)

Where Legislature has assumed to regulate a given course of conduct by prohibitory enactment, a municipality with subordinate power to act in the matter may make such new and additional regulations in aid and furtherance of the purpose of the general law as it may seem fit and appropriate to the necessities of the particular locality and which are not in themselves unreasonable where the local regulations are not in conflict with provisions of the general law. West's Ann.Const. art. 11, § 11.

5. Municipal Corporations 🔑592(1)

Regardless of whether there is any actual grammatical conflict between an ordinance and a statute, the ordinance is invalid if it attempts to impose additional requirements in a field which is fully occupied by statute. West's Ann.Const. art. 11, § 11.

6. Municipal Corporations 🔑592(1)

An ordinance and a statute which fully occupies a field may be identical and yet the ordinance is invalid because within constitutional provision it is in "conflict" with the statute, since by only such a broad definition of "conflict" is it possible to confine local legislation to its proper field of supplementary regulation. West's Ann. Const. art. 11, § 11.

See publication Words and Phrases, for other judicial constructions and definitions of "Conflict".

7. Municipal Corporations 🔑592(1)

Where the Legislature has adopted statutes governing a particular subject matter, its intent with regard to occupying the field to the exclusion of all local regulation is not to be measured alone by the language used but by the whole purpose and scope of the legislative scheme. West's Ann.Const. art. 11, § 11.

8. Municipal Corporations 🔑592(1)

State regulation of a subject may be so complete and detailed as to indicate an intent to preclude local regulation; in this connection it may be significant that the subject is one which requires uniform treatment throughout state and that there is a conflict with a general legislative declaration of policy. West's Ann.Const. art. 11, § 11.

9. Labor Relations 🔑259

"Union security" is a term which indefinitely may include the closed shop, the union shop, the preferential shop, and maintenance of membership.

See publication Words and Phrases, for other judicial constructions and definitions of "Union Security".

10. Labor Relations 🔑259

A "closed shop" is an establishment in which the employer by agreement hires and retains in employment only union members in good standing, except that, by some agreements, when union members are unavailable, the employer may hire nonunion workers provided they apply for union membership or obtain work permits before beginning work.

See publication Words and Phrases, for other judicial constructions and definitions of "Closed Shop".

11. Labor Relations 🔑259

A "union shop" is an establishment in which the employer by agreement is free to hire nonmembers as well as members of the union but retains nonmembers on the payroll only on condition of their becoming members of the union within a specified time.

See publication Words and Phrases, for other judicial constructions and definitions of "Union Shop".

12. Labor Relations 🔑251

Generally, union security agreements are lawful provided that the circumstances of the agreements and the means used to negotiate them are not in themselves unlawful.

13. Labor Relations 🔑133

The Legislature tacitly recognized the propriety of the closed shop by enacting statutes which make it criminal to falsely represent that union labor was employed in the manufacture of goods, to forge a union label, and to use a union label without authorization. West's Ann.Labor Code, §§ 1010–1018.

14. Labor Relations 🔑46

The paramount principle of the California legislation relating to workman-labor-organization-management relations is the welfare of the individual workmen, through the principle of freedom to associate, organize and bargain collectively. West's Ann.Labor Code, §§ 920–923, 1115–1122, 1126.

15. Labor Relations 🔑251

The sections of the Labor Code relating to contracts against public policy do not prohibit closed union shop contracts. West's Ann.Labor Code, §§ 920–923.

16. Labor Relations 🔑251

The statute declaring contrary to public policy a promise between employee or prospective employee and his employer, prospective employer or person acting on behalf of employer, to join or remain member of labor organization or employer organization, not to join or not to remain member of such an organization, or to withdraw from employment relation if he joins or remains member thereof does not preclude union shop agreements between the employer and the union as an entity; the statute does not proscribe a collective bargaining agreement entered into by and between the employer and a labor organization, the latter acting as the agent or representative of the workmen, voluntarily authorized by them to negotiate and agree on the terms and conditions of their employment. West's Ann.Labor Code, § 921.

17. Labor Relations ⟹86, 176
Statutes ⟹223.2(19)

The statute declaring contrary to public policy a promise between employer or prospective employee and his employer, prospective employer or person acting on behalf of employer, to join or remain member of labor organization or employer organization, not to join or not to remain member of such an organization, or to withdraw from employment relation if he joins or remains mamber thereof should be read in the light of the wording of the statute declaring that it is the public policy of the state that negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees; the predominant concern of each statute is the welfare of the individual workman and to that end the fostering of collective bargaining; the first statute protects the individual against pressures from his employer that he as an individual workman make any compact with the employer curtailing the workman's right to organize and bargain collectively while the second statute declares the personal right of each workman to join with his fellows in forming an association to act and bargain as a unit. West's Ann. Labor Code, §§ 921, 923.

18. Labor Relations ⟹180

The typical "yellow-dog contract" is an at-will employment agreement which contains, in addition to the usual provisions for employment, the following three provisions: (1) a representation by the employee that he is not a member of a labor union; (2) a promise by the employee not to join a labor union; (3) a promise by the employee that, upon joining a labor union, he will quit his employment. West's Ann.Labor Code, § 921.

See publication Words and Phrases, for other judicial constructions and definitions of "Yellow-Dog Contract".

19. Courts ⟹488(1)

Judgments of the District Court of Appeal are not "reversed"; such judgments are in effect only tentative until they become final as provided by the rule of the judicial council and until they become final are subject to being automatically vacated upon transfer of the cause to the Supreme Court; upon such transfer the decision of the District Court of Appeal becomes a nullity and its opinion has no authoritative effect. West's Ann.Rules on Appeal, rule 28; West's Ann.Const. art. 6, § 4d.

20. Labor Relations ⟹81

An authorized union which contracts with an employer acts as an entity or institution which is distinct from the individual workmen who are or may become the beneficiaries of its bargaining. West's Ann. Labor Code, §§ 921, 923.

21. Labor Relations ⟹175

The statute declaring that it is the public policy of the state that the negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees and that individual workman has full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment is a general independent declaration of state policy, notwithstanding that the opening sentence of the statute provides that "in the interpretation and application of this chapter, the public policy of this State is declared". West's Ann.Labor Code, § 923.

22. Labor Relations ⟹82, 175, 192, 282

The principles and objectives of California's Labor Law are (1) That the terms and conditions of labor employment be fixed through bargaining; (2) that the bargaining power of management and labor be substantially equal; (3) that labor-management contracts result from voluntary agreements; (4) that lawful collective agreements be mutually respected and enforceable; (5) that physical violence in labor disputes be avoided; (6) that the individual workman be free from employer influence in selecting his bargaining agent; (7) that the individual workman have an unimpeded right ("full freedom") to express his personal choice in the selection of a representative and a like voice in governing the affairs of his organization. West's Ann.Labor Code, §§ 921–923.

23. Labor Relations ⚷86, 176

Advancement of the interests of the individual workman, of his right to organize and to bargain collectively is the compelling reason for government protection of labor organizations. West's Ann. Labor Code, § 923.

24. Labor Relations ⚷248

The general labor laws enacted in 1933 and the Jurisdictional Strike Law permit, encourage and protect collective bargaining agreements which have been freely negotiated and entered into by and between employees' lawfully authorized organization and their employers whereby the interests of each party may be advanced. West's Ann.Labor Code, §§ 920–923, 1115–1122, 1126.

25. Labor Relations ⚷251

Under the general labor laws enacted in 1933 and the Jurisdictional Strike Law, if employees have voluntarily become members of labor organization not financed or interfered with by their employer and have selected and authorized a bargaining agent, such agent and the employer are free to bargain for the respective legitimate objectives of both workmen and employer, and the ensuing collective agreement may include provisions for union security, such as a union shop, maintenance of membership, and exclusive bargaining rights with the employer, and both the workman and the employer are bound by the contract negotiated. West's Ann.Labor Code, §§ 920–923, 1115–1122, 1126.

26. Labor Relations ⚷262

A workman, whether union or nonunion, who requests employment in a capacity covered by collective bargaining agreement must be deemed to accept the terms of the contract when he accepts such employment. West's Ann.Labor Code, §§ 920–923, 1115–1122, 1126.

27. Labor Relations ⚷192

No compact between an employer and a labor organization can deprive the employees initially or permanently of their freedom to participate in the selection, or in the changing if they see fit, of their bargaining representatives. West's Ann.Labor Code, §§ 920–923, 1115–1122, 1126.

28. Labor Relations ⚷321

A strike must have a lawful objective. West's Ann.Labor Code, §§ 1115–1122, 1126.

29. Labor Relations ⚷192

A state, in a situation where questions of Taft-Hartley pre-emption are absent, has the right to declare and enforce a policy against coercion by employers of employees in their choice of a collective bargaining representative. National Labor Relations Act, § 1 et seq. as amended by Labor Management Relations Act of 1947, 29 U.S.C.A. § 141 et seq.

30. Labor Relations ⚷352

Any group of employees, organized or unorganized in the formal, conventional sense, who are free of the proscribed employer influence and who have determined and informed their employer through their authorized spokesman that they are unwilling to accede to the demands of an organizer or unwanted union, and that they are satisfied with the terms and conditions of their employment and wish to continue in the established employee-employer relationship, constitute a "labor organization" within the meaning of the Jurisdictional Strike Law. West's Ann.Labor Code, §§ 1117, 1118.

See publication Words and Phrases, for other judicial constructions and definitions of "Labor Organization".

31. Statutes ⚷188

Courts are bound to give effect to statutes according to the usual, ordinary import of the language employed in framing them; particularly is this true when the law as so construed is consistent with the general policy of the state.

32. Labor Relations ⚷352

The Jurisdictional Strike Law makes clear that it is the policy of the state to avoid jurisdictional strife and, as a corollary, to protect both management and labor organizations in established employer-employee relations. West's Ann.Labor Code, §§ 1115–1122, 1126.

33. Labor Relations ⚷352

Pressure by a union or its organizers to compel an employer, whose employees are not organized and do not wish to be organized, to execute a closed or union shop agreement with the unauthorized union, is essentially a jurisdictional dispute pressure; the object of such pressure is not to gain security protection in respect to an existing collective bargaining contract or for the employees' authorized labor organization; rather, its objective is to secure jurisdiction over an employer-employee relationship to which the union is not a party, and this type of concerted activity is contrary to the policy of California as disclosed by the general labor laws enacted in 1933 and the Jurisdictional Strike Law. West's Ann.Labor Code, §§ 921–923, 1115–1122.

34. Statutes ⚷223.2(19)

The provision in the Jurisdictional Strike Law that any person who organizes an employee group which is financed in whole or in part, interfered with or dominated or controlled by employer or employer association, as well as such employer or employer association, shall be liable to suit by any person who is injured thereby are in pari materia with the antiyellow-dog statute and the statute declaring that collective bargaining is the policy of the state. West's Ann.Labor Code, §§ 921, 923, 1122.

35. Statutes ⚷212.6

Each word in statute must be presumed to have been used intelligently and designedly and for an express purpose by the Legislature.

36. Labor Relations ⚷352

Under the Jurisdictional Strike Law, it is an unlawful interference by employer for him to notify his employees that he has agreed with a union which is, and which he knows to be, unauthorized and unwanted by his employees, that they must join such union and be represented by it or be dismissed from employment. West's Ann.Labor Code, § 1122.

37. Labor Relations ⚷1

Industrial self-government is a goal to be desired in employer-employee relations.

38. Labor Relations ⚷47

In so far as problems arise over issues which are not specifically covered by the California statutory law regulating workmen-labor-organization-management relations, they should be solved by looking to the policy of the legislation and fashioning a remedy that will effectuate that policy. West's Ann.Labor Code, §§ 921–923, 1115–1122, 1126.

39. Labor Relations ⚷1

An effect to be desired in labor management relations is to decrease activities in the wasteful arena of economic combat and increase reliance on the orderly processes of administering collective bargaining agreements; viz., promotion of peaceful negotiation, and, when necessary, arbitration or court proceedings, but not strikes, lockouts, work stoppages, mass picketing, or acts of physical or economic violence which, if not specially protected, would constitute torts or other violation of laws, state or federal. West's Ann.Labor Code, §§ 920–923, 1115–1122, 1126.

40. Labor Relations ⚷5

A state can control unlawful conduct in the field of labor management relations where the conduct has no arguable effect on interstate commerce or has a potential of violence. National Labor Relations Act, § 1 et seq. as amended by Labor Management Relations Act of 1947, 29 U.S.C.A. § 141 et seq.

41. Labor Relations ⚷171, 192

California labor law encourages collective bargaining contracts which result from voluntary agreement between employer and employees and forbids an employer, whether acting alone or in concert with an unauthorized union or organizer who has not been chosen by a majority of the freely participating workmen he seeks to represent, from coercing his unwilling employees to accept a particular union or person as their bargaining agent or from agreeing that he will coerce them to that end. West's Ann.Labor Code, §§ 921, 923, 1115–1122.

42. Labor Relations ⇨178

Under California labor law, where employees of a shop or a craft, through their lawfully designated representative, negotiate for union security within any limits not barred by law, the objective is proper and can be attained and enforced. West's Ann.Labor Code, §§ 921, 923, 1115–1122.

43. Labor Relations ⇨326

Under California labor law, where an organization which has been fairly selected by the majority vote of all the employees of an employer or as an affected craft or group seeks union security, the organization acting for all such employees may use lawful forms of pressure such as the strike and picketing to induce the employer to grant that condition of labor. West's Ann.Labor Code, §§ 921, 923, 1115–1122.

44. Labor Relations ⇨86, 192, 218, 262

Under California labor law, employees have freedom from employer interference in such matters as association, organization and selection of representatives, to the end that through the democratically chosen representatives, collective bargaining agreements may be negotiated, and the workmen, having had the opportunity to freely participate in such procedure, are bound by the majority vote and the contract negotiated will be the contract of all. West's Ann.Labor Code, §§ 921, 923.

45. Counties ⇨21½

County "right to work" ordinance is invalid as contravening the state-wide policy, as disclosed in the statutory labor law, that employees have full freedom for self-organization and for voluntarily selecting and negotiating agreements through their own employee committees or agencies. West's Ann.Labor Code, §§ 920–923, 1115–1122, 1126.

46. Counties ⇨21½

County "right to work" ordinance which invades the field occupied by valid state law must be declared invalid in its entirety where the conflict cannot be eliminated by mechanical separation of the language of the ordinance. West's Ann.Labor Code, §§ 920–923, 1115–1122, 1126.

47. Labor Relations ⇨930

In action by employer against union and its secretary for injunctive relief from activities designed to induce employer to enter into union shop agreement with union, complaint failed to state cause of action, where it affirmatively appeared therefrom that employer and union proposed to execute a mutually desired, lawful, collective union security agreement arrived at by means which accord with and fully recognize the rights of the individual workman to organize and to participate in the selection of their bargaining agents for the negotiation of such agreement free from employer interference, all in accord with the overriding state policy declared in the California statutory labor law. West's Ann. Labor Code, §§ 920, 923, 1115–1122, 1126.

48. Labor Relations ⇨210, 367

The want of any governmentally prescribed procedure by which affected employees will be assured of a free vote without fear of reprisal to determine whether a particular union is to be their representative should not preclude the employer and the union themselves from arranging for such an election, and the employer would not interfere with his employees' rights of self-organization by merely furnishing to his employees an opportunity to hold an election. West's Ann.Labor Code, §§ 920–923, 1115–1122, 1126.

49. Labor Relations ⇨326

A union and its secretary can lawfully persist in demanding that employer sign a union contract and such a demand is merely fair persuasion when not accompanied by threat of physical harm or economic loss, molestation or harassment or material and fraudulent misrepresentation.

Garvin W. Hale, San Jose, for appellant.

Severson, Davis & Larson, Nathan R. Berke and George Brunn, San Francisco, amici curiae for appellant.

Morgan & Beauzay, Robert Morgan, San Jose, and Louis Sherman, Washington, D. C., for respondents.

Charles P. Scully, Victor Van Bourg, Gladstein, Anderson, Leonard & Sibbett and Norman Leonard, San Francisco, amici curiae for respondents.

SCHAUER, Justice.

Plaintiff appeals from a judgment of dismissal entered after a general demurrer to his complaint was sustained and he had declined to amend. By the complaint an employer seeks injunctive relief from activities of defendants, a labor union and its secretary, designed to induce plaintiff to enter in a union shop agreement with defendant union. Both plaintiff and a majority of his employes desire such an agreement; i. e., neither plaintiff nor defendants wish to force a union shop upon a group of employes whose majority do not freely choose it. But defendants' activities are, and the execution of the contract which such activities are intended to effect would be, contrary to the provisions of a San Benito County "right-to-work" ordinance.

[1] The controlling issues, it will develop, are (1) whether the state by valid law has occupied the field so comprehensively that the ordinance cannot stand, and (2) whether the complaint states a cause of action under state law. To resolve these issues confidently requires examination of the state's statutory law concerning not only the relations between labor and management, as such, but also that which regulates relationships and activities between competing labor organizations and between those organizations and their own members, and the members of other organizations, and unorganized workmen, and the rights, if any, of the individual workmen to participate in the selection of their bargaining agents and in the determination of objectives of collective negotiations and ultimate terms of agreement. The statutory law must be interpreted in the light of the earlier decisions of this court as they, in turn, have been affected by developing law, both statutory and decisional.

By way of circumscription, however, and to preclude misapprehension as to the import of our discussion or holdings, we note that this litigation presents no occasion to, and we do not, consider or undertake to define the extent to which, as between any willing employer and any willing union, the Legislature can validly regulate their respective basic freedoms to voluntarily contract for the services and remunerations of workmen and for other basically lawful objectives of the contracting parties.

We have concluded that: (1) There is no cause of action under the ordinance, for such ordinance is invalid because it contains unseverable provisions which conflict with both the legislatively declared general labor policy of this state and certain specific implementations thereof. (2) No cause of action under the general law of this state is or can be stated because it affirmatively appears that plaintiff and defendants propose to execute a mutually desired, lawful, collective union security agreement arrived at by means which accord with and fully recognize the rights of plaintiff's individual workmen to organize and to participate in the selection of their bargaining agents for the negotiation of such agreement free from employer interference, all in accord with the overriding state policy declared in Labor Code section 923 and implementing statutes hereinafter quoted.

The complaint alleges the enactment and terms of the subject ordinance (No. 201).

Its provisions are quoted or summarized in the margin.[1] The further substance of the complaint is by no means a model of certainty or clarity. However, the facts directly or inferentially alleged were summarized in the opinion prepared by Presiding Justice Peters (now an associate justice of this court) for the District Court of Appeal before transfer of the cause to this court and as neither party suggests any error in such summary we adopt it (with interpolations of certain further details averred in the complaint) as a correct summary of the pleading. [329 P.2d 579]

[ ][2] The complaint alleges that the plaintiff, Ted Chavez, is a painting contractor doing commercial and residential painting in Santa Clara and San Benito Counties; that a majority of his employees are members of [defendant Painters and Decorators Local Union 1157 AFL-CIO] [ ]; that [defendant] Sargent is the secretary of that union, and that such union is the only painters' union in San Benito County; that the defendants demand that plaintiff sign a union contract similar to the one that he has in Santa Clara County with the painters' union there, providing ["as permitted by the NLRA (Taft-Hartley)"] for union membership after 30 days of employment; that the union members in San Benito County are conspiring to compel the nonunion painters to join the union, and refuse to work with nonunion painters; that these acts are in violation of the ordinance; that plaintiff "wishes to sign a union security contract but is subject to a suit for damages" under the ordinance if he does so. ["That plaintiff will suffer

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[1] Section 1: "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or other conditions of employment." (It should be noted that the definition of "labor organization" in this section is for all practical purposes identical in language and meaning with Labor Code section 1117 hereinafter quoted.)

Section 2: "The word 'person' includes a corporation, association, company, firm or labor organization, as well as a natural person."

Section 3: "No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, nor shall the county, any agency thereof, or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment because of non-membership in a labor organization."

Section 4: "Any act or provision in any agreement entered into on or after the effective date hereof or any renewal or extension of any existing agreement entered into on or after the effective date hereof which is in violation of this ordinance shall be illegal and void. Any strike or picketing to force or induce any employer to make an agreement in writing or orally in violation of this ordinance shall be for an illegal purpose."

Section 5: "It shall be unlawful for any employee, labor organization, or officer, agent or member thereof to compel or attempt to compel any person to join any labor organization or to strike against his will or to leave his employment by any threatened or actual interference with his person, immediate family, employment or property."

Section 6: "Any combination or conspiracy by two or more persons to cause the discharge of any person or to cause him to be denied employment because he is not a member of a labor organization, by inducing or attempting to induce any other person to refuse to work with such person, shall be illegal."

Section 7 provides that one injured by violation of the ordinance can sue for damages and section 8 provides that such a person can have injunctive relief. Section 9 is a broad separability provision. The ordinance contains no penal provision.

[2] In the adopted paragraph, brackets together, in this manner [ ], indicate deletions from the statement of the District Court of Appeal; brackets enclosing material denote insertions by this court; quotation marks indicate quotations from the complaint. (For a more complete explanation of our use of brackets to avoid the extension of quotation marks within quotation marks when adopting part or substantially all of an opinion of the District Court of Appeal, see People v. Lyons (1956), 47 Cal. 2d 311, 314, 303 P.2d 329, footnote 1.)

irreparable harm unless the injunction authorized by Ordinance 201 is issued."] Plaintiff therefore prayed for a temporary and permanent injunction compelling the defendant union "to desist from their demands for any type of union security in San Benito County and compelling them to work with non-union building trades employees." [ ] [And as a conclusional summation of the pleading the subject opinion states:] In the instant case the employees want a union shop agreement and the employer wants a union shop agreement, but both are prevented from entering into such a voluntary agreement by the terms of the ordinance. [ ]

[2] Defendants argue that by the Taft-Hartley Act (Labor Management Relations Act of 1947, 61 Stat. 136, as amended; 29 U.S.C.A. § 141 et seq.) the federal government has preempted the field of labor relations in which this complaint seeks state court relief. Since the pleading does not suggest that the problems arising from defendants' attempt to unionize plaintiff's San Benito County contracting business have any relation to interstate commerce, we cannot assume that the national act has taken hold of the conduct here involved. See International Brotherhood of Teamsters Union etc. v. Vogt, Inc. (1957), 354 U.S. 284, 294, 77 S.Ct. 1166, 1 L.Ed.2d 1347; Thorman v. International Alliance etc. Employees (1958), 49 Cal.2d 629, 632–633 [3, 4], 320 P.2d 494.) Therefore, we need not be concerned, in our ensuing discussion of state law, with any possibility that such law, on the facts of this case, might conflict with the federal law.

[3] The power of San Benito County (not a chartered county) in respect to this ordinance is defined by section 11 of article XI of the California Constitution, which provides that "Any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." Even in matters of statewide concern (see In re Portnoy (1942), 21 Cal.2d 237, 239 [1], 131 P.2d 1; Mann v. Scott (1919), 180 Cal. 550, 556, 182 P. 281), the city or county has police power equal to that of the state so long as the local regulations do not conflict with general laws. (McKay Jewelers, Inc. v. Bowron (1942), 19 Cal.2d 595, 600 [3], 122 P.2d 543, 139 A.L.R. 1188; In re Iverson (1926), 199 Cal. 582, 585 [1], 586 [3, 4], 250 P. 681; Jardine v. City of Pasadena (1926), 199 Cal. 64, 68 [1], 71 [3], 248 P. 225, 48 A.L.R. 509.)

[4] California's leading case on the pertinent subject states the law as follows: "[4] * * * 'Where the legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipality with subordinate power to act in the matter may make such new and additional regulations in aid and furtherance of the purpose of the general law as may seem fit and appropriate to the necessities of the particular locality and which are not in themselves unreasonable.' [Citation.] The cases in this state have consistently upheld local regulations in the form of additional reasonable requirements not in conflict with the provisions of the general law. [Citations.]

[5, 6] "[5] This general rule permitting the adoption of additional local regulations supplementary to the state statutes is subject to an exception, however * * * Regardless of whether there is any actual grammatical conflict between an ordinance and a statute, the ordinance is invalid if it attempts to impose additional requirements in a field which is fully occupied by the statute. Thus, * * * an ordinance which is substantially identical with a state statute is invalid because it is an attempt to duplicate the prohibition of the statute. [Citations.] * * * The invalidity arises, not from a conflict of language, but from the inevitable conflict of jurisdiction which would result from dual regulations covering the same ground. Only by such a broad definition of 'conflict' is it possible to confine local legislation to its proper field of *supplementary* regulation." (Pipoly v. Ben-

son (1942), 20 Cal.2d 366, 370–371, 125 P.2d 482, 147 A.L.R. 515.)[3]

[7] A further pertinent principle is: "Where the Legislature has adopted statutes governing a particular subject matter, its intent with regard to occupying the field to the exclusion of all local regulation is not to be measured alone by the language used but by the whole purpose and scope of the legislative scheme. [Citations.]" (Tolman v. Underhill (1952), 39 Cal.2d 708, 712 [6], 249 P.2d 280.)

[8] State regulation of a subject may be so complete and detailed as to indicate an intent to preclude local regulation. (Wilson v. Beville (1957), 47 Cal.2d 852, 860 [8], 306 P.2d 789; Tolman v. Underhill, supra, at pages 712–713 [6, 7] of 39 Cal.2d, at pages 282–283, of 249 P.2d.) In this connection it may be significant that the subject is one which, in our view, as in Tolman v. Underhill, supra, at page 713 [7] of 39 Cal.2d, at page 283 of 249 P.2d, requires uniform treatment throughout the state. Furthermore, and of significance in impelling a conclusion that no part of the local ordinance can be effective, is the fact that in aspects wherein it does not substantially either parallel or breach specific state legislation it conflicts, as hereinafter explained, with a general legislative declaration of policy. (See In re Porterfield (1946), 28 Cal.2d 91, 115–118 [27–28], 168 P.2d 706, 167 A.L.R. 675.)

No case has been found which discusses the question whether an ordinance which conflicts, not with statutory, but with decisional, law on a subject of state-wide concern, violates the requirement of section 11 of article XI of the state Constitution that local regulations must not conflict with "general laws." But decision of this question is not now necessary because, as is hereinafter developed, the ordinance here attacked conflicts with California's statutory law.

[9–12] The Legislature has not enacted a completely detailed scheme of regulation of the "field" which this ordinance is principally designed to affect, i. e., the legality of jurisdictional (or jurisdictional-organizational) strikes and of union shop or security agreements[4] and conduct intended to

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[3] We recognize that in Pipoly v. Benson the Chief Justice was dealing with a penal ordinance and that the ordinance with which we are concerned declares no penal sanction, but we nevertheless view the quoted language as applicable here.

[4] "Union security" is a term which indefinitely may include the closed shop, the union shop, the preferential shop, and maintenance of membership. (See Teller, Labor Disputes and Collective Bargaining (1950 supp.), § 398.58.)

In present parlance a closed shop is "An establishment in which the employer by agreement hires, and retains in employment only union members in good standing, except that, by some agreements, when union members are unavailable, the employer may hire nonunion workers provided they apply for union membership or obtain work permits before beginning work"; a union shop is "An establishment in which the employer by agreement is free to hire nonmembers as well as members of the union but retains nonmembers on the payroll only on condition of their becoming members of the union within a specified time." (Webster's New Internat. Dict. (2d ed., 1958); Teller, Labor Disputes and Collective Bargaining (1950 supp.), § 398.59.) It is in this sense that it is said that section 8(a) (3) of the Labor Management Relations Act of 1947 (29 U.S.C.A. § 158(a) (3), which does not use the terms "closed shop" and "union shop") "forbids the closed shop and strictly regulates the conditions under which a union-shop agreement may be entered." (Algoma Plywood & Veener Co. v. Wisconsin Board (1948), 336 U.S. 301, 314, 69 S.Ct. 584, 93 L.Ed. 691.)

The terms did not always have these clearly distinguished meanings (e. g., Funk & Wagnalls New Stand. Dict. (1933 ed.) defines union shop as "same as closed shop") and the cases have not always used them in their presently recognized sense. For the purpose of our discussion herein possible uncertainty as to the meanings of "closed shop" and "union shop" in some of the cases is of no importance. What is important is that the cases recognize the lawfulness of union security agreements in general, provided that the circumstances of the attain or enforce such agreements, but it has declared both a general policy and basic regulations in implementation thereof which, as we view them, are fully comprehensive of the field. To show the impelling reasons for our views we examine in appropriate detail the pertinent statutes and the development of the relevant decisional law construing those statutes.

Prefatorily it is observed that the legality of the closed shop,[4] and of the strike and boycott, primary and secondary, as means of enforcing or seeking that objective, were recognized by this court at a comparatively early date, under common law principles, in J. F. Parkinson Co. v. Building Trades Council (1908), 154 Cal. 581, 98 P. 1027, 21 L.R.A.,N.S., 550, and Pierce v. Stablemen's Union (1909), 156 Cal. 70, 103 P. 324. The legality of conduct akin to the "jurisdictional strike" (concerted union activity in connection with a dispute between "labor organizations," as that term is defined in legislation hereinafter quoted) was recognized, under an application of the principles of the Parkinson and Pierce cases, in Greenwood v. Building Trades Council (1925), 71 Cal.App. 159, 167, 175, 233 P. 823.

[13] The Legislature tacitly recognized the propriety of the closed shop by statutes enacted between 1905 and 1921 (the provisions are now in Lab.Code, §§ 1010–1018) which make it criminal to falsely represent that union labor was employed in the manufacture of goods, to forge a union label, and to use a union label without authorization.

[14] With labor emerging from weakness toward power, the justness of its cause was gaining recognition. Such recognition did not come without struggle and strife, costly to labor, to management and to the public, but come it did. Eventually taking cognizance of the need for more equality in bargaining power as between workmen and employers, of the developing manifestations of change in political climate, of the growing competition between organized capital on the one hand and organized labor on the other, and between competing labor organizations, and the impact of all these competitions on the welfare of the general public as well as on that of the competing parties, both the Congress of the United States and the Legislature of this state adopted legislation establishing both general policy and certain implementations thereof. (See as to federal legislation: Norris-LaGuardia Act, 1932, 47 Stat. 70, 29 U.S.C.A. §§ 101–115, as amended; Wagner (National Labor Relations) Act, 1935, 49 Stat. 449, 29 U.S.C.A. § 151 et seq., as amended; Taft-Hartley (Labor Management Relations) Act, 1947, 61 Stat. 136, 29 U.S.C.A. § 141 et seq., as amended. And as to state enactments: Lab.Code, §§ 920–923, Stats.1937, ch. 90, p. 208, based on Stats.1933, ch. 566, p. 1478; Lab.Code, §§ 1131–1136, Stats.1941, ch. 623, p. 2079, adopted by referendum at the 1942 general election, but see In re Blaney (1947), 30 Cal.2d 643, 184 P.2d 892;[5] Lab.Code, §§ 1115–1122, Stats.1947, ch. 1388, p. 2952, as amended Stats.1955, ch. 1417; Lab.Code, § 1126, Stats.1941, ch. 1188, p. 2959.) It is important to note, as will hereinafter be emphasized, that notwithstanding the pushing and pulling as between "big business" and increasingly powerful labor organizations, the State of California—and the proponents of its legislation—made *welfare of the individual workmen*, through the principle of freedom to associate, organize and bargain collec-

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agreement and the means used to negotiate it are not in themselves unlawful.

[4] See Note 4 on page 810.

[5] The facts that this court (in In re Blaney (1947), supra, 30 Cal.2d 643, 650 [3], 184 P.2d 892) held the "Hot Cargo" and "Secondary Boycott" statute to be so "sweeping, vague and uncertain" and so permissive of prior censorship of matters protected by the constitutional guarantees of free speech and press, and that its enactment was an emergency measure, do not obliterate the significance of its adoption.

tively, the paramount principle of its legislation. The addition (by California's voters on referendum at the general election in 1942) of the "Hot Cargo" and "Secondary Boycott" Act[5] (Stats.1941, ch. 623, p. 2079) and of the Jurisdictional Strike Law in 1947 (Stats.1947, ch. 1388, p. 2952) are indicative of growing public concern over the clashes arising from the proscribed activities, their undesirable effects, and of a desire to more clearly define and further implement the state policy against certain organizational and jurisdictional activities.

As hereinabove mentioned, in 1933 the California Legislature enacted the "general laws" (Stats.1933, ch. 566, p. 1478) recast and adopted as sections 920 through 923[6] of the Labor Code in 1937, which sections, together with the Jurisdictional Strike Law[7] (Stats.1947, ch. 1388, § 1, p. 2952, as

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5. See Note 5 on page 811.

6. Sections 920 through 923 appear (in Lab.Code, div. 2, pt. 3, ch. 1) under the chapter heading "Contracts Against Public Policy." Section 920 defines "promise."

Section 921: "Every promise made after August 21, 1933, between any employee or prospective employee and his employer, prospective employer or any other person is contrary to public policy if either party thereto promises any of the following:

"(a) To join or to remain a member of a labor organization or to join or remain a member of an employer organization,

"(b) Not to join or not to remain a member of a labor organization or of an employer organization,

"(c) To withdraw from an employment relation in the event that he joins or remains a member of a labor organization or of an employer organization.

"Such promise shall not afford any basis for the granting of legal or equitable relief by any court against a party to such promise, or against any other persons who advise, urge, or induce, without fraud or violence or threat thereof, either party thereto to act in disregard of such promise."

Section 922: "Any person or agent or officer thereof who coerces or compels any person to enter into an agreement, written or verbal, not to join or become a member of any labor organization, as a condition of securing employment or continuing in the employment of any such person is guilty of a misdemeanor."

Section 923: "In the interpretation and application of this chapter, the public policy of this State is declared as follows:

"Negotiation of terms and conditions of labor should result from *voluntary agreement* between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the *individual workman have full freedom* of association, self-organization and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that *he shall be free* from the interference, restraint, or coercion *of employers of labor*, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." (Italics added.)

7. Section 1115: "A jurisdictional strike as herein defined is hereby declared to be against the public policy of the State of California and is hereby declared to be unlawful."

Section 1116: "Any person injured or threatened with injury by violation of any of the provisions hereof shall be entitled to injunctive relief therefrom in a proper case, and to recover any damages resulting therefrom in any court of competent jurisdiction."

Section 1117: "As used herein, 'Labor organization' means any organization or any agency or employee representation committee or any local unit thereof in which employees participate, and exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, hours of employment or conditions of work, which labor organization is not found to be [or to have been] financed in whole or in part, interfered with, dominated or controlled by the employer [or any employer association within one year of the commencement of any proceeding brought under this chapter. The plaintiff shall have the affirmative of the issue with respect to establishing the existence of a 'labor organization' as defined herein].

"As used herein, 'person' means any person, association, organization, part-amended Stats.1955, ch. 1417) encompassed as Labor Code sections 1115 through 1122, together also with section 1126[8] of the Labor Code (added Stats.1941, ch. 1188, p. 2959), constitute the statutory law with which we are here particularly concerned.

The first enacted portion of the subject legislation (Lab.Code, §§ 920–923) was considered and construed by this court in a series of cases including McKay v. Retail Auto. Salesmen's Local Union No. 1067 (1940), 16 Cal.2d 311, 106 P.2d 373; Shafer v. Registered Pharmacists Union (1940), 16 Cal.2d 379, 106 P.2d 403; and C. S. Smith Metropolitan Market Co. v. Lyons (1940), 16 Cal.2d 389, 106 P.2d 414.

[15] In the McKay case *plaintiffs-employes had chosen their own representatives to bargain with their employer and were satisfied with their relations with their employer.* From the fact that the McKay employes had chosen their own representatives and authorized them to bargain with their employer it is apparent that (unless they were employer financed or controlled or "interfered with") they had a "labor organization" within the definition of that term as used in the Jurisdictional Strike Law, which was subsequently enacted and is hereinabove quoted[7] and hereinafter discussed. Whether plaintiffs' organization (in the McKay case) was a company union or a small independent union was not decided by the court.[9] *In either event,* it was held, plaintiffs could not have equitable protection against defendant unions' concerted activity (picketing and promotion of secondary boycotts) designed to attain a "closed union shop" or "union shop" with certain of the demanding unions displacing the independent union and becoming the exclusive bargaining agents of the unwilling employes. C. S. Smith Metropolitan Market Co. v. Lyons (1940), supra, 16 Cal. 2d 389, 395–396 [3–6], 106 P.2d 414, reaffirmed the view that it was lawful to engage in concerted union activity, including the secondary boycott, designed to attain

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nership, corporation, unincorporated association, or labor organization." (The bracketed words were added by Stats. 1955, ch. 1417, § 1. It should be noted, by reference to footnote 1, that the definition of "labor organization" herein is substantially identical with that set forth in section 1 of San Benito County Ordinance No. 201.)

Section 1118: "As used in this chapter, 'jurisdictional strike' means a concerted refusal to perform work for an employer or any other concerted interference with an employer's operation or business, arising out of a controversy between two or more labor organizations as to which of them has or should have the exclusive right to bargain collectively with an employer on behalf of his employees or any of them, or arising out of a controversy between two or more labor organizations as to which of them has or should have the exclusive right to have its members perform work for an employer."

Section 1119: "Nothing in this chapter shall be construed to interfere with collective bargaining subject to the prohibitions herein set forth, nor to prohibit any individual voluntarily becoming or remaining a member of a labor organization, or from personally requesting any other individual to join a labor organization."

Section 1120: This is a separability clause which is immaterial to our discussion and, hence, is not quoted.

Section 1122: "Any person who organizes an employee group which is financed in whole or in part, interfered with or dominated or controlled by the employer or any employer association, as well as such employer or employer association, shall be liable to suit by any person who is injured thereby. Said injured party shall recover the damages sustained by him and the costs of suit." (Added by Stats.1955, ch. 1417, § 2.)

[8] Section 1126 (under the title "Collective Bargaining Agreements"): "Any collective bargaining agreement between an employer and a labor organization shall be enforceable at law or in equity, and a breach of such collective bargaining agreement by any party thereto shall be subject to the same remedies, including injunctive relief, as are available on other contracts in the courts of this State."

[9] In the dissent authored by Mr. Justice Curtis it is stated that (at page 338 of 16 Cal.2d, at page 387 of 106 P.2d) "[T]here is absolutely nothing in the pleadings to warrant any assumption that the present organization of the plaintiffs' employees is what is called a 'company union' or is dominated by the employer."

"a closed union shop" where the activity was directed against an employer to induce him to compel his employes (who were satisfied with the terms of their employment, which included an open shop without discrimination against union employes) to subject themselves to the unwanted jurisdiction of, and representation by, the invading union. These cases (McKay and C. S. Smith), it is, or in later discussion will become, obvious, have been superseded to the extent that they are inconsistent with the Jurisdictional Strike Law. The subject cases, however, have not been supplanted or overruled insofar as they hold that Labor Code sections 920 through 923 do "not prohibit closed union shop contracts." (McKay, at page 327 [15] of 16 Cal.2d, at page 382 of 106 P.2d.)

In the Shafer case (1940), supra, 16 Cal.2d 379, 106 P.2d 403, the facts, presented by agreed statement, were not in dispute. Plaintiff employer had a collective bargaining agreement with defendant union. So far as appears, such agreement had been lawfully negotiated and the union, at the time of the hereinafter described strike which resulted in the litigation, was the duly authorized and freely chosen representative of plaintiff's striking employes. It is not necessary, therefore, at this time to inquire into the circumstances which led to the initial signing of the collective agreement. (at page 381 of 16 Cal.2d, at page 404 of 106 P.2d.) "The parties are agreed that the effect of their contract was to require the employer to retain only union-member pharmacists in employment and to recognize the defendant union as the sole collective bargaining agent of the employees who were subject to it. At the end of the year the respondent [plaintiff employer] refused to renew the agreement unless the closed shop provisions were deleted * * * Thereupon, the union [presumptively as authorized by the employes] declared a strike against him and started picketing his stores." The court stated that (16 Cal.2d at page 380, 106 P.2d at page 404.) "The determinative question * * * is whether closed union shop agreements have been rendered unlawful in this state by virtue of the enactment of sections 920, 921, and 923 of the Labor Code." The court properly concludes that the subject legislation does not proscribe such contracts but in reaching its conclusion engages in some discussion which requires further attention if the legislation is to be fully understood.

In reading the following paragraphs it is important to bear in mind that section 921 by its precise language applies only to a "promise * * * between any employee or prospective employee and his employer, prospective employer or any other person" (i. e., any person acting on behalf of the employer). After quoting sections 921 and 923 (hereinabove quoted[6]) the court continues (at page 383 of 16 Cal.2d, at page 405 of 106 P.2d): "Concerning these provisions the respondent argues that a closed union shop contract violates the terms of section 923 in that it deprives the individual employee of his right of 'freedom of association, self-organization, and designation of representatives of his own choosing' guaranteed by that section. Moreover, it is said, such a contract also violates section 921 because its effect is to require an individual employee 'to join' and 'to remain a member of a labor organization'. On the other hand, the appellants contend that these measures were drafted and proposed at the instance of organized labor for the purpose of extending and safeguarding the principle of collective bargaining, and considering their history and background, they should not be interpreted contrary to the principle they were designed to promote.
* * *

"Impartial studies of the labor movement in this country show that for many years the extension of collective bargaining in industrial relations has been opposed by employers. Chief among the devices resorted to for that purpose has been the anti-union or 'yellow dog' contract, *an agreement between an employer and his employee* which, in its usual form, provides that the employer will maintain his business on a non-union basis and the employee will not become a member of any labor union during the course of his employment. * * *

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[6] See Note 6 on page 812.

"However, with the growth of the labor movement in this country and the development of public opinion more favorable to collective bargaining, industry found it advisable to change the methods of opposition. Many employers, although professing to accept the principle of collective bargaining and unionization by which it is made effective, either directly or indirectly sponsored company controlled unions having no members except their own employees, and by that means were able to minimize the workers' demands. This was a change in method only. * * *

"[at page 385 of 16 Cal.2d at page 407 of 106 P.2d.] The California legislation is the result of labor's efforts [to outlaw 'yellow dog' contracts and regulate company unions] * * * [16 Cal.2d at page 386, 106 P.2d at page 407.] Bearing in mind the necessity for economic equality as a foundation for fair bargaining, the plain language of section 921, when read in connection with the declaration of policy contained in section 923, can only mean that the term 'employer organization', as used in each subdivision of the former, refers to an association of employers and not to a company union, as the respondent contends.

"*Considering another point made by the employer* in this connection, the clause 'to join or to remain a member of a labor organization' may not reasonably be construed as prohibiting a promise to join an independent labor union. Although the term 'labor organization', taken by itself, is broad enough to refer to either a company or an independent union, the purpose of the legislation must be considered in arriving at a conclusion concerning its meaning. If the words are meant to designate an independent union, then it is against public policy for an employee or prospective employee to join such an organization, which is a result exactly contrary to the declaration of policy in section 923. In matters of both employment and concerted activity for the purpose of collective bargaining, reads this section, the employee 'shall be free from interference, restraint or coercion of employers of labor, or their agents'. *What is this 'interference, restraint or coercion' which should not be exercised against employees?* Obviously it is anything which is a barrier to the full freedom of association and self-organization without which 'the individual unorganized worker is helpless to exercise actual liberty of contract'. *Who should not interfere with the employees' rights?* 'Employers of labor or their agents', says the statute. Nowhere is there the suggestion that some employees must be protected against other employees.

"*These and other considerations render untenable the contention that union shop contracts in California are void under section 921. As has already been noted, the usual company union contract is an individual agreement between the employer and an employee, whereas the union shop contract is an agreement running between the employer and the union as an entity.*" (Italics added.)

[16] The important holding of Shafer is the conclusion that section 921 does not preclude union shop agreements "between the employer and the union as an entity" (16 Cal.2d at page 387 [5], 106 P.2d at page 407). That holding is correct. It is correct because the language used in section 921 means exactly what it says, not because the identical words "labor organization" can or should be held to mean one type of labor organization in one sentence and an opposingly different type in the next sentence. The only "promise" whatsoever which the language of section 921 mentions is the promise of the individual workman made directly with "*his employer, prospective employer or any other person,*" the "any other person," in context, obviously meaning a person acting on behalf of the employer. By no warrantable interpretation of the language used could it be held to include (and thereby to proscribe) a *collec-*

tive bargaining agreement—an agreement entered into by and between the employer and a labor organization, the latter acting as the agent or representative of the workmen, voluntarily authorized by them to negotiate and agree on the terms and conditions of their employment. Obviously a promise of an individual workman with his employer to join or not to join a "labor organization" is not at all the same thing as a contract between a labor organization on the one hand and an employer on the other. The court, itself, in the Shafer case furnishes the key to the meaning of section 921, and a sound basis for the court's conclusion, when it says, as quoted above, "[T]he usual company union contract is an individual agreement between the employer and an employee, whereas the union shop contract is an agreement running between the employer and the union as an entity." We think that the court's hereinabove quoted discussion of the suggested opposing meanings of the term "labor organization" in succeeding sentences of section 921 is properly to be understood as constituting a recitation of, and comments on, one of the arguments which was presented to the court but not as forming the controlling basis for its conclusion.

[17] If there were otherwise any doubt as to the correct interpretation of section 921 that doubt would disappear when section 921 is read, as it should be, in the light of the wording of section 923. Sections 921 and 923 fit together perfectly to make clear both the overriding policy and its implementation in the premises. The predominant concern of each section is the welfare of the *individual workman,* and *to that end* the fostering of collective bargaining. Section 921 protects the individual against pressures from his employer that *he as an individual workman* make any compact with the employer curtailing the workman's right to organize and bargain collectively while section 923 declares the personal right of each workman to join with his fellows in forming an association to act and bargain as a unit, and to that end each workman to "have full freedom of association * * * and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment." An important question, however, arises from section 923 as to the circumstances and extent under and to which the "full freedom" of the individual workman, therein declared, may be limited—if it may be at all curtailed—by union security provisions in collective agreements.

Inherent in government—in all social and economic regulation—is an area of give and take. There must be a weighing of values. It is of primary importance that the individual workman have protection—that *he* have "full freedom" of "self-association" and in the designation of representatives of "his own choosing." But it is also essential that the group's lawfully selected negotiators have power and freedom of contract to secure the workman's interests by contract with employers, and that for the ultimate benefit of each individual workman the authorized representative shall be able to wield the collective power of all. It is in this field of workman-labor-organization-management relations that the balancing of relative values becomes most delicate.

Considerable assistance in understanding the legislative objectives, and therefore the legislative language, in the enactment of Labor Code sections 921 through 923, as well as the subsequently enacted Jurisdictional Strike Law, may be derived from discussions by law writers contemporaneously with the adoption of the earlier sections and their judicial construction and application in the already noted cases of McKay v. Retail Auto. Salesman's Local Union No. 1067 (1940), supra, 16 Cal.2d 311, 106 P.2d 373; Shafer v. Registered Pharmacists Union (1940), supra, 16 Cal.2d 379, 106 P.2d 403; C. S. Smith Metropolitan Market Co. v. Lyons (1940), supra, 16 Cal.2d 389, 106 P.2d 414; and also in Fortenbury v. Superior Court (1940), 16 Cal.2d 405, 106 P.2d 411. The McKay case was the subject of particular comment after its tentative decision by the District Court of Appeal in 1939.

[18] The view of the District Court of Appeal in that case (opinion reported in (1939), 89 P.2d 426; opinion on denial of rehearing reported in (1939), 90 P.2d 113; vacated when this court granted a hearing) is discussed in 2 Teller, Labor Disputes and Collective Bargaining (1940), § 461, p. 1359, under the section heading "Judicial Applications of Anti-Yellow-Dog Statutes." As the Teller work points out (1 op. cit., § 48, p. 118), "The typical yellow-dog contract is an at-will employment agreement which contains, in addition to the usual provisions for employment, the following three provisions: (1) a representation by the employee that he is not a member of a labor union; (2) a promise by the employee not to join a labor union; (3) a promise by the employee that, upon joining a labor union, he will quit his employment." From the placement of his discussion in a section directed to anti-yellow-dog statutes it appears that Teller correctly assumes that the legislation considered in McKay (Lab.Code, §§ 920–923) is primarily concerned with contracts between the individual workman and the employer. He says:

"The danger inherent in labor law statutes at the hands of a judiciary unmindful of the historical facts behind such legislation has already been demonstrated by a California court in relation to an anti-yellow-dog contract statute of the type which declared the contract void and denied to it any legal or equitable relief. In McKay v. Retail Automobile Salesmen, it was held [by the District Court of Appeal in its vacated opinions reported in 89 P.2d 426, 90 P.2d 113] that a contract for a closed shop entered into between an employer and a bona fide labor union was unenforceable where the contract was executed without consulting the employer's employees. The employees, reasoned the court, would thereby and in violation of the statute be compelled to join a labor union as a condition of their remaining in employment. A statute designed to eliminate interference with labor organizations was thus construed to hinder it."

Mr. Teller's just quoted language in respect to the tentative decision of the District Court of Appeal is not very clear. But his position as to the decisions of this court in McKay and companion cases is obvious from his discussion in the 1947 Supplement to Labor Disputes and Collective Bargaining, § 461, pp. 408–409. There he says:

[19] "The McKay case was reversed[10] by the Supreme Court, the high California court holding labor activity legal though carried on against the desires of the employer's employees. [(1940), 16 Cal.2d 311, 106 P.2d 373], certiorari denied (1941), 313 U.S. 566, 61 S.Ct. 939, 85 L.Ed. 1525. Accord: C. S. Smith Metropolitan Market Co. v. Lyons [(1940), 16 Cal.2d 389, 106 P.2d 414]; Lund v. Auto Mechanics' Union [(1940), 16 Cal.2d 374, 106 P.2d 408]. Picketing or striking for a closed shop is also lawful in California. Shafer v. Registered Pharmacists Union Local [(1940), 16 Cal. 2d 379, 106 P.2d 403]. In the Shafer case, supra, the Court considered the background of Sections 921 and 923 of the Labor Code and concluded that nothing therein contained was a bar to closed shop contracts with labor organizations, or (see Smith Metropolitan Market Co. v. Lyons, supra), picketing carried on by labor unions in the absence of a labor dispute between the picketed employer and his employees. * * *

"There is reason to pause, before according to labor unions the right to engage in labor activity for the closed shop in connection with employers whose employees do not desire to be represented by unions. The Na-

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[10] Judgments of the District Court of Appeal are not "reversed." Such judgments are in effect only tentative until they become final as provided by rule of the Judicial Council (Cal.Const., art. VI, § 4d) and until they become final are subject to being automatically vacated upon transfer of the cause to the Supreme Court. (Rules on Appeal, Rule 28.) Upon such transfer the decision of the District Court of Appeal becomes a nullity and its opinion has no authoritative effect. (Ponce v. Marr (1956), 47 Cal. 2d 159, 161 [1], 301 P.2d 837; cases collected in 6B McKinney's New Cal.Dig. (1955), Courts, § 137.)

tional Labor Relations Act has expressed a policy in favor of closed shop contracts only where a majority of the employer's employees in an appropriate unit have authorized the contracting union to deal for them. * * * It has therefore been indicated that a labor union may not seek to compel an employer to enter into a closed shop contract unless the union represents a majority of the employer's employees. See International Ass'n of Bridge, Structure & Ornamental Iron Workers v. Pauly Jail Bldg. Co., 8 Cir., 1941, 118 F.2d 615." (Italics added.)

[20] In interpreting sections 921 through 923, particularly as to certain applications hereinafter developed, it is to be borne in mind that an authorized union which contracts with an employer acts as an entity or institution which is distinct from the individual workmen who are or may become the beneficiaries of its bargaining. (See, e. g., Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp. (1955), 348 U.S. 437 [75 S.Ct. 489, 99 L.Ed. 510]; see also Mendelsohn, Enforceability of Arbitration Agreements Under Taft-Hartley, Section 301 (1956), 66 Yale L.J. 167, 196–202; Shafer v. Registered Pharmacists Union (1940), supra, at page 387 [5] of 16 Cal.2d, at page 408 of 106 P.2d.) For example (with full recognition of the differences in legal theories, statutes, and results in various jurisdictions), we note that (1) an individual workman, when he is hired by an employer who is a party to a collective agreement, gets rights derived from the collective agreement; (2) there are strong practical reasons which support holdings that the union cannot and the individual workman can maintain an action to enforce such a predominantly individual right as that of the workman to the wages to which he is entitled by virtue of the collective agreement plus the individual contract of hire (see Association of Westinghouse Salaried Employees v. Westinghouse El. Corp., 3 Cir., 1954, 210 F.2d 623, 626, 629, affirmed, Association of Westinghouse Salaried Employees v. Westinghouse Corp. (1955), supra, 348 U.S. 437, 455–460, 75 S.Ct. 489, 99 L.Ed. 510; Sublett v. Henry's etc. Lunch (1942), 21 Cal.2d 273, 275, 131 P.2d 369); (3) on the other hand, the union can sue to enforce a predominantly institutional right under a collective agreement; e. g., an arbitration clause (in a federal court under federal law; § 301 of the Taft-Hartley Act, 29 U.S.C.A. § 185; Textile Workers Union of America v. Lincoln Mills (1957), 353 U.S. 448, 456, 77 S.Ct. 912, 1 L.Ed.2d 972) or union shop clause (in a California court under California law; Silva v. Mercier (1949), 33 Cal.2d 704, 706 [1], 707 [2], 204 P.2d 609); but it has been held that an individual union workman who is discharged and replaced by a nonunion employe has no cause of action against the employer for damage suffered as a union member because of the employer's violation of a union shop clause in a collective agreement (under California law as interpreted by a federal court; MacKay v. Loew's, Inc., (9 Cir., 1950), 182 F.2d 170 [18 A.L.R.2d 348, 351]).

As we have hereinabove indicated, the language used in section 921[11] is designed to cover only promises between the individual workman on the one hand and his employer on the other; it has no direct application to agreements between an authorized union bargaining agent as one party and the employer as the other party. It is equally clear that nothing in the subject section (§ 921) purports to limit the freedom of contract as between an employer or prospective employer and an *organization* which is authorized to negotiate contracts on behalf of the affected workmen. Pertinent and persuasive of legislative intent to the contrary, and therefore helpful to understanding of

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[11] Section 921: "Every promise made * * * between any *employee* or prospective employee *and his employer*, prospective employer * * * is contrary to public policy if either party thereto promises * * *: (a) To join or to remain a member * * * or * * * (b) Not to join or not to remain a member of a labor organization or of an employer organization. * * * (c) To withdraw from an employment relation in the event that he joins or remains a member of a labor organization or of an employer organization."

921, section 923 specifies that "In the interpretation and application of this chapter, the public policy of this State is declared as follows:

"Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the *individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment,* and that *he shall be free from the interference, restraint or coercion of employers* of labor, or their agents, *in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.*" (Italics added.)

[21] I has been suggested that because the opening sentence of section 923 reads, "In the interpretation and application of *this chapter* [italics added], the public policy of this State is declared," etc., its application should be limited to that chapter. But it is well established that the declared policy is not limited to "the interpretation and application of this chapter" (Lab.Code, div. 2, pt. 3, ch. 1). When this court first had occasion to consider that section (in Levy v. Superior Court (1940), 15 Cal.2d 692, 704, 104 P.2d 770, 129 A.L.R. 956), it was not in connection with "this chapter" but in connection with a holding that an arbitrator's award under a collective bargaining agreement could be the subject of court confirmation and enforcement under our arbitration statute (Code Civ.Proc., §§ 1280–1293). This court said, "This declaration [§ 923] evidences the existence of a policy to uphold the freedom of employees to organize and to enter into collective bargaining contracts for their own protection. * * * It would be difficult to uphold such a policy without recognizing the right of enforcement of collective bargaining contracts when voluntarily entered into by the unions." And In re Porterfield (1946), supra, 28 Cal.2d 91, 115–118 [27, 28], 168 P.2d 706, 167 A.L.R. 675, established that the policy declared in section 923 of the Labor Code is not limited to the interpretation of the chapter of the code of which that section is a part, but is a general independent declaration of state policy, and local legislation in conflict therewith is void. Specifically, it is there held that section 923 declares "a state policy of complete freedom in regard to the formation of labor organizations to the end that there may be collective action by workmen," and that a municipal ordinance which imposed a license tax upon paid labor organizers was invalid because it conflicted with that legislatively declared state-wide policy.

At this point certain principles and objectives of California's labor laws will have become apparent; but it is likewise apparent that in the road leading to those objectives there is an area wherein several excellent values will assert respectively conflicting claims. We list first the indicated principles and objectives and thereafter suggest some of the values and their conflicting claims.

[22] *Some Principles and Objectives of California's Labor Law.*

1. Both labor and management are encouraged toward, and protected in, the formation of their own respective organizations. (Lab.Code, § 923.)

2. The individual workman shall have full freedom of self-organization and designation of representatives of his own choosing, completely free of employer influence or "interference," to the end that an agent chosen by the workmen voting individually may represent them collectively in negotiating the terms and conditions of their employment. (Id.)

3. Collective bargaining, implicitly including union security measures, should result from "voluntary agreements between employer and employees," the latter acting (of necessity if it be *collective* bargaining) through their chosen collective bargaining representative. (Id.)

4. The employes as individuals shall be free from *employer* influence either to organize or not to organize and, if they elect to organize, in the choosing of their representatives. If organized by the employes' free act, the workmen through their selected representatives are free to bargain collectively. Corollarially, the employer (absent some legal impediment not here suggested) is free to bargain with the employes' authorized representatives but is not free to interfere with, restrain or coerce his employes in their selection of a collective bargaining representative. (Lab.Code, §§ 921, 923.)

5. The avoidance of violence in labor-management, organizational and jurisdictional matters is a policy of the state and, to that end, it is desirable to regulate, or as to some objectives and in some circumstances to prohibit, activities which create or foster situations which are conducive to mass emotions and violent acts. (Id.)

6. The Legislature (as is hereinafter shown in more detail), implementing the policy noted in the preceding paragraph, has declared unlawful various activities by unauthorized unions or organizers which have as their objective the securing of jurisdiction over the unwilling workmen of any particular employer or group of employers or an employes' group, by means other than (speaking generally) an intellectual appeal. (Lab.Code, §§ 1115–1122, 1126.)

Conflicting Claims of Relative Values.

In a general sense, there should be no serious dispute as to the acceptability of the following principles: (1) That the terms and conditions of labor employment be fixed through bargaining; (2) that the bargaining power of management and labor be substantially equal; (3) that labor-management contracts result from voluntary agreements; (4) that lawful collective agreements be mutually respected and enforceable; (5) that physical violence in labor disputes be avoided; (6) that the individual workman be free from employer influence in selecting his bargaining agent; (7) that the individual workman have an unimpeded right ("full freedom") to express his personal choice in the selection of a representative and a like voice in governing the affairs of his organization.

The difficulties arise in the practical attainment of the desirable ends and among those difficulties the following are noted:

Probably above all else in principle, democracy in labor unions is important to the workman. Democracy to an individual workman may conceivably mean (we are not at this point intimating any view as our own) any or all of the following "rights": to belong to a union, or not, as he may choose; to freely select his own bargaining agents; to change them when he wishes; to have the power, through majority vote, to instruct his representatives as to the terms and conditions of labor which he wishes to have negotiated; to *not* be excluded from employment in a particular shop because of a union shop contract with a union other than his own; to *not* be compelled to pay union dues as a condition of retaining employment in a shop wherein the contract has been negotiated neither by his own union nor by any representative authorized by him, and perhaps not even in an industry wherein the contract has been negotiated by his own union; etc. But no more can the rank and file individual workmen conduct the business of a union than can the rank and file voters of a nation or state conduct its governmental and business affairs. Even though we pride ourselves in our democracy, we run the business of our country as a republic; i.e., through elected representatives and through officers and agents who have either been elected, or been appointed by those who have been elected.

To union officers, some of the following considerations may appear in the forefront of importance: In the broader markets union labor must compete with non-union labor as well as with the organized power of management; the closer the union comes to complete control of the relevant labor market the greater will be its ability to negotiate on substantially equal, or superior, terms with management, and to that end recruitment of members by various concerted pressures, as well as by purely intellectual appeals, will appear highly desirable, if not necessary. As to authority to act, the negotiating officers no doubt will feel that they should be able to make firm offers and demands and have available an area for give and take; they must base their demands on an accurate analysis of complex factors and may, themselves, distrust the judgment of the rank and file members on business matters; the union negotiators must be free to act with dispatch. Furthermore, it may be assumed the officers believe that the union needs power to combat employer tactics which might follow execution of the collective agreement, and to that end want a definite term contract with provisions for a union shop, exclusive bargaining rights, maintenance of membership, charge-off of dues, etc. It thus becomes apparent that, even as in governmental affairs generally, he who organizes and gains the strength of united effort must to that end surrender some portion of his individual freedom. To determine within the issues of the litigation before us the extent to which the law of California regulates the freedom of the individual workman and the power of his union over him as opposed to his power over the union, is essential to proper resolution of such issues.

[23] Certainly advancement of the interests of the individual workman, of his right to organize and to bargain collectively —service to benefit *him* in all the conditions and circumstances of his work—is the compelling reason for government protection of labor organizations. As nearly as labor may be said to have a governmentally declared Bill of Rights in California, it is that enunciated in section 923. It is that section which undertakes to insure to each individual workman freedom to associate, to organize, to select representatives to negotiate for his group, and through those representatives and the strength of his organization, to bargain collectively. In particular it is that section which provides for the workman whatever democracy there may be in his union. The American Civil Liberties Union in an official statement entitled "Democracy in Labor Unions" (Sept. 1958, Report) has well enunciated the important principles which, insofar as they are statutorily protected at all in California, find primary declaration in Labor Code section 923, with further implementation as to certain applications of those principles encompassed in sections 921 and 922, 1115 through 1122, and section 1126. The statement of the American Civil Liberties Union is of particular significance in that it strongly supports the forthright acceptance of section 923 in its solicitude that "the individual workman have full freedom of * * * *self*-organization, and designation of representatives of *his own* choosing, to negotiate the terms and conditions of his employment" (italics added), and at the same time recognizes that practicality presents obstacles which preclude Utopia in union democracy.

"Democracy in Labor Unions.

"For the American Civil Liberties Union there are at least three compelling reasons why unions should have a special responsibility to maintain democratic standards.

"First, a union in collective bargaining acts as the representative of every worker within the bargaining unit. It speaks for him, makes choices of policies which vitally affect him, and negotiates a contract which binds him. His wages, his seniority, his holidays, and even his retirement are all governed by this contract which becomes the basic law of his working life. The union in bargaining, helps make laws; in processing grievances acts to enforce those laws; and in settling grievances helps interpret and apply those laws. It is the worker's economic legislature, policeman, and judge. The union, in short, is the worker's industrial government. The union's power is the power to govern the working lives of those for whom it bargains, and like all governing power should be exercised democratically.

"Second, unions should be democratic because the power which they hold over the individual worker is largely derived from government. Labor relations acts such as the Wagner Act affirmatively protect the right to organize and place the government's stamp of approval on unionization. Even more, these statutes provide that government shall certify unions as the officially designated representatives and compel employers to recognize these unions as the exclusive representatives of all workers within the bargaining units. Unions, in the exercise of these powers derived from government, should maintain the same democratic standards required by government itself.

"Third, unions should be democratic because their principal moral justification is that they introduce an element of democracy into the government of industry. They permit workers to have a voice in determining the conditions under which they shall work. This high objective of industrial democracy can be fulfilled only if unions which sit at the bargaining table are themselves democratic. Only to the extent that workers are allowed to participate in determining union policies do they become self-governing.

"The Obstacles of Union Democracy.

"Any demands for union democracy must be tempered with a clear recognition of the serious obstacles which face unions in maintaining democratic standards. Historically, many unions have had to struggle for survival against deadly attacks by employers who did not hesitate to use spies, bribery, intimidation, or even physical violence. Although large segments of management have fully accepted collective bargaining, anti-union practices are not dead and the old fears remain. Employers are not the only enemy, for rival unions may constantly threaten the union's very existence by raiding its membership or seeking to supplant it as bargaining representative. Even though employers accept unions and no rival union threatens, much of collective bargaining is carried on with the prospect of an ultimate deadlock and resort to economic force. The state of seige, the cold war, and the strike do not provide a healthy climate for the growth of democratic processes. * * *"

After stating the view that a workman having trouble within his union "can place little reliance on the courts, for [first] their results are too unpredictable" and, second, "judicial remedies are so costly and time consuming that few workers can afford to vindicate their rights," the ACLU report continues: "The third weakness of judicial relief is that many union members have such a deep-seated hostility to the courts that any action may be self-defeating. In a number of instances courts have removed racketeering leaders from office and held new elections only to have the same leaders reelected. The desire to repudiate judicial interference is greater than the desire to repudiate corrupt leadership. * * *

"At the present time the only effective protection is given by the courts. They are burdened with out-moded rules and a confusing body of precedents, resort to them is costly and time consuming, and they are viewed with such hostility by union members that their action is often self-defeating. It is clear that further protection is needed. * * *

"The ACLU still believes that organized labor can and should provide protection of union democracy. * * * If unions fail to take effective action to provide increased protection for the rights of union members, then no alternative is left but to seek increased legal protection."

[24] Neither before nor since the 1947 and 1955 enactments (adding and amending the Jurisdictional Strike Law) has California's statutory law prohibited collective bargaining agreements relating to union security, insofar as the word "security" is used in a legitimate sense. As has been shown

hereinabove state laws as interpreted and applied by the courts prior to the Jurisdictional Strike Law of 1947 had permitted recruitment of individual workmen by unions engaged in organizational (more accurately, jurisdictional) drives, aided and abetted by employer action, voluntary or union-compelled. State laws as they should be interpreted and applied, at least since the 1947 and subsequent enactments, continue to permit, to encourage and protect collective bargaining agreements which have been freely negotiated and entered into by and between employes' lawfully authorized organizations and their employers whereby the interests of each party may be advanced. These interests, on the part of labor, of course include reasonable union security clauses, but if we are to give reasonable effect to the plain language of section 923, as it should be understood in the light of the policy of the state as more particularly defined in the legislation of 1947 and subsequent amendments, neither an unauthorized union or pretending employes' agent nor an employer acting alone or in concert with any unauthorized employe representative may lawfully attack an established employer-employe relationship and compel the unwilling employes to join the *particular* unchosen union as a condition of retaining or obtaining employment.

[25, 26] If employes have voluntarily become members of any "labor organization" (not financed or interfered with by their employer, Lab.Code, § 1117) and have thereby or therein selected and authorized a bargaining agent, such agent and the employer are free to bargain for the respective legitimate objectives of both workmen and employer. The ensuing collective agreement may, of course, include provisions for union security, such as a union shop, maintenance of membership, and exclusive bargaining rights with the employer. Having freely participated (or had the opportunity to so participate) in the selection of his bargaining agent and in the authorization of that agent to negotiate terms and conditions of employment for him, the workman, like the employer, is bound by the contract negotiated. And the workman, whether union or non-union, who thereafter requests employment in a capacity covered by the contract must be deemed to accept the terms of the contract when he accepts such employment. But there are certain rights of the individual workman which should be held inalienable and which no contract, whether made by the individual or by his group, can bargain away.

[27] No compact between an employer and a labor organization can deprive the employes initially or permanently of their "freedom" to participate in the selection, or in the changing if they see fit, of their bargaining representatives. It is entirely unnecessary, and would go beyond the issues at bench, for us to consider at this time what limitations, if any, may reasonably be placed on such matters as the freedom of employes to reorganize, or to hold elections for the selection or retirement of their representatives, or to declare new objectives for collective bargaining negotiations. The need for and scope of any such regulations could well have legislative attention. It is sufficient here to suggest that in ordinary governmental matters—national, state and local—every citizen of adult age has the right to vote (unless he has lost it, as in the event of imprisonment for felonious crime) but his representatives, once elected, serve for a term of years (unless, as is provided for in some states, sooner recalled). And it is imperative to remember that if the workmen have no vote in choosing those who negotiate the terms and conditions under which they are to labor then, *a fortiori*, they have no voice at the bargaining table. This would not be the "full freedom" which section 923 purports to insure them; rather, it would be something akin to serfdom. And if a workman with established employment is compelled on pain of dismissal from such employment to pay dues to an invading union which he has not had a voice in selecting as his representative, that is taxation without representation.

The issue here is not between labor and management; it is between the workmen and the unions: Are we to have workmen's unions with unions' officers? Or bosses' unions with unions' workmen? Section 923 spells the answer. The right of the workman to participate in the selection of his bargaining agent and in the government of his union is the workman's right of self-determination. Organization and collective bargaining are but tools to that end.

[28] A strike with a jurisdictional objective is unlawful in certain applications hereinabove suggested and hereinafter discussed, not because a strike as such is unlawful or unprotected but because it, like any other concerted action, must have a lawful objective. In James v. Marinship Corp. (decided 1944, before enactment of the Jurisdictional Strike Law), 25 Cal.2d 721, 155 P.2d 329, 160 A.L.R. 900, this court in a pioneering opinion held: "[25 Cal.2d at page 728, 155 P.2d at page 333.] [1] It should be recognized * * * that a union may use the various forms of concerted action, such as strike, picketing, or boycott, to enforce an objective that is reasonably related to any legitimate interest of organized labor. [Citations.] [2] It is equally well settled that the object of concerted labor activity must be proper and that it must be sought by lawful means, otherwise the persons injured by such activity may obtain damages or injunctive relief. [Citations.] [3] Although recent decisions in the United States Supreme Court hold that a state cannot deprive labor unions of the right of free speech through peaceful picketing [citations], these decisions do not deny a state the power to protect against abuses of the right. * * * [25 Cal.2d at page 730, 55 P.2d at page 334.] [I]n Senn v. Tile Layers Protective Union, 301 U.S. 468 [57 S.Ct. 857, 81 L.Ed. 1229], the leading case associating picketing with the right of free speech, the court, while affirming the action of a state court in refusing to enjoin picketing to compel Senn to stop working with his own hands, stated (301 U.S. at page 481, 57 S.Ct. at page 863): 'Whether it was wise for the State to permit the unions to do so is a question of its public policy—not our concern. The Fourteenth Amendment does not prohibit it.' Thus a state may impose limitations upon picketing or other concerted action if the 'end sought' is not permissible under state law and public policy * * [25 Cal.2d at page 731, [14], 55 P.2d at page 335.] Where a union has * * * attained a monopoly of the supply of labor by means of closed shop agreements and other forms of collective labor action, such a union occupies a quasi public position similar to that of a public service business and it has certain corresponding obligations. * * * Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living. [Citations.] * * * [25 Cal.2d at page 732, 55 P.2d at page 336, quoting from Wilson v. Newspaper & Mail Deliverers' Union (1938), 123 N.J.Eq. 347 [197 A. 720].] '[T]he holders of the monopoly must not exercise their power in an arbitrary, unreasonable manner so as to bring injury to others.' * * * [25 Cal.2d at page 734, 55 P.2d at page 337.] [A]s said in 4 Restatement, Torts, p. 136, comment to section 794: 'The expression of public policy is not confined to legislation and criminal law; in passing upon the propriety of an object [of concerted labor action], public policy otherwise defined is an important factor. If the object is an act against which the law has definitely set its face, it is not a proper object of concerted action.'"

In full accord with the above quoted holding is 4 Restatement, Torts, § 794, p. 135: "An act by an employer which would be a crime or a violation of a legislative enactment or contrary to defined public policy is not a proper object of concerted action against him by workers." Supporting the same principles see, e. g., Hughes v. Superior Court (1948), 32 Cal.2d 850, 198 P.2d 885, affirmed Hughes v. Superior Court (1950), 339 U.S. 460 [70 S.Ct. 718, 94 L.Ed. 985]. And, as forcefully put by Professor Francis E. Jones, Jr., writing in the Southern California Law Review (1956, Vol. 29, p. 137 at 159) on the subject "Free Speech and Picketing": "One very persuasive argument for the inexorable validity of the unlawful objective test is the complete reluctance of the labor counsel to attack it.

Counsel for appellant union pickets in the Giboney case [Giboney v. Empire Storage & Ice Co. (1949), 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834] made no effort in their appellate brief to refute the unlawful purpose test * * * Equally persuasive, considering the source, as an acceptance of the test by labor, and well-nigh conclusive, because of the inescapability of the argument, is the following excerpt from an artice in The American Federationist [Sept. 1949, "High Court and Labor II"] by Woll, Glenn and Thatcher, then counsel for A. F. of L.: 'They [the union] could not use their right of free speech to compel an employer to violate a valid state law any more than the right of free speech could be used to compel an employer to commit arson, burglary or other recognized crime'. * * *"

[29] There is no longer any doubt as to the right of a state (in a situation where questions of Taft-Hartley preemption are absent) to declare and enforce a policy against coercion by employers of employes in their choice of a collective bargaining representative. In International Brotherhood of Teamsters etc. v. Vogt, Inc. (1957) supra, 354 U.S. 284, 77 S.Ct. 1166, 1 L.Ed.2d 1347, the court summarized a series of its cases which "established a broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy" (at page 293 of 354 U.S. at page 1171 of 77 S.Ct.). This series of cases includes Hughes v. Superior Court (1950), supra, 339 U.S. 460, 70 S.Ct. 718, 94 L.Ed. 985 (which holds that the state policy can be expressed by the judiciary rather than the Legislature); International Brotherhood of Teamsters Union etc. v. Hanke (1950), 339 U.S. 470, 70 S.Ct. 773, 94 L.Ed. 995 (which holds that a state can enjoin picketing of a business, conducted by the owner without employes, to secure compliance with a demand to become a union shop); and Building Service Employees International Union Local 262 v. Gazzam (1950), 339 U.S. 532, 70 S.Ct. 784, 94 L.Ed. 1045 (which holds that a state can enjoin picketing, after an unsuccessful attempt at unionization and the owner's refusal to sign a contract with the union as bargaining agent, where the picketing violates state statutory policy against employer coercion of employe choice of bargaining representative). The Vogt opinion (at pages 293–294 of 354 U.S., at pages 1170–1171, of 77 S.Ct.) then summarizes Pappas v. Stacey (1955), 151 Me. 36 [116 A.2d 497], appeal dismissed, Stacey v. Pappas (1955), 350 U.S. 870, 76 S.Ct. 117, 100 L.Ed. 770 (which concerned a statute substantially similar to the second paragraph of our Labor Code section 923), and concludes (at page 294 of 354 U.S. at page 1171 of 77 S.Ct.), "The Stacey case is this case. As in Stacey, * * * the picketing was to coerce the employer to put pressure on his employees to join the union, in violation of the declared policy of the State [the policy in Vogt was declared by Wis.Stats., § 111.06 (2) (b)]. (For a declaration of similar congressional policy, see § 8 of the National Labor Relations Act, 61 Stat. 140, 29 U.S.C. § 158, 29 U.S.C.A. § 158.) The cases discussed above all hold that, consistent with the Fourteenth Amendment, a State may enjoin such conduct."

Implementing in part the generally declared policy of Labor Code section 923, section 1115 specifies that "A jurisdictional strike as herein defined is hereby declared to be against the public policy of the State of California and is hereby declared to be unlawful." The immediate effect of this legislation, as heretofore indicated, was to supersede the decisions of this court in such cases as McKay v. Retail Auto. Salesman's Local Union No. 1067 (1940), supra, 16 Cal.2d 311, 106 P.2d 373; Shafer v. Registered Pharmacists Union (1940), supra, 16 Cal.2d 379, 106 P.2d 403; C. S. Smith Metropolitan Market Co. v. Lyons (1940), supra, 16 Cal.2d 389, 106 P.2d 414; and Fortenbury v. Superior Court (1940), supra, 16 Cal.2d 405, 106 P.2d 411, to whatever extent such decisions[12] enunciated or rested on a presumed state policy inconsistent with that statutorily evidenced in section 1115 and related sections. We must, therefore, as was suggested in Garmon v. San Diego Bldg. Trades Council (1958), 49 Cal.2d 595, 607 et seq., 320 P.2d 473, in applying any of our earlier decisions, determine whether the principle on which we then rested may still be considered as controlling. (The reversal of Garmon by San Diego Building Trades Council v. Garmon (1959), 79 S.Ct. 773, of course does not affect state labor law independent of federally preempted matters.)

Section 1117 (enacted 1947, Stats.1947, ch. 1388, p. 2952, as amended by Stats. 1955, ch. 1417) declares that "As used herein, 'labor organization' means any organization *or any agency or employee representation committee* or any local unit thereof in which employees participate, and exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, hours of employment or conditions of work, which labor organization is not found to be or to have been financed in whole or in part, interfered with, dominated or controlled by the employer or any employer association within one year of the commencement of any proceeding brought under this chapter.

* * *

"As used herein, 'person' means any person, association, organization, partnership, corporation, unincorporated association, or *labor organization*." (Italics added.)

Section 1118 defines "jurisdictional strike" to mean "a concerted refusal to perform work for an employer or *any other concerted interference with an employer's operation or business*, arising out of a controversy between two or more labor organizations as to which of them has or should have the exclusive right to bargain collectively with an employer on behalf of his employees or any of them or arising out of a controversy between two or more labor organizations as to which of them has or should have the exclusive right to have its members perform work for an employer." (Italics added.) The situation covered by this section is the situation which was dealt with by this court in McKay v. Retail Auto. Salesman's Local Union No. 1067 (1940), supra, 16 Cal.2d 311, 328–331, 106 P. 2d 373. That this legislation necessarily supplants our decision in the McKay and related cases insofar as it is pertinent is obvious.

[30] The language quoted (§ 1117) specifies that "any agency or employee representation committee * * * in which employees participate * * * for the purpose, in whole or in part, of dealing with employers" concerning matters of employer-employe relationship is a "labor organization" within the meaning of the Jurisdictional Strike Law so long as the agency or "representation committee" is not (and within the period limited has not been) "financed in whole or in part, interfered with, dominated or controlled by the employer." Thus, any group of employes, organized or unorganized in the formal, conventional sense, who were free of the proscribed employer influence and who determined and informed their employer through their authorized spokesman that they were unwilling to accede to the demands of an organizer or unwanted union, and that they were satisfied with the terms and conditions of their employment and wished to continue in the established employe-employer relationship, would thereby act as and constitute a "labor organization" within the meaning of sections 1117 and 1118.

[31] It is a primary rule that "courts are bound to give effect to statutes accord-

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[12] We note that Park & Tilford Import Corp. v. International etc. of Teamsters (1946), 27 Cal.2d 599, 165 P.2d 891, 162 A.L.R. 1426, dealt with a related subject. But that case rested on federal rather than state law. Furthermore, it was decided before the Jurisdictional Strike Law was enacted. As a concomitant of the evolution of the law in this field the decision furnishes no impediment to the conclusions we reach today.

ing to the usual, ordinary import of the language employed in framing them." (In re Alpine (1928), 203 Cal. 731, 737 [3], 265 P. 947, 58 A.L.R. 1500.) Particularly is this true when the law as so construed is consistent with the general policy of the state. As applied to the subject legislation, the meaning is that a jurisdictional strike has been shown, insofar as the *jurisdictional* feature is concerned, whenever it appears that there is a controversy between any two "labor organizations" within the definition of section 1117 "as to which of them has or should have the exclusive right to bargain collectively with an employer on behalf of his employees or any of them, or * * as to which of them has or should have the exclusive right to have its members perform work for an employer." The statute also makes clear that a "jurisdictional strike" does not require any cessation of work but may be found to exist whenever there is "any * * * *concerted interference* with an employer's *operation or business*." (Italics added.)

Section 1119, fitting the jurisdictional strike legislation into the policy generally enunciated in section 923, cautions that "Nothing in this chapter shall be construed to interfere with collective bargaining *subject to the prohibitions herein set forth*, nor to prohibit any individual *voluntarily* becoming or remaining a member of a labor organization, or from personally *requesting* any other individual to join a labor organization." (Italics added.) Again, it must be noticed, the Legislature carefully preserves the basic elements of collective bargaining which are declared in section 923 to be the policy of the state, including, of course, the specifically mentioned right of self-organization to that end, but makes it clear that the exercise of the right to bargain collectively is "subject to the prohibitions herein set forth" and that such limitations do *not* "prohibit *any* individual *voluntarily* becoming or *remaining* a member of a labor organization, or from personally *requesting* any other individual to join" (italics added) the organization, a right such as that which was upheld in In re Porterfield (1946), supra, 28 Cal.2d 91, 168 P.2d 706, 167 A.L.R. 675.

[32] The Jurisdictional Strike Law makes clear that it is the policy of the state to avoid jurisdictional strife and, as a corollary, to protect both management and labor organizations in established employer-employe relations. Collective bargaining agreements would seem to be scarcely worth the time and effort of negotiation if the first labor organization to thereafter come along with a view to recruitment could impose concerted pressure against the employer to induce the latter to agree that he will discharge his employes unless they pay dues to the new union and accept it in place of their established organization as their sole bargaining agent. Section 923 in proscribing employer interference with the freedom of his workmen to act as they choose in labor organization matters makes no distinction between organized and unorganized workmen. The freedom of the workmen from employer influence is the same in both cases.

[33] Pressure by a union or its organizers to compel an employer, whose employes are not organized and do not wish to be organized, to execute a closed or union shop agreement with the unauthorized union, is essentially a jurisdictional dispute pressure. The object of such pressure is not to gain *security* protection in respect to an existing collective bargaining contract or for the *employes' authorized* labor organization; rather, its objective is to secure jurisdiction over (to displace and replace through employer compulsion) an employer-employe relationship to which the union is not a party. It is clear that this type of concerted activity—this objective—is contrary to the policy of California (Lab. Code, §§ 921–923, 1115–1122; Garmon v. San Diego Bldg. Trades Council (1958), supra, 49 Cal.2d 595, 606–609, 320 P.2d 473; Seven Up Bottling Co. of Los Angeles v. Grocery etc. Union (1953), 40 Cal.2d 368, 377–379, 254 P.2d 544, 33 A.L.R.2d 327.) The pertinent legislation, however, makes it equally clear that, subject to the statutory

restrictions which have been noted, "Any collective bargaining agreement *between an employer and a labor organization* [i. e., as authorized by Lab.Code, §§ 921 and 923] shall be enforceable at law or in equity, and a breach of such collective bargaining agreement by any party thereto shall be subject to the same remedies, including injunctive relief, as are available on other contracts in the courts of this State." (Lab. Code, § 1126; italics added.)

Further definition of the state's policy as to protection of the individual workman is encompassed in section 922 of the Labor Code. It provides that "Any person * * who coerces or compels any person to enter into an agreement * * * *not to join* * * * *any labor organization*, as a condition of securing employment or continuing in the employment of any such person is guilty of a misdemeanor." (Italics added.) The quoted language makes clear at least two propositions: (1) that it is unlawful to coerce any person to agree *not* to become a member of *any* labor organization as a condition for securing or continuing in employment, and (2) that requiring a workman to enter into the agreement "as a condition of securing employment or continuing in the employment" constitutes coercion or compulsion.

[34-36] Section 1122, being *in pari materia* with sections 921 and 923 and further implementing the policy therein established, provides additional protection of the individual workman. "Any person who organizes an employee group which is financed in whole or in part, *interfered with* or dominated or controlled *by the employer* or any employer association * * * shall be liable to suit by any person who is injured thereby." (Lab.Code, § 1122; italics added.) The proscription in this language extends not alone to the act of organizing an employe group *financed* by an employer but also to organizing any group of employes wherein the act of organizing such group, i. e., obtaining the consent of the employes to join in the organization, is either "interfered with or dominated or controlled by the employer." Each of the quoted words must be presumed to have been used intelligently and designedly and for an express purpose by the Legislature. (Clements v. T. R. Bechtel Co. (1954), 43 Cal.2d 227, 233 [9], 273 P.2d 5; Read v. Rahn (1884), 65 Cal. 343, 4 P. 111; Bakersfield Home Bldg. Co. v. J. R. McAlpine etc. Co. (1938), 26 Cal.App.2d 444, 448 [2], 79 P.2d 410.) For an employer to notify his employes that he has agreed with a union which is, and which he knows to be, unauthorized and unwanted by his employes, that they must join such union and be represented by it or be dismissed from employment would appear to constitute an unlawful interference by the employer and subject him to the liability imposed by section 1122.

[37, 38] Industrial self-government is a goal to be desired. Insofar as problems arise over issues which are not specifically covered by legislation they should be "solved by looking to the policy of the legislation and fashioning a remedy that will effectuate that policy." (See Textile Workers Union of America v. Lincoln Mills (1957), supra, 353 U.S. 448, 457, 77 S.Ct. 912, 1 L.Ed.2d 972.)

[39] An effect to be desired is to decrease activities in the wasteful arena of economic combat and increase reliance on the orderly processes of administering collective bargaining agreements; viz., promotion of peaceful negotiation and, when necessary, arbitration or court proceedings, but not strikes, lockouts, work stoppages, mass picketing, or acts of physical or economic violence which, if not specially protected, would constitute torts or other violation of laws, state or federal.

An agreement freely negotiated and voluntarily accepted by and between a union and an employer is likely to be mutually respected and, assuming lawful objectives, can be specifically enforced through arbitration or court action, if the impelling forces of self-respect, honesty and public opinion prove insufficient. Such an agreement can scarcely be reached, and the climate for its duration will likely be unpleasant, if it is the product of coercion starting with a jurisdictional assault. And the combat is no less in truth jurisdictional where the assault is made by an organizer upon a relationship between an employer and his satisfied unorganized or self-organized employes than where the attack is on a formally organized union-employer agreement. If jurisdiction-objective raids by attacking organizers on establishments enjoying freely and fairly negotiated labor agreements are precluded and if labor and employer objectives and tactics are carefully screened, it well may be that the means of enforcement toward legitimate ends can be greatly strengthened.[13]

The constitutionality of the Jurisdictional Strike Law, hereinabove quoted and discussed, has already been established. (Seven Up Bottling Co. of Los Angeles v. Grocery etc. Union (1953), supra, 40 Cal.2d 368, 254 P.2d 544, 33 A.L.R.2d 327.) In that case plaintiff employer, among other things, raised the contention (which had been specifically rejected in McKay, Shafer, and C. S. Smith) that defendant unions, by concerted activity designed to force the employer to require its employes to join a particular union, were seeking to compel a violation of sections 921 through 923 of the Labor Code. This court, because of its holding that defendants' activity was unlawful under the Jurisdictional Strike Law, determined that it was at that time unnecessary to consider the contention as to the true meaning of sections 921 through 923. (See at pages 371–372 of 40 Cal.2d at pages 546–547 of 254 P.2d.) Thus the proper interpretation of those sections in the light of the statutory and decisional evolution since their first consideration by this court in the McKay and related cases was expressly left open, as it also was in Garmon v. San Diego Bldg. Trades Council (1958), supra, 49 Cal.2d 595, 613–614, 320 P.2d 473, and is for the first time re-examined in the case at bar.

In the first Garmon case (Garmon v. San Diego Bldg. Trades Council (1955), 45 Cal.2d 657, 665 [13], 291 P.2d 1) and in Charles H. Benton, Inc. v. Painters Union (1955), 45 Cal.2d 677, 681 [5], 291 P.2d 13, this court, without finding necessity or occasion to reconsider the construction of sections 921 through 923 in the light of the then recently enacted *in pari materia* legislation, proceeded on the view that under state law an employer could not obtain injunctive relief from or damages for union activity designed to compel the employer to execute a closed or union shop agreement. (These decisions also antedated International Brotherhood of Teamsters etc. v. Vogt, Inc. (1957), supra, 354 U.S. 284, 77 S.Ct. 1166, 1 L.Ed.2d 1347, with its comprehensive discussion of the federal court's evolution of views subsequent to its decision in Thornhill v. State of Alabama (1940), 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093. In Garmon defendant unions picketed and exerted secondarv pressure to induce plaintiff employers to execute a union shop agreement. Plaintiffs' employes were not members of, and indicated that they did not wish to join or be represented by, a union. The evidence, it would seem, might have warranted finding that the activities come within the Jurisdictional Strike Law. But the employers' business affected interstate commerce, and the union objective and activity were unfair labor practices under the federal Labor Management Relations Act of 1947 (29 U.S.C.A. § 158). It was held (at page 666 [2b] of 45 Cal.2d, at page 7 of 291 P.2d) that "Concerted labor activities for such a purpose thus were unlawful under the federal statute, and for that reason were not privileged under the California law." A judgment enjoining the activities and awarding damages on the mistaken interpretation of California law and equally mistaken application of federal law was affirmed.

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[13] E. g., as by contract provisions authorizing specific enforcement through arbitration of "hot cargo" agreements (see Jones, Specific Enforcement of "Hot Cargo" Provisions in Collective Bargaining Agreements (1959), 6 U.C.L.A.L.Rev. 85; Note (1959), 6 U.C.L.A.L.Rev. 101) or by specific performance through court action of collective bargaining agreements (Silva v. Mercier (1949), supra, 33 Cal.2d 704, 204 P.2d 609).

The United States Supreme Court granted certiorari in Garmon and, in San Diego Building Trades Council v. Garmon (1957), 353 U.S. 26, 77 S.Ct. 607, 1 L.Ed. 2d 618, "vacated" the judgment of this court and remanded the case for proceedings not inconsistent with its opinions in that case and in Guss v. Utah Labor Relations Board (1957), 353 U.S. 1, 77 S.Ct. 598, 1 L.Ed.2d 601, and Amalgamated Meat Cutters etc. v. Fairlawn Meats (1957), 353 U.S. 20, 23, 77 S.Ct. 604, 1 L.Ed.2d 613. The pertinent holding (as stated in the Meat Cutters case) was that "The conduct here restrained—an effort [unlawful under state policy] by a union not representing a majority of his employees to compel an employer to agree to a union shop contract—is conduct of which the National Act has taken hold. § 8(b) (2), 61 Stat. 141, 29 U.S.C. § 158(b) (2), 29 U.S.C.A. § 158(b) (2). Garner v. Teamsters Union [(1953, 346 U.S. 485, 491, 74 S.Ct. 161, 98 L.Ed. 228], teaches that in such circumstances a State cannot afford a remedy [by injunction] parallel to that provided by the Act." In its 1957 Garmon decision the high federal court did not reach the question whether the award of damages could be upheld under United Construction Workers etc. v. Laburnum Construction Co. (1954), 347 U.S. 656, 74 S.Ct. 833, 98 L.Ed. 1025. It said (at page 29 of 353 U.S., at page 608 of 77 S.Ct.), "Laburnum sustained an award of damages under state tort law for violent conduct. We cannot know that the California court would have interpreted its own state law to allow an award of damages in this different situation."

Upon the remand of Garmon a majority of this court concluded that its earlier view (enunciated in 1940 preceding both the enactment of Lab.Code, §§ 1131–1136, but see In re Blaney (1947), supra, 30 Cal. 2d 643, 184 P.2d 892; Lab.Code, §§ 1115–1122; Lab.Code, § 1126, and the evolution of the relevant decisional law, federal and state, all as hereinabove reviewed) that the policy of California as declared in sections 921 through 923 permitted confederation between employer and an unauthorized union wherein they compacted to require unwilling employes, not members of the union, to join and maintain membership in such union, and thereby to "choose" it as their bargaining agent, on pain of dismissal from employment, had in effect, been "superseded" by the later legislation. (Garmon v. San Diego Bldg. Trades Council (1958), supra, 49 Cal.2d 595, 607 [5a], 613–614 [9], 320 P.2d 473.) We held that "The trial court correctly concluded from the evidence that by their demand the defendants sought to require the plaintiffs to interfere with the bargaining rights of their employees and force upon them terms and conditions of their employment and labor representation not of their own choosing and which in fact they had rejected. If the plaintiffs had acceded to the demand of the defendants a definite case of coercion on the part of the plaintiffs with respect to the bargaining rights of their employees, contrary to law, would have been accomplished." Therefore, this court reversed the Garmon trial court judgment insofar as it awarded injunctive relief but affirmed its award of damages.

The United States Supreme Court again granted certiorari and, in San Diego Building Trades Council v. Garmon (1959), supra, 79 S.Ct. 773, reversed our second Garmon judgment. It said, "When an activity is arguably subject to § 7 [setting out federally protected labor activities] or § 8 [setting out federal unfair labor practices] of the [Taft-Hartley] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted. * * * [T]he failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. * * * *The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.* * * * Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of § 7 or § 8 of the Act, the State's jurisdiction is displaced." (Italics added.)

The second United States Supreme Court Garmon decision and its predecessors, such as Garner, are disturbing because of their relation (or lack of relation) to the principles enunciated in Yick Wo v. Hopkins (1886), 118 U.S. 356, 370, 6 S.Ct. 1064, 30 L.Ed. 220: "the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws." Fourteenth Amendment equal protection precludes local administration of an ordinance, enacted under the police power, to arbitrarily forbid the conduct of a business because the businessman is Chinese. But apparently Fifth Amendment due process does not preclude interpretation by the high federal court of an act of Congress, enacted under the commerce power, and administration of the act by a federal board, to permit unlawful destruction of a business because the businessman is small. In the former (Yick Wo) situation destruction of the business by local government action (denial of a license) was not permitted; in the latter (Garmon) situation destruction of the business is permitted by federal board action (setting up a monetary limitation upon the size of a business which the board will protect) and federal court interpretation of a federal law to preclude any state action in this area where the board will not act. The board of supervisors were not allowed to unlawfully destroy Yick Wo's laundry by arbitrarily withholding a permit, but the San Diego unions are allowed to unlawfully destroy the Garmons' lumber mill by virtue of the federal board's refusal to take jurisdiction of the controversy and the state's federally declared inability to exercise such jurisdiction. We think the distinction between government action on the one hand and government inaction on the other hand is too subtle to be appreciated by the man whose means of livelihood are taken from him. The businessman is not reassured by the fact that his business is destroyed, not because of "an evil eye and an unequal hand" of local authority (at pages 373–374 of 118 U.S. at pages 1072–1073 of 6 S.Ct.), but because the federal agency which has sole jurisdiction to remedy his situation rules that it is too busy to bother with him.

[40] In many situations there remains uncertainty as to whether a state can afford relief for conduct which violates state law and also may be potentially subject to regulation under Taft-Hartley. We are told that the state cannot control peaceful activities which are "arguably" subject to the national board's determination that they can be federally regulated. We do not know whether a state can properly rest its regulation of or redress for conduct which is tortious under state law upon a state finding that the conduct in fact has no arguable relation to interstate commerce or in fact is a threat to public peace or private interest in freedom from violence or intimidation. We do know that as to "activities that are potentially subject to federal regulation" but which are refused such regulation because the business with which such activities are connected amounts to less than the minimum (currently announced as $500,000 a year in the case of

a retail business) over which the federal agency elects to exercise its jurisdiction, there is an area of lawlessness. In this area, even though the act be tortious by state law and an unfair labor practice by federal law, the persons damaged can have no relief, either prohibitory or compensatory. They can have no relief because the federal agency refuses to act, but since potentially it *could* act, the state must *not* act. This peculiar type of segregation for justice which affords relief to the financially great but denies even a hearing to the small (less than $500,000 a year in the case of a retail) businessman does not commend itself to us. Until we are advised to the contrary we shall not enlarge the lawless area by assuming that a state cannot control unlawful conduct where, upon conflicting evidence, it finds as a fact that the conduct has no arguable effect on interstate commerce or has a potential of violence.

As we have pointed out, however, the federal Garmon decisions do not affect disposition of the case at bar, for it does not appear that the subject activities have even an arguable relation to interstate commerce. Our conclusions in the present case, furthermore, are independent of, and do not rest on, our second Garmon decision, supra, 49 Cal.2d 595, 320 P.2d 473.

The limited effect, in any event, of the second Garmon decision of this court upon the statutory and decisional rules of this state is apparent not only from the court's treatment therein of the McKay and related cases but from its express statement. The opinion in the subject Garmon decision (at pages 612–613 of 49 Cal.2d, at pages 483–484 of 320 P.2d) points out that "we are requested to reconsider" McKay, but concludes that such reconsideration is unnecessary "for the reason that the result sought by the request has already been accomplished" by enactment of the Jurisdictional Strike Law which made the activities of defendants in McKay unlawful (assuming that plaintiffs there did not comprise an employer dominated or "interfered with" union), by the decision in Seven Up Bottling Co. v. Grocery etc. Union (1953), supra, 40 Cal.2d 368, 254 P.2d 544, 33 A.L.R.2d 327, which upheld the constitutionality of that act, and by the decision in International Brotherhood of Teamsters etc. v. Vogt, Inc. (1957), supra, 354 U.S. 284, 294, 77 S.Ct. 1166, 1 L.Ed.2d 1347, *that where interstate commerce is not involved* a state can enjoin picketing to coerce an employer to put pressure on his employes to join a union. It was unnecessary to, and this court did not undertake to, discuss the many other California cases (including those hereinabove summarized) which uphold the general legality of the union shop agreement with appropriate security covenants. Rather, it is concluded (at page 614 of 49 Cal.2d, at page 484 of 320 P.2d) that "Whether they are or are not consistent with present law may * * * be more appropriately pointed out as questions with reference thereto are presented."

[41–44] From the preceding discussion it appears that section 923, by its terms in context with the *in pari materia* statutes, recognizes and encourages collective bargaining contracts which result from "voluntary agreement between employer and employees"[14] but forbids an employer (whether acting alone or in concert with an unauthorized union or organizer who has not been chosen by a majority of the freely participating workmen he seeks to represent) from coercing his unwilling employes to accept a particular union or person as their bargaining agent. If it is unlawful for the employer to so coerce his employes it must also be unlawful for him to agree that he will coerce them to that end. Mistakenly calling such a compact a "union security" agreement does not alter its character. On the other hand, where the employes of a shop or a craft, through their lawfully designated representative, negotiate for union security within any limits not barred by law, the objective is proper and can be attained and enforced.

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[14] It should be noted that where an organization which has been fairly selected by the majority vote of all the employes of an employer (or of an affected craft or group) seeks union security, the organization acting for all such employes may use lawful forms of pressure (e. g., the strike, picketing, etc.) to induce the employer to grant that condition of labor. From what has hereinabove been said in the discussion of sections 921 and 923 it is obvious that the freedom declared is the freedom from employer interference in such matters as association, organization and selection of representatives, to the end that through the democratically chosen representatives collective bargaining agreements may be negotiated. The workmen, having had the opportunity to freely participate in such procedures, are, of course, bound by the majority vote, and the contract negotiated will be the contract of all.

Again, we emphasize, we are not now concerned with defining the validity or the reach of legislation insofar as in some particular application not now before us it might be urged to unlawfully curtail the freedom of competent parties to contract for lawful objectives. Such issues may be resolved when they arise.

From the diverse issues as to labor matters in the many cases which have come before the courts of this state it has appeared that California could well further implement her generally sound and beneficial labor-management laws by spelling out regulations and procedures whereby employes might be assured that without fear of reprisal they may exercise the full freedoms essential to self-determination as workmen in a democracy, with free participation in determining the policies of their union and confidence in the integrity of their officers, and whereby also the many honest and able leaders in labor's activities may be better protected in their work, in the confidence of the men they serve and of the public at large, to the ultimate benefit of all concerned. It is to the honor of the many capable and upright pioneers and builders of labor's organizations that they have accomplished so much for so many with so little of scandal, but those regrettable defections which have occurred have injured not only the workmen directly affected but also inevitably to some extent all of the workmen and all of the officers who are the labor unions of America. The workmen as individuals and their unions and officers would seem to deserve some better protection in the subject areas than the law now gives them, not that the state should become officious in union affairs but that it should more adequately aid and protect labor in the conduct of its own business.

Although the Legislature has not stated what procedures as to the attainment of union designation or authorization can or shall be followed by a union which represents some but not all of the employes of an employer, who may or may not desire union representation, it has unequivocally declared a general policy favoring the right of voluntary organization and voluntary security measures and forbidding coercion or compulsion of employes by employers in the choosing of representatives.

[45, 46] The ordinance here under consideration does not properly regulate these last mentioned matters which the Legislature has left unregulated. Rather, it attempts to cut across the legislatively declared state-wide policy as to the full freedom of employes for self-organization and for voluntarily selecting, and negotiating agreements through, their own employe committees or agencies. The ordinance contravenes that policy as to voluntary self-organization and authorized negotiations for union security and partially duplicates that policy insofar as it prohibits jurisdictional-organizational assaults on unwilling employe-employer relationships. The ordinance sweepingly prohibits (in § 3) "*any* agreement * * * which excludes *any* person from employment because of non-membership in a labor organization" (italics added), and makes any injury resulting from any violation of such prohibition remediable by injunction (with possible ensuing punishment for contempt) as well as by damages. Its conflict with the terms and the reach of the hereinabove discussed statutes of this state as we construe and apply those statutes today cannot be eliminated by mechanical separation of its language. Therefore, the ordinance

must be declared invalid in its entirety. (See In re Blaney (1947), supra, 30 Cal.2d 643, 653–656 [4], 184 P.2d 892.)

[47] There remains to be determined what character of relief, if any, may be afforded in this action under existing law. In our determination of the question whether the complaint states a cause of action for the legislatively denounced tort of coercing an employer to compel his employes to join and be represented by a labor organization not selected by the employes (Lab.Code, §§ 920–923, 1115–1122, as explained ante), or a cause of action for any other tort, we apply the familiar rule that "In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties" (Code Civ.Proc., § 452). From the complaint as hereinabove summarized it appears that a majority of plaintiff's employes, as members of defendant union, authorize and support its demands for execution of the collective agreement. The crucial fact as to the legality of the demand by defendants that plaintiff execute the union shop agreement desired by plaintiff, defendants, and a majority of plaintiff's employes, is pointed up by the averment that the contract is to be one "providing, *as permitted by the NLRA (Taft-Hartley)*, for union membership after 30 days employment." (Italics added.) This allegation combines with all other pertinent averments to make it clear that plaintiff is not being asked to interfere with the free choice of his employes in the selection of their bargaining agent. He is being asked to sign only an agreement of which both he and a majority of his employes approve. Whether each and all of the terms of the subject compact have been heretofore tentatively settled upon and nothing is left to be done but the signing, or whether some items remain to be negotiated, is immaterial. This is immaterial because the only fair construction of the facts pleaded is that in either event the contract to be executed will be one negotiated by a bargaining agent voluntarily selected and thereunto authorized by a majority of plaintiff's employes acting with complete freedom from employer interference.

[48] Obviously the *procedures* prerequisite to execution of this contract have not been and need not be precisely the same as the procedures required by Taft-Hartley.[15] The contract cannot be attained under the national act because the National Labor Relations Board cannot take jurisdiction of this intrastate matter. It cannot be arrived at by California statutorily prescribed procedures similar in all details to Taft-Hartley because California has no such detailed legislation.[16] But the essence of the alle-

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[15] The federal statute (National Labor Relations [Wagner] Act, 1935, 49 Stat. 449, as amended by Labor Management Relations [Taft-Hartley] Act, 1947, 61 Stat. 136; 29 U.S.C.A. § 141 et seq. [§§ 8 and 9 of the act are §§ 158 and 159 of 29 U.S.C.A.]) provides the following conditions under which a union shop contract may be attained:

> The labor organization must be the collective bargaining representative designated or selected by a majority of employes in an appropriate bargaining unit; there is no particular statutory procedure prescribed for this selection or designation (except where there are controversies concerning representation or recognition, in which cases the procedure is set forth in § 9(c)); the representative selected by the majority is the exclusive collective bargaining representative of all the employes in the unit. (§§ 8(a) (3) (i), 9(a).) The National Labor Relations Board decides what bargaining unit is appropriate. (§§ 8(a) (3) (i), 9 (b).) The union must have filed copies of its constitution and bylaws and certain reports with the Secretary of Labor and filed non-Communist affidavits with the board. (§§ 8(a) (3) (i), 9(f), (g), (h).)

[16] The want of any governmentally prescribed procedure by which the affected employes will be assured of a free vote (without fear of reprisal) to determine whether a particular union is to be their representative should not preclude the parties themselves from arranging for such an election. Labor organizations could well take the lead in this as they have in so many advances for the welfare of workmen. Plaintiff employer here resisted the demands of defendants for a

gation concerning Taft-Hartley, as we understand it in context, is that the union shop contract which the parties here wish to execute was (or will be) negotiated and agreed upon by plaintiff employer and defendant union only after all plaintiff's employes to be covered by the agreement had (or shall have had) the opportunity, free from interference by plaintiff, to participate in choosing (or in rejecting) the union as their collective bargaining representative authorized to negotiate for legitimate terms and conditions of employment, and after a majority of the employes had (or shall have) so selected and authorized the union. This, fundamentally, is "as permitted by the NLRA (Taft-Hartley)" and is precisely as authorized by Labor Code section 923.

[49] Inasmuch as defendants' objective—a lawfully negotiated union shop contract—is proper, and the means by which they seek such objective are lawful,[17] plaintiff has no cause of action.

For the reasons above stated, the judgment is affirmed.

SHENK and SPENCE, JJ., concur.

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union security compact not because of hostility to the union or to union security but because compliance with those demands would have violated the ordinance. From our decision he now learns that the ordinance is invalid and no legal impediment to execution of the contract appears. But in the interest of orderly and fair procedures, and the avoidance of disputes following execution of union security contracts, the following matters merit mention.

Plaintiff's employes are not parties to this litigation. Plaintiff, or some other employer in a similar situation, before entering into any union security compact, might wish some assurance that a majority of his employes do in fact desire to be represented by the union; i. e., assurance that he will not commit the tort of forcing a union shop upon an unwilling majority of employes if he agrees to a union security contract. Surely the employer's mere furnishing to his employes of the opportunity to hold an election (preferably equally participated in and supervised by the union) would not be interference with their rights of self-organization and selection of their bargaining representative, or interference with or undue support of the union.

[17] The allegation that defendants "persist in demanding he [plaintiff] sign a union contract" avers, at the most, conduct which the Restatement (4 Rest., Torts (1939), § 779), in its chapter on "Labor Disputes," calls "fair persuasion"; i. e., exhortation without threat of physical harm or economic loss, molestation or harassment (mere persistence is not necessarily harassment), or material and fraudulent misrepresentations. Obviously these means, which can lawfully be used (for a proper object) against the employer's own employes, and against third persons, to induce them to refrain from working for or dealing with the employer (see id., §§ 798–801), can lawfully be used directly against the employer.

The refusal of union men to work with non-union men is a traditional weapon of organized labor. Such concerted refusal might, in some circumstances, violate the Jurisdictional Strike Law (Lab.Code, §§ 1115–1122) but those circumstances are not shown here.

The allegation that "members of Local 1157 are conspiring to have non-union painters join the said union and they persist in refusing to work with non-union painters" does not in its context suggest any improper activity directed against plaintiff. It has been said that "conspiracy" is "a word which imports illegality" (Pierce v. Stablemen's Union (1909), supra, 156 Cal. 70, 75, 103 P. 324) but the bare word is a mere conclusion and, without supporting facts showing illegality, does not allege unlawful coercion (see McKay v. Retail Auto. Salesman's Local Union No. 1067 (1940), supra, 16 Cal.2d 311, 325 [11], 106 P.2d 373). As used in the complaint here the subject allegation appears, at most, to constitute an attempt to plead a violation of section 6 of the subject ordinance, which provides that "Any combination or conspiracy by two or more persons to cause the discharge of any person * * * because he is not a member of a labor organization, by inducing or attempting to induce any other person to refuse to work with such person, shall be illegal." Since the ordinance is void a violation of its terms is immaterial.

McCOMB, Justice.

I concur in the judgment in this case; also in the careful and accurate reasoning of Mr. Justice SCHAUER in support of the judgment.

In addition, it is my view that the field has been occupied by the people of the United States when they adopted the Constitution of the United States and by the people of the State of California by the adoption of the Constitution of this state.

The right to contract is a natural and inalienable right protected by both the federal and state Constitutions. The citizen's rights of liberty, property, and the pursuit of happiness, which are protected by the United States Constitution and the California Constitution, apply as fully to his right to contract, unlimited by unnecessary regulation, as they do to the individual's freedom from arrest or restraint of person. This liberty of contract, which includes contracts to work, contracts to employ, and liberty freely to make such contracts, means freedom from arbitrary restraint, subject only to reasonable regulation to safeguard the public interest.

The power to restrict the right of private contract is strictly limited to police regulations in behalf of the public health, safety, morals and welfare. The Legislature may not limit parties in their power to incorporate in their contracts, otherwise valid, such terms as may be mutually satisfactory to them. Nor does the Legislature have the power to impose regulations which infringe upon the constitutional rights of the parties making the contract.

The foregoing principles have been recognized in a long line of decisions by the Supreme Court of the United States, the Supreme Court of California, and numerous other courts of last resort. See cases cited in 16 C.J.S. (1956) Constitutional Law, § 210, p. 1065 et seq.; 11 Am.Jur. (1937) Constitutional Law, § 339, p. 1153, § 344, p. 1168.

The following excerpts are just a few which support the principles above announced and they illustrate that the federal and state Constitutions have completely occupied the field of freedom of contract, guaranteeing to citizens the broadest liberty in entering into contracts which are mutually satisfactory to them.

In Allgeyer v. State of Louisiana, 165 U.S. 578, at page 589, 17 S.Ct. 427, at page 431, 41 L.Ed. 832, the Supreme Court of the United States in discussing the right of the State of Louisiana to limit the issuance of marine insurance policies to companies authorized to do business in that state said: "As so construed, we think the statute is a violation of the fourteenth amendment of the federal constitution, in that it deprives the defendants of their liberty without due process of law. * * * The 'liberty' mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

In Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353, at page 356, 51 S.Ct. 476, at page 477, 75 L.Ed. 1112, the Supreme Court of the United States said: "The general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts."

In New Method Laundry Co. v. MacCann, 174 Cal. 26, at page 32, 161 P. 990, at page 992, which granted an injunction restraining a former employee of a laundry from soliciting business from customers whose names appeared on the laundry's list of customers, but not from receiving laundry work from customers of his former employer tendered him without solicitation on his part, the court said: "To restrain a person, lawfully engaged in a laundry business, from receiving unlaundered goods from certain former patrons is to sanction, to that extent, the establishment of a trade blacklist, thereby depriving such patrons, without any fault on their part, of the right to have their laundry work done where they will. The constitutional guaranties of liberty include the privilege of every citizen to freely select those tradesmen to whom he may desire to extend his patronage, and equity cannot invade or take away this right, either directly or indirectly."

In Snell v. Bradbury, 139 Cal. 379, 381, 73 P. 150, 151, this court said: "The right to acquire, possess, and protect property includes the right to make all reasonable contracts with respect thereto, and this right is guaranteed by the Constitution. The right of the 'owner is invaded if he is not at liberty to contract with others respecting the use to which he may subject his property, or the manner in which he may enjoy it.' Stimson Mill Co. v. Braun, 136 Cal. 122, 125, 68 P. 481, 57 L.R.A. 726."

In Ex parte Dickey, 144 Cal. 234, at page 237, 77 P. 924, at page 925, 66 L.R.A. 928, involving a statute limiting the compensation of employment agents, this court said, quoting from Holden v. Hardy, 169 U.S. 366, 18 S.Ct. 383, 42 L.Ed. 780: "'As the possession of property, of which a person cannot be deprived, doubtless implies that such property may be acquired, it is safe to say that a state of law which undertakes to deprive any class of persons of the general power to acquire property would also be obnoxious to the same provision (due process of law). Indeed, we may go a step further, and say that, as property can only be legally acquired, as between living persons, by contract, a general prohibition against entering into contracts with respect to property, or having as their object the acquisition of property, would be equally invalid.'"

In the same case, 144 Cal. at page 238, 77 P. at page 925, the court said: "This right of contract common to the followers of all legitimate vocations is an asset of the petitioner in his chosen occupation, and, as has been said, is a part of the property in the enjoyment of which he is guaranteed protection by the Constitution."

In Ex parte Hayden, 147 Cal. 649, 650, 82 P. 315, 316, 1 L.R.A.,N.S., 184, we stated: "It has come to be well recognized that the liberty and the pursuit of happiness, in which the individual is protected by the Constitution of the United States and of the state, applies as fully to his right of contract, his right to follow a legitimate vocation untrammeled by unnecessary regulations, as it does to the freedom from arrest or restraint of his person. * * *

"Putting out of contemplation, therefore, the fundamental right of the government to subject private property to taxation and to take such property in time of public calamity and peril, the right of the state to impose burdens upon such property where the business is legitimate and innocuous, in other words, to regulate harmless vocations, is found in the police power alone."

In Ex parte Drexel, 147 Cal. 763, 764, 82 P. 429, 430, 2 L.R.A.,N.S., 588, it was stated: "The liberty mentioned is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purpose above mentioned. * * And the court further declare that a statute prohibiting, regulating, or interfering with private business can be upheld only under the police power, and that the police power can be rightfully exercised only when the statute in question is for the protection of the public safety, the public health, or the public morals."

On page 767 of 147 Cal., on page 431 of 82 P. of the same case it was said: "The law, therefore, being settled that the Legislature cannot prohibit or seriously interfere with the right of the citizen to make harmless contracts touching the acquisition, protection, management, and enjoyment of property—contracts which do not wrongfully affect the lawful rights of others, or the public safety, health, or morals—the remaining question in these cases at bar is whether trading stamps or coupons constitute contracts which are outside the protection of the constitutional principles above declared."

In Stimson Mill Co. v. Braun, 136 Cal. 122, 125, 68 P. 481, 482, 57 L.R.A. 726, it is stated: "The right of property antedates all constitutions, and the individual's protection in the enjoyment of this right is one of the chief objects of society. He has the right to enjoy his property and improve the same according to his own desires, in any way consistent with the rights of others, subject only to the just demands of the state. This right is invaded if he is not at liberty to contract with others respecting the use to which he may subject his property, or the manner in which he may enjoy it. The legislature may prescribe the form in which contracts shall be executed in order that they may be valid or binding, but it cannot limit the right of parties to incorporate into their contracts respecting property, otherwise valid, such terms as may be mutually satisfactory to them. A statute declaring invalid any contract by the owner of real property for the construction of a building thereon, unless it is provided therein that the contract price shall be payable only in money, is unconstitutional, in that it is an infringement upon the right of the owner in the possession and enjoyment of his property."

In Gibbs v. Tally, 133 Cal. 373, 377, 65 P. 970, 972, 60 L.R.A. 815, this court said: "It is also an unreasonable and unnecessary restriction upon the power to make contracts. (Citations.) It clearly contravenes the provisions of section 1, art. I, of the constitution of the state, and the fourteenth amendment to the constitution of the United States. It is not—and clearly it could not be—contended that this law is a regulation which comes within what is called the 'police power'."

In Ex parte Quarg, 149 Cal. 79, 80, 84 P. 766, 5 L.R.A.,N.S., 183, appears the following: "The constitutional guaranty securing to every person the right of 'acquiring, possessing and protecting property,' refers to the right to acquire and possess the absolute and unqualified title to every species of property recognized by law, with all the rights incidental thereto, and, in connection with the right of personal liberty, it includes the right to dispose of such property in such innocent manner as he pleases, and to sell it for such price as he can obtain in fair barter. Any statute which interferes with this right, except in cases where the public health, morals, or safety, or the general welfare authorizes such restriction as an exercise of the police power is to the extent of such interference unconstitutional and void."

In Credit Bureau of San Diego v. Johnson, 61 Cal.App.2d Supp. 834, 839, 142 P. 2d 963, 966, the court said: "The right to make lawful contracts are rights enjoyed by the citizens under the protection of the Fourteenth Amendment of the Constitution of the United States. * * *

"* * * Can it be said that the Employer's Liability Act and the provisions of the State Constitution authorizing the statute was intended to abrogate the constitutional right of the parties to so contract? In approaching this problem we cannot assume that the Legislature either wilfully or ignorantly intended to violate the organic law of the United States."

GIBSON, C. J., and TRAYNOR, J., concur in the judgment.

52 Cal.2d 222

RETAIL CLERKS' UNION, LOCAL NO. 1364, AFL–CIO (an unincorporated association) et al., Petitioners,

v.

SUPERIOR COURT of the State of California, In and For the COUNTY OF TRINITY, Respondent; Cornelius A. Hood et al., Real Parties in Interest.

Sac. 6938.

Supreme Court of California,
In Bank.
May 19, 1959.

Rehearing Denied June 18, 1959.

Original prohibition proceeding. The Supreme Court, Schauer, J., held that where employers sought injunctive relief against picketing by unions to compel employers to execute collective bargaining agreements with unions in alleged violation of county "right to work" ordinance, and unions instituted instant prohibition proceeding after preliminary injunction issued, the Supreme Court, even though it held that the ordinance was invalid as conflicting with state law, would permit the injunction action to continue inasmuch as relief conceivably could be afforded under the same state law.

Alternative writ discharged and preemptory writ denied.

Traynor, J., and Gibson, C. J., dissented in part.

1. Prohibition 🔑28

Where employers sought injunctive relief against picketing by unions to compel employers to execute collective bargaining agreements with unions, and unions asserted that exclusive jurisdiction of controversy was in National Labor Relations Board and the federal courts and alleged in their cross complaint that employers had coerced the employees, and the employers in their answer to the cross complaint alleged that the National Labor Relations Board had exclusive jurisdiction of the cross complaint and the unions instituted instant prohibition proceeding after preliminary injunction issued, the allegations of their conclusions of law as to jurisdiction established no facts as to effect of any alleged labor practice upon interstate commerce but there was an unresolved factual question upon the determination of which jurisdiction might eventually depend, and consequently the issue of federal pre-emption would not be determined in the prohibition proceeding but would be left for determination in the injunction proceeding. National Labor Relations Act, § 1 et seq. as amended by Labor Management Relations Act of 1947, 29 U.S.C.A. § 141 et seq.

2. Counties 🔑21½

County "right to work" ordinance contravenes the state-wide statutory policy as to freedom of employees to organize, select representatives, and through them bargain collectively for the traditional objectives of organized labor, and partially duplicates state-wide statutory policy in so far as it prohibits jurisdiction–organizational assaults on established employee-employer relationships and such conflict cannot be eliminated by mechanical separation of the language of the ordinance. West's Ann.Labor Code, §§ 920–923, 1115–1122, 1126.

3. Prohibition 🔑3(1)

Where employers sought injunctive relief against picketing by unions to compel employers to execute collective bargaining agreements with unions in alleged violation of county "right to work" ordinance, and unions instituted instant prohibition proceeding after preliminary injunction issued, the Supreme Court, even though it held that the ordinance was invalid as conflicting with state law, would permit the injunction action to continue inasmuch as relief conceivably could be afforded under the same state law. West's Ann.Labor Code, §§ 920–923, 1115–1122, 1126.

4. Labor Relations 🔑510, 756

If employers' business does not affect interstate commerce within the meaning of the federal Labor Management Relations Act of 1947 and if unions are picketing to compel employers to violate State law by coercing their employees to designate the defendants as their exclusive bargaining representatives and to accept terms and conditions of employment dictated by unions, without authorization by the employees, the employers may be entitled to both injunctive relief and damages; however, if the dispute interferes with the flow of interstate commerce then the conduct of the unions, tortious but peaceful within the federal concept, cannot be restrained or redressed by the State. National Labor Relations Act, § 1 et seq. as amended by Labor Management Relations Act of 1947, 29 U.S.C.A. § 141 et seq.; West's Ann. Labor Code, §§ 921–923, 1115–1122, 1126.

◆

Charles P. Scully, Victor Van Bourg, San Francisco, and Halpin & Halpin, Redding, for petitioners.

Stennett M. Sheppard, Dist. Atty., Weaverville, for respondent.

Severson, Davis & Larson, Nathan R. Berke and George Brunn, San Francisco, for real parties in interest.

SCHAUER, Justice.

Petitioners (labor unions and organizers) seek a writ of prohibition (with mandatory as well as prohibitory effect) to compel respondent superior court of Trinity County (1) to desist from further proceedings in an action (hereinafter sometimes referred to as the basic or superior court action) brought against petitioners by the other respondents (employers who operate a retail market), (2) to dissolve an "order for preliminary injunction and preliminary injunction" entered in such basic action, and (3) to grant petitioners' "motions to dismiss and vacate any judgment, order for preliminary injunction and preliminary injunction" entered in that action.

The complaint in the subject basic action alleges that defendants (petitioners here) are interfering with plaintiffs' business by picketing to compel plaintiffs to execute collective bargaining agreements with the demanding unions; that the unions are not authorized to represent, or to negotiate for, any of plaintiffs' employes; but that the agreements contain a provision that plaintiffs will require their employes to become and remain members of the unauthorized unions (and thereby choose and designate such unions as their bargaining representatives) as a condition of retaining their employment. Plaintiffs in the basic action seek injunctive relief and ask leave to amend to set forth damages when the amount of such damages becomes ascertainable. The complaint alleges the enactment of a county "right-to-work" ordinance which by its terms became effective on the date of the filing of the complaint. The provisions of the ordinance (No. 228) are in all material respects, including the definition of "labor organization" in section 1, identical with the provisions of the San Benito County ordinance quoted and summarized in Chavez v. Sargent, Cal., 339 P.2d 801, footnote 1. The facts in this case, however, are antithetical to those in Chavez. There all three interested entities—employer,—employes (the majority of them), and the subject union—want to execute a union shop agreement. Here, neither employers nor employes want a contract with or membership in the demanding unions. The unions, nevertheless, seek by the pressures of picketing to induce the employers to compel their employes to join such unwanted unions and constitute them their bargaining agents.

Petitioners attack the validity of the ordinance on various grounds; also they urge that exclusive jurisdiction of this controversy is in the National Labor Relations Board and the federal courts. We have concluded that the record does not establish that exclusive jurisdiction is in the federal board and courts; that the ordinance is invalid for the reasons explained in Chavez v. Sargent, 339 P.2d 801; but that since the subject superior court action seeks relief which conceivably can be afforded under the same state law which renders the ordinance void, the proceedings therein can continue on both the complaint and the defendants' cross-complaint.

The preliminary injunction attacked by petitioners restrains them from "picketing, boycott, strike, or threats" for the purpose of inducing plaintiffs-employers to make an agreement that they will require their employes to become or remain members of any labor organization as a condition of employment, in violation of Ordinance No. 228. In support of this injunction the court found, among other things, that "Most of the employees of plaintiffs are not members of the defendant labor organizations and the employees of plaintiffs have not at any time demanded from plaintiffs a union shop or union recognition, *nor have such employees participated at any time in the negotiations for collective bargaining agreements, nor have the employees of plaintiffs designated the defendants or any of them as their representatives for collective bargaining.*" (Italics added.) All of the italicized portion of the quoted finding is material but, as explained in the Chavez case, that which is of paramount importance in bringing this case within the control of the statutes which declare the overriding state policy and which must govern disposition of this litigation (Lab.Code, §§ 920–923, 1115–1122, 1126, quoted in Chavez v. Sargent, 339 P.2d 812, footnotes 6 through 8) is the fact that plaintiffs' employes have not chosen or designated petitioners as their representatives.

[1] The answer of petitioners (as defendants in the basic action) alleges "That the court has no jurisdiction of the subject matter of this action * * * in this, that the exclusive jurisdiction thereof lies with the judicial and administrative agencies of the United States." Petitioners also cross-complained, alleging that plaintiffs coerced their employes "to prevent the exercise of their right to full freedom of association, self-organization and designation of representatives of their own choosing." Plaintiffs' answer to the cross-complaint alleges "that the Court has no jurisdiction of the subject matter of the cross-complaint * * in that the exclusive jurisdiction thereof lies with the National Labor Relations Board."

Petitioners urge that by the above quoted allegation of the answer they have alleged, and by the above quoted averment of the answer to the cross-complaint plaintiffs have admitted, that the plaintiffs' business affects interstate commerce within the meaning of the federal Labor Management Relations Act of 1947, as amended (the Taft-Hartley Act, 29 U.S.C.A. § 141 et seq.); that under the national act the state court has no jurisdiction to grant relief on account of the conduct here in question; and that therefore (as in Calise v. Superior Court (1958), 159 Cal.App.2d 126, 133, 135 [3], 323 P.2d 859) prohibition should issue. We are not prepared to hold that the allegations of bare conclusions of law as to jurisdiction establish any facts as to the effect of any alleged labor practice upon interstate commerce (see Brown v. Aguilar (1927), 202 Cal. 143, 149, 259 P. 735; Kidwell v. Ketler (1905), 146 Cal. 12, 17, 18, 79 P. 514 [pleader is not bound by allegation or admission of conclusion of law]; Faulkner v. Cal. Toll Bridge Authority (1953), 40 Cal.2d 317, 329 [9], 330 [12], 253 P.2d 659 [conclusions of law are not admitted by demurrer]; Wheeler v. Oppenheimer 1956), 140 Cal.App.2d 497, 501 [3], 295 P.2d 128, 130 [conclusion of law "tendered no issue"]); rather, we agree with the superior court that in the present state of the record there is an unresolved "factual question" (in addition to questions of law) upon which determination of its jurisdiction may eventually depend. At the present time the allegations as to jurisdiction show at most that upon further proceedings in the basic action questions of federal preemption *may* be presented; but they show also that no such issue is ripe for resolution in this proceeding.

[2] Here, as in the Chavez case, the ordinance contravenes the state-wide statutory policy as to the freedom of employes to organize, select representatives, and through them bargain collectively for the traditional objectives of organized labor, subject only to such regulations and proscriptions as are set forth in the statutes or otherwise imposed by law (Lab.Code, §§ 920–923, 1115–1122, 1126; see by way of examples of "regulations and proscriptions * * * otherwise imposed," the decisional law of James v. Marinship Corp. (1944),

25 Cal.2d 721, 155 P.2d 329, 160 A.L.R. 900; Hughes v. Superior Court (1948), 32 Cal.2d 850, 198 P.2d 885, affirmed Hughes v. Superior Court (1950), 339 U.S. 460, 70 S.Ct. 718, 94 L.Ed. 985); likewise, the ordinance partially duplicates state-wide statutory policy insofar as it prohibits jurisdiction-organizational assaults on established employe-employer relationships; and its conflict with general law cannot be eliminated by mechanical separation of its language. The basic superior court action, therefore, cannot continue insofar as it seeks relief under the ordinance.

[3, 4] The subject action, however, can continue both on the complaint and on the cross-complaint in respect to any relevant relief which is not, on the facts, precluded by federal law and which is provided under state law as declared in sections 921 through 923, sections 1115 through 1122, and section 1126 of the Labor Code. (Chavez v. Sargent, 339 P.2d 812.) If it develops that plaintiffs' business does not affect interstate commerce within the meaning of the Labor Management Relations Act of 1947, and that defendants are picketing to compel plaintiffs (the employers) to violate state law by coercing their employes to designate the defendants as their exclusive bargaining representatives, and to accept terms and conditions of employment dictated by defendants, without authorization by plaintiffs' employes, then plaintiffs may be entitled to both injunctive relief and damages. If it develops that the subject dispute interferes with the flow of interstate commerce (see the Taft-Hartley declaration of policy and purpose, 29 U.S.C.A. § 141), then the alleged conduct of defendants, tortious but peaceful within the federal concept, cannot be restrained or redressed by the state. This conclusion follows because no facts are alleged or found which tend to exclude plaintiffs from the class segregated by the federal authority[1] for non-access to the courts. (San Diego Building Trades Council v. Garmon (1959), 79 S.Ct. 773; San Diego Bldg. Trades Council v. Garmon (1957), 353 U.S. 26, 77 S.Ct. 607, 1 L.Ed.2d 618.)

The preliminary injunction enjoins "any picketing, boycott, strike, or threats for the purpose of forcing and inducing plaintiffs to make an agreement requiring plaintiffs' employees to become or remain members of * * * any * * * labor organization, in order to obtain, retain or continue in employment with plaintiffs *which in any way is in violation of Ordinance No. 228 of the County of Trinity, which became effective on September 18, 1957.*" (Italics added.) The unitalicized portion of the preliminary injunction is proper, for it enjoins conduct which under the circumstances found is tortious under the above referred to sections of the Labor Code and which has not been shown to affect interstate commerce so as to bring it within the purview of the national act. The emphasized portion of the preliminary injunction, characterizing the enjoined conduct as violative of the invalid ordinance, is mere descriptive surplusage, utterly void in any application.

For the reasons above stated, the alternative writ is discharged and the peremptory writ is denied.

SHENK and SPENCE, JJ., concur.

McCOMB, Justice.

I concur in the judgment and opinion for the reasons expressed in my concurring opinion in Chavez v. Sargent, 339 P.2d 836.

TRAYNOR, Justice.

I concur in the judgment insofar as it determines that the Trinity County ordinance is invalid. It is my opinion, however, that the finding relied upon by the majority opinion does not establish that petitioners' objective was unlawful under state law and that the preliminary injunction is therefore without support in the record.

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[1] The National Labor Relations Board, according to its present self-imposed limitation of jurisdiction, will not act in cases of alleged unfair labor practices where the employer is a retailer with a gross annual business of less than $500,000.

Petitioners, certain unions and their officers seeking to organize plaintiffs' Super Market employees, commenced picketing the market to induce plaintiffs to execute union shop agreements. Plaintiffs' employees had not selected the unions as their bargaining agents, and it does not appear that they wish to be organized or to work under a union shop agreement. The majority opinion holds that picketing or other concerted activities by the unions to secure union shop agreements is therefore unlawful under state law. In the companion case of Chavez v. Sargent, 339 P.2d 801, the majority opinion holds that a union or closed shop agreement is lawful if a majority of the employees wish it and that in such a case picketing or other peaceful concerted activity to secure a union or closed shop is likewise lawful.

This is new law in this state. The majority opinions purport to find it in sections 920–923, 1115–1120, 1122, and 1126 of the Labor Code. Since sections 920–923 had been interpreted to permit conduct now found to be proscribed, the majority opinions invoke the later-enacted Jurisdictional Strike Act (Labor Code, §§ 1115–1120) and Labor Code section 1122 to support their conclusion that organizational activity carried on without the support of or against the wishes of a majority of the employees involved is unlawful. The Jurisdictional Strike Act, however, deals only with disputes between two or more labor organizations, and accordingly, to make its provisions relevant to a dispute between organized and unorganized labor, the majority opinions are driven to create a fictitious labor organization consisting of the unorganized employees and then pitting that unorganized "organization" against the unions.

The Jurisdictional Strike Act says nothing whatever about the new test of legality now adopted. To avoid the prohibition of organizational activities by a majority of the employees against a dissident unorganized minority under the new construction of that act the majority opinions judicially amend it to permit jurisdictional strikes carried on by unions representing a majority of the employees involved. Such amendment is a flagrant usurpation of legislative power.

Furthermore, neither section 1122 nor 1126 supports the new rules created by the majority opinions. Section 1122, like section 923, proscribes employer interference with labor organizations. Far from indicating a legislative repudiation of the settled judicial interpretation of section 923 when section 1122 was enacted, it constitutes a legislative adoption of that interpretation. Section 1126 merely provides for the enforcement of collective bargaining agreements. It is silent as to the validity of closed or union shop provisions in such agreements or the legality of concerted activity undertaken to secure them.

Before the decision of this court in Garmon v. San Diego Bldg. Trades Council, 49 Cal.2d 595, 320 P.2d 473, it was settled that a closed or union shop is a proper objective of concerted labor activity, since it is reasonably related to union welfare and the betterment of working conditions whether or not any or a majority of the employees belong to the union or wish to bargain collectively. Parkinson Co. v. Bldg. Trades Council, 154 Cal. 581, 98 P. 1027, 21 L.R.A.,N.S., 550; McKay v. Retail Auto. S. L. Union No. 1067, 16 Cal.2d 311, 315–325, 106 P.2d 373; C. S. Smith Metropolitan Market Co. v. Lyons, 16 Cal.2d 389, 401, 106 P.2d 414; Magill Bros. v. Bldg. Service, etc., Union, 20 Cal.2d 506, 508, 127 P.2d 542; James v. Marinship Corp., 25 Cal.2d 721, 730, 155 P.2d 329, 160 A.L.R. 900; Park & Tilford Import Corp. v. International, etc., of Teamsters, 27 Cal.2d 599, 604, 165 P.2d 891, 162 A.L.R. 1426; Charles H. Benton, Inc. v. Painters Local Union, 45 Cal.2d 677, 681, 291 P.2d 13. The reasons for permitting picketing to compel a closed or union shop, even when none of the employees belong to the picketing union, were articulated in C. S. Smith Metropolitan Market Co. v. Lyons, 16 Cal. 2d 389, 401, 106 P.2d 414, 421: "The members of a labor organization may have a substantial interest in the employment relations of an employer although none of them is or ever has been employed by him. The reason for this is that the employment relations of every employer affect the working conditions and bargaining power of employees throughout the industry in which he competes. Hence, where union and nonunion employees are engaged in a similar occupation and their respective employers are engaged in trade competition one with another, the efforts of the union to extend its membership to the employments in which it has no foothold is not an unreasonable aim." See also Schauer, J. dissenting in Bautista v. Jones, 25 Cal.2d 746, 767, 783, 155 P.2d 343.

In the Garmon case, by reinterpreting section 923 of the Labor Code and invoking the Jurisdictional Strike Act, the court held that a union shop contract is an unlawful objective under state law when none of the employees wish to join or be represented by the union. The court concluded that by signing a union shop agreement the employer would interfere with his employees' rights "in the designation of * * * representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" (Labor Code, § 923) in violation of section 923. As I pointed out in my dissent in the Garmon case, the court in effect overruled a settled rule of decision to the contrary and in particular Shafer v. Registered Pharmacists Union, 16 Cal.2d 379, 383–388, 106 P.2d 403, which expressly held that sections 920–923 of the Labor Code do not restrict the right of labor to engage in concerted activity to attain a closed or union shop.

The Garmon case dealt with a business that affected interstate commerce and was reversed on the question of federal preemption in San Diego Building Trades Council v. Garmon, 79 S.Ct. 773. Moreover, it was decided on an erroneous assumption that the conduct found tortious under state law was also illegal under federal law. As the United States Supreme Court pointed out, however, it was by no means clear that the conduct involved violated federal law. In fact, it may have been protected by that law. See Labor Management Relations Act, §§ 7, 8(b), 29 U.S.C.A. §§ 157, 158(b). If, despite these weaknesses in this court's Garmon decision, the majority opinions in the present cases adhered to it on the question of the illegality of union or closed shop contracts and concerted activity to achieve them under state law, it would be necessary to determine if that case controls the present ones. In my opinion, however, there is no basis whatsoever in the statutory law of this state for distinguishing between a closed or union shop agreement sought by a union representing a majority of the employees and such an agreement sought by a union representing none or only a minority of the employees. By agreeing to hire only union members or to require new employees to join the union, the employer in either case assists the union in controlling the labor market and thereby enables it to recruit and retain members. It makes no difference to the nonunion employee who wishes to remain unorganized whether he is compelled to accede to the wishes of a majority of his fellow employees in the same shop or to the pressure of a union seeking to organize a shop in which it has not yet gained a foothold. If the employer accedes to the demand for a closed or union shop in either case, he interferes with the right of unorganized employees to remain unorganized. Such interference was not proscribed before the Garmon case, for it was merely incidental to the union's pursuit of a proper objective. Section 923 does not provide that a closed or union shop is a lawful objective when the union has a majority but an unlawful objective when it does not. It does not make the legality of concerted union activity turn on the extent of the success the union has already achieved in the particular shop it seeks to organize. Acccordingly, if as the Garmon case held, it is unlawful employer interference to make a union or closed shop agreement with a union that does not represent a majority of the employees, it is also such interference to make such an agreement with a union that does. By distinguishing between these two situations the majority opinions in the present cases at least in part repudiate the Garmon decision, and it is significant that they now point out that "our conclusions in the present case * * * are independent of, and do not rest on, our second Garmon decision, supra, 49 Cal.2d 595, 320 P.2d 473." Chavez v. Sargent, 339 P.2d 832. For these reasons the Garmon case does not control the present cases.

The majority opinions hold that a closed or union shop agreement and concerted activity to achieve it are lawful, but only if a majority of the employees to be covered by the agreement wish it. Such a limitation is admittedly contrary to the law as it was understood before the enactment of the Jurisdictional Strike Act in 1947. Moreover, it finds no support whatever in that act as a reading of its provisions makes abundantly clear. In Seven Up Bottling Co., etc. v. Grocery, etc., Union, 40 Cal.2d 368, 381, 254 P.2d 544, 553, 33 A.L.R.2d 327, we sustained the constitutionality of the act and summarized its effect as follows: "Wisely or unwisely the Legislature has declared the policy of this state that an employer's business shall not be interfered with or the pubic welfare disrupted by reason of an argument between two or more unions as to which shall be chosen to represent his employees * * *. The act eliminates the situation where the labor organization is employer controlled, hence *an independent union is not prevented from endeavoring to organize an employer's employees when they belong to an employer controlled union or no union.*" (Italics added.) We are now told, however, that organizational pressure is "essentially a jurisdictional dispute pressure," and that "any group of employes, organized or unorganized in the formal, conventional sense, who were free of the proscribed employer influence and who determined and informed their employer through their authorized spokesman that they were unwilling to accede to the demands of an organizer or unwanted union, and that they were satisfied with the terms and conditions of their employment and wished to continue in the established employe-employer relationship, would thereby act as and constitute a 'labor organization' within the meaning of sections 1117 and 1118." Chavez v. Sargent, 339 P.2d 801, 826, 827.

To constitute a labor organization, sections 1117 and 1118 of the Labor Code require more than an agreement not to be organized. Such an organization must exist for the purpose "of dealing with employers concerning grievances, labor disputes, wages, hours of employment or conditions of work." Labor Code, § 1117. A group whose sole purpose is to express the wish of its members not to deal as a group with the employer "concerning grievances, labor disputes, wages, hours of employment or conditions of work" is obviously not an organization that exists for the purposes stated in section 1117. It is a contradiction in terms to hold that a group whose purpose is *not* to bargain is nevertheless a bargaining agent. But even if such a group could be a labor organization under section 1117, its objection to organization of the shop could not give rise to a jurisdictional strike within the meaning of section 1118. Such a strike can only arise out of a "controversy between two or more labor organizations as to which of them has or should have the exclusive right to bargain collectively with an employer * * * [or] the exclusive right to have its members perform work for an employer." Labor Code, § 1118. The wish of all or some of the employees to work in an open shop without collective bargaining is the very antithesis of a demand for the "exclusive right to bargain collectively" or for the "exclusive right to have [their] members perform work for [the] employer."

Even if a dispute with the fictitious organization created by the majority opinion in the Chavez case could give rise to a jurisdictional strike, there is no such dispute here. The trial court did not find that the employees had an "authorized spokesman" who informed the employer "that they were unwilling to accede to the demands of an organizer or unwanted union, and that they were satisfied with the terms and conditions of their employment and wished to continue in the established employe-employer relationship." Chavez v. Sargent, 339 P.2d 801, 826. It found only that "Most of the employees of plaintiffs are not members of the defendant labor organizations and the employees of plaintiffs have not at any time demanded from plaintiffs a union shop or union recognition, nor have such employees participated at any time in the negotiations for collective bargaining agreements, nor have the employees of plaintiffs designated the defendants or any of them as their representatives for collective bargaining." At most this finding simply shows that the employees were indifferent to the unions' efforts. It does not even suggest a common wish to retain the status quo. The burden of establishing the existence of a labor organization within the meaning of the Jurisdictional Strike Act is on the plaintiff seeking relief pursuant to its terms. Labor Code, § 1117. It is obvious that plaintiffs did not meet this burden. They did not even attempt to do so, for the novel theory that the Jurisdictional Strike Act might be applicable to a dispute between a union and unorganized employees was yet to be suggested for the first time in the Garmon case.

The logic of the majority opinions' invocation of the Jurisdictional Strike Act would carry them far beyond where they profess willingness to go. The existence of an organization does not depend on the number of its members so long as there are more than one. Thus, if a majority of the employees in a shop are a labor organization because they wish to remain unorganized, so must be a minority that wish to remain unorganized. Any dispute between a union and the unorganized employees would result in a jurisdictional strike if the union engaged in concerted activity to advance its position. Labor Code, § 1118. Under the reasoning of the majority opinions as few as two employees who did not wish to be organized would constitute a labor organization. If the terms of the act are to be thus distorted to make the unorganized organized, no concerted activity for collective bargaining is lawful unless the employees involved achieve substantial unanimity. As the majority opinions tacitly concede, no such absurd result was contemplated by the Legislature, and to avoid it, the majority opinions are driven to limit the application of the act to cases where the organizational activity is carried on by a union that does not represent a majority of the employees involved. The Jurisdictional Strike Act, however, does not provide for majority rule; majority rule is the creation of the majority opinions. By its terms the act protects the employer from jurisdictional strife between labor organizations without regard to where the preference of a majority of his employees may lie. He is entitled to relief if he proves that a jurisdictional strike exists. He need not prove that the union engaged in the proscribed activity does not represent a majority. As now amended the act affords him much less protection, and it may come as a shock to employers who assumed that they were protected from true jurisdictional concerted activities conducted by powerful contending unions to learn that relief may be secured only against the union found to represent a minority or none of the employees.

The majority opinions' reliance on section 1122 of the Labor Code is equally illogical. That section provides that "Any person who organizes an employee group which is financed in whole or in part, interfered with or dominated or controlled by the employer or any employer association, as well as such employer or employer association, shall be liable to suit by any person who is injured thereby. Said injured party shall recover the damages sustained by him and the costs of suit." We are told that "The proscription in this language extends not alone to the act of organizing an employe group *financed* by an employer but also to organizing any group of employes wherein the act of organizing such group, i. e., obtaining the consent of the employes to join in the organization, is either 'interfered with or dominated or controlled by the employer.'

* * * For an employer to notify his employes that he has agreed with a union which is, and which he knows to be, unauthorized and unwanted by his employes, that they must join such union and be represented by it or be dismissed from employment would appear to constitute an unlawful interference by the employer and subject him to the liability imposed by section 1122." Chavez v. Sargent, 339 P.2d 801, 828.

Section 1122 was added to the Labor Code in 1955 by the same act that amended section 1117 to put the burden on the plaintiff of establishing the existence of a labor organization. Stats.1955, ch. 1417, §§ 1–2. Its obvious purpose is to prevent abuse of the Jurisdictional Strike Act by discouraging employers from organizing company unions to create the appearance of jurisdictional strikes when none in fact exist. It prohibits, not the execution of union or closed shop agreements with independent unions, but the organizing of an employer-interfered-with group. Moreover, if it did constitute employer interference within the meaning of section 1122 to execute a closed or union shop agreement with a union that does not represent a majority of the employees, it would likewise constitute such interference to execute such an agreement with a union representing a majority of them. Here, as in the case of the Jurisdictional Strike Act, however, the majority opinions shrink from the logic of their position and read into section 1122 language that is not there to permit what in their view would be employer interference but for the wish of a majority of the employees to have a closed or union shop agreement. Before the decision in the Garmon case it was settled that the proscription of employer interference in section 923 of the Labor Code did not outlaw closed or union shop agreements even though the employees did not wish them. Not only must the similar inhibitions of section 1122 be interpreted in accord with the established interpretation of section 923 at the time section 1122 was enacted, but the failure of the Legislature to amend section 923 when it enacted both the Jurisdictional Strike Act and section 1122 affords cogent evidence that it approved the existing interpretation of section 923. See People v. Nash, 52 Cal.2d —, 338 P.2d 416; Cole v. Rush, 45 Cal.2d 345, 355, 289 P.2d 450, 54 A.L.R.2d 1137; Buckley v. Chadwick, 45 Cal.2d 183, 200, 288 P.2d 12, 289 P.2d 242.

Thus, neither the Jurisdictional Strike Act nor section 1122 of the Labor Code supports a reinterpretation of section 923 to restrict the right of workmen to engage in concerted organizational activity. Before the Garmon decision such activities were fully protected as part of the individual workman's "full freedom of association, self-organization, and designation of representatives of his own choosing." Labor Code, § 923. Of course the right of a union effectively to compete for employment on satisfactory terms for its members by seeking a closed or union shop interferes with the right of nonunion workmen to go it alone. Its recognition is not at war, however, as the majority opinions suggest, with either union democracy or majority rule unless the relevant majority is determined with myopic vision. A union that seeks control of available employment cannot arbitrarily close its ranks to qualified workmen or deny them full participation in its councils (James v. Marinship Corp., 25 Cal.2d 721, 730–734, 155 P.2d 329, 160 A.L.R. 900; Thorman v. International Alliance, etc., Employees, 49 Cal.2d 629, 632, 320 P.2d 494), and accordingly, democratic representation must be afforded to those the union claims the right to represent. Moreover, by approving the legality of a closed or union shop when a majority of the workmen directly involved wish it, the majority opinions recognize that the right to remain unorganized is subject to legitimate group interests and pressures. By looking only to the workmen immediately involved, however, the majority opinions blind themselves to the essential interrelation of working conditions in competitive businesses and choose as the relevant group whose majority may govern, not all of the workmen with interests in common, but only a small fraction of them. It is true that we have no mechanism for determining whether a majority of all workmen with common interests do or do not wish collective bargaining through unions in which they may freely participate, but if each workman the union seeks to represent is protected in his right to participate in union affairs, the danger of a minority thrusting itself on an unwilling majority in the labor market would be remote. Moreover, the "outcome of concerted activities for a closed shop depends largely on public sentiment. No competitive business can endure indefinitely without good will; no group of workers can long define the terms of its employment without public support." Park & Tilford Import Corp. v. International, etc., of Teamsters, 27 Cal.2d 599, 608, 165 P.2d 891, 897, 162 A.L.R. 1426.

One searches the California statutes relied upon by the majority opinions in vain for a hint of the new law of labor-management relations set forth today. Either the proscriptions of employer interference in sections 923 and 1122 preclude closed or union shop contracts or they do not. Neither section affords any support for the conclusion that they are sometimes lawful and sometimes not, depending on the wishes of a majority of the employees directly involved. The requirement of majority rule has been lifted from section 8 (a) (3) (i) of the federal Labor Management Relations Act. 29 U.S.C.A. §§ 158, 159. Such borrowing is obviously a legislative function. Moreover, the administrative machinery that is not only basic to the operation of the federal act but necessary to make section 8 (a) (3) (i) effective and workable is not so easily come by. The majority opinion in the Chavez case suggests that employers and unions may cooperate in conducting free elections, and so I suppose they may. But who is to determine the appropriate bargaining unit or conduct an election when the parties disagree or refuse to cooperate? See §§ 8(a) (3) (i); 9(b); 29 U.S.C.A. §§ 158, 159. These difficulties, of course, only emphasize the impropriety of usurping the legislative function. If we are to have a little Labor Management Relations Act, it is for the Legislature not this court to enact it.

I am convinced that union or closed shop agreements and concerted activities to achieve them are lawful under the law of this state whether or not a majority of the employees wish them. The majority opinions do not state that any of the cases so holding were wrongly decided, but apparently convinced that the time is now ripe for striking a new balance between the rights of organized and unorganized labor and employers, they seize upon the Jurisdictional Strike Act to achieve an objective foreign to its purpose. By enacting the Jurisdictional Strike Act the Legislature did not change or modify the policy set forth in section 923 insofar as purely organizational union activity is concerned. Only by amending that act by judicial fiat to provide for "majority rule" and applying it when it is obviously inapposite do the majority opinions achieve their aims. The conclusion is inescapable that in both method and result they have usurped legislative power.

GIBSON, C. J., concurs.

Rehearing denied; GIBSON, C. J., and TRAYNOR, J., dissenting.

PETERS, J., not participating.

52 Cal.2d 278

BELLFLOWER CITY SCHOOL DISTRICT OF LOS ANGELES COUNTY, Appellant,

v.

Carl E. SKAGGS et al., Respondents.

L. A. 25337.

Supreme Court of California,
In Bank.
June 5, 1959.
Rehearing Denied July 1, 1959.

Condemnation proceeding by school district. The Superior Court, Los Angeles County, William E. Fox, J., entered order allowing interest, from date of entry of interlocutory judgment, and school district appealed. The Supreme Court, Spence, J., held that property owners were entitled to interest upon condemnation awards from date of entry of interlocutory judgment even though under statute property owners' right to award could have been defeated by school district's exercise of its power to abandon proceedings within 30 days thereafter.

Affirmed.

Opinion, 333 P.2d 211, vacated.

1. Interest ⚷39(3)

In ordinary civil cases a judgment bears interest from date of its entry even though it is subject to direct attack. West's Ann.Code Civ.Proc. § 1264.7.

2. Interest ⚷53

Statute defining final judgment as such judgment when all possibility of direct attack thereon by way of appeal, motion for new trial, or motion to vacate judgment has been exhausted, does not purport to declare that a judgment bears interest only after it has become final, nor could it so modify constitutional provision requiring payment of interest on any judgment rendered. West's Ann.Const. art. 20, § 22; West's Ann.Code Civ.Proc. § 1264.7.

3. Eminent Domain ⚷198(1)

Interlocutory judgment in condemnation proceeding gave plaintiff right to take property and fixed defendants' right to compensation for such taking, and while at date of entry judgment did not create a present and unqualified obligation to pay money and property owners' right to award could have been defeated by plaintiff's exercise of power to abandon proceeding, after time for abandonment had passed defendants' rights sprang not from failure of plaintiff to exercise its privilege but from judgment. West's Ann.Const. art. 20, § 22; West's Ann.Code Civ.Proc. §§ 1251, 1255a, 1264.7.

4. Eminent Domain ⚷247(2)

Property owners were entitled to interest on condemnation award from date of entry of interlocutory judgment.

5. Eminent Domain ⚷247(2), 249

Under statute providing that in eminent domain proceedings plaintiff must within 30 days after final judgment pay sum of money assessed, a stay of execution is granted for convenience of condemnor but such a stay could not preclude accrual of interest on an obligation which is fixed and not subject to diminution or modification by lapse of time. West's Ann.Code Civ.Proc. § 1251.

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Harold W. Kennedy, County Counsel, Richard L. Riemer and Richard A. Del Guercio, Deputy County Counsel, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., Walter S. Rountree, Asst. Atty. Gen., Benjamin E. King, Henry K. Workman, Warren L. Abbott and Lester Ziffren, Deputy Attys. Gen., Robert E. Reed, Chief Atty., Department of Public Works, Sacramento, George C. Hadley, Asst. Chief Atty., and Thomas M. Dankert, Los Angeles, amici curiae on behalf of appellant.

Holbrook, Tarr & O'Neill, W. Sumner Holbrook, Jr., Leslie R. Tarr and Richard L. Huxtable, Los Angeles, for respondents.

Anson, Gleaves & Dowds and Milnor E. Gleaves, Los Angeles, amici curiae on behalf of respondents.

SPENCE, Justice.

Plaintiff school district appeals from an order allowing interest, from the date of entry of the interlocutory judgment, upon certain condemnation awards made in favor of the defendant property owners.

The action was brought to acquire portions of certain lots for the enlargement of an existing school site. An interlocutory judgment was entered on February 18, 1957. Plaintiff did not move for a new trial, appeal, or take steps seeking to have the judgment vacated or modified. Neither did it seek possession before title later became vested in it. It paid the principal awards and costs to the several property owners on various dates between March 20 and August 23, 1957. By agreement of the parties, these payments were conditionally accepted by the property owners without waiver of their claimed right to accrued interest. On motion of the property owners, the court thereafter made an order fixing plaintiff's liability for interest on the principal awards from the date of entry of judgment until the dates of payment. Plaintiff appeals from this order, contending that no interest accrues on an interlocutory judgment in condemnation until thirty days after all possibility of direct attack thereon has been exhausted. In our opinion this contention cannot be sustained.

[1] Section 22 of article XX of the Constitution provides that rate of interest on any "judgment rendered in any court of the State, shall be 7 per cent per annum."[1] In People v. Superior Court, 145 Cal.App.2d 683, 303 P.2d 628, an interlocutory judgment in condemnation was held to be a judgment within the meaning of this constitutional provision. It is implicit in the reasoning of that decision that interest should run from the date that the judgment is entered. The same conclusion is indicated in Vallejo & N. R. Co. v. Reed Orchard Co., 177 Cal. 249, on pages 251–252, 170 P. 426, on page 427, where it is said: "In [condemnation] proceedings the award constitutes a judgment in favor of defendant and against the plaintiff for the amount thereof, payment of which, unless the proceeding within the time be abandoned by plaintiff as provided in section 1255a, Code of Civil Procedure, shall be made within 30 days after final judgment (Code Civ.Proc., sec. 1251), and in the absence of such payment of the money awarded or deposit thereof made in court, defendant may have execution to enforce the judgment as in civil cases. (Code Civ. Proc., sec. 1252.) In this respect the rights of defendant are substantially identical with those of a plaintiff recovering a money judgment against a defendant in a civil action." See also McDaniels v. Dickey, 219 Cal. 89, 91–92, 25 P.2d 404. We note that in ordinary civil cases a judgment bears interest from the date of its entry even though it is subject to direct attack. Glenn v. Rice, 174 Cal. 269, 275–276, 162 P. 1020.

[2] Plaintiff contends that the interlocutory judgment in condemnation should draw no interest until thirty days after it becomes final within the meaning of section 1264.7 of the Code of Civil Procedure. That section provides: "The term 'judgment' as used in this title means the judgment determining the right to condemn and fixing the amount of compensation to be paid by the plaintiff. The term 'final judgment' as used in this title means such judgment when all possibility of direct attack thereon by way of appeal, motion for a new trial, or motion to vacate the judgment has been exhausted." Section 1264.7 was enacted three years after the adoption in 1934 of the above-mentioned constitutional mandate for the payment of interest on judgments. Const. art. XX, § 22. The code section does not purport to declare that a judgment bears interest only after it becomes final, nor could it so modify the Constitution. Cf. Pasadena University v. Los Angeles County, 190 Cal. 786, 788, 214 P. 868.

Plaintiff maintains, however, that section 22 of article XX applies only to judgments which create an absolute obligation to pay money and that, by virtue of sections 1251 and 1255a of the Code of Civil Procedure, no such obligation existed until thirty days after the interlocutory judgment became final under section 1264.7. Section 1251 provides: "The plaintiff must, within thirty days after final judgment, pay the sum of money assessed. * * *" By section 1255a, "Plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of thirty days after final judgment * *."

[3, 4] We do not believe section 1255a has the effect plaintiff ascribes to it. The

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[1] Two unrelated amendments were adopted in 1934 and were given the same section number.

interlocutory judgment determined the rights of the parties, giving plaintiff the right to take the property and fixing defendants' right to compensation for such taking. California S. R. Co. v. Southern Pacific R. Co., 67 Cal. 59, 63, 7 P. 123; City of Los Angeles v. Aitken, 32 Cal.App.2d 524, 527, 90 P.2d 377, 94 P.2d 1045; Lincoln Northern Ry. Co. v. Wiswell, 8 Cal.App. 578, 581, 97 P. 536. It is true that at the date of its entry the judgment did not create a present and unqualified obligation to pay money (Colusa & H. R. Co. v. Superior Court, 31 Cal.App. 746, 750, 161 P. 1011), and that the property owners' right to the award could have been defeated by plaintiff's exercise of its power to abandon the proceedings. But after the time for abandonment had passed, defendants' rights "sprang not from the failure of the plaintiff to exercise its privilege but from the judgment. In other words, the judgment from its inception gave the defendant[s] the right to receive the amount awarded * * * and the plaintiff in the action the right to take the property, and to this judgment the right to receive interest and the obligation to pay interest attached as it would attach to any other money judgment; and it was the obligation of this judgment—that is, the obligation to pay principal plus interest—that the plaintiff * * * was given the right to avoid and to assume a new and different obligation, by section 1255a * * *. When [plaintiff] waived the right or privilege granted to it by section 1255a, that section ceased to have any effect and the situation then was no different than if the right or privilege had never existed." People v. Superior Court, supra, 145 Cal.App.2d 683, 688, 303 P.2d 628, 631. Plaintiff relies on City of Los Angeles v. Aitken, supra, 32 Cal.App.2d 524, 90 P.2d 377, 94 P.2d 1045, and County of Los Angeles v. Lorbeer, 158 Cal.App.2d 804, 323 P.2d 542, as establishing that a judgment in condemnation bears interest only from the time the power to abandon expires. The Aitken case is not controlling, for the property owners there did not claim that interest ran from an earlier date. To the extent that the Lorbeer case is in conflict with the views here expressed, it is disapproved.

[5] Section 1251 of the Code of Civil Procedure grants a stay of execution for the convenience of the condemner. Such a stay cannot preclude the accrual of interest on an obligation which is "fixed and is not subject to diminution or modification by the lapse of time." Southern Public Utility Dist. v. Silva, 47 Cal.2d 163, 166, 301 P.2d 841, 843; see also People v. Superior Court, supra, 145 Cal.App.2d 683, 687–688, 303 P.2d 628.

The order is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, McCOMB, and PETERS, JJ., concur.

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52 Cal.2d 267

CITY LINCOLN-MERCURY COMPANY (a Corporation), Respondent,

v.

L. V. LINDSEY, Appellant.

L. A. 25290.

Supreme Court of California,
In Bank.
June 2, 1959.

Action by conditional seller of automobile to recover from buyer the deficiency which arose when buyer returned automobile to seller and seller resold it. The buyer cross-complained to recover the payments which he had made. The Superior Court, Los Angeles County, Jerold E. Weil, J., entered judgment for seller as to both the deficiency action and the cross complaint, and the buyer appealed. The Supreme Court, Gibson, C. J., held that the seller could not enforce conditional sales contract in that contract was void for omission of statement of time price differential and contract balance as required by the automobile conditional sale contract and so could not recover the amount of the deficiency, and that seller could offset its detriment due to the extensive use which buyer had made of automobile, resulting in a great depreciation in value, with the result that the buyer could recover nothing on his cross-complaint inasmuch as the offset was larger than the payments which had been made by buyer.

Judgment on cross complaint affirmed, and judgment in action for deficiency reversed with directions.

Opinions, 328 P.2d 288, 331 P.2d 759, vacated.

1. Sales ⚷461, 481

Where, at time buyer took delivery of new automobile and traded in his old automobile, buyer and salesman of corporate seller signed a sales order and buyer signed blank form of conditional sale contract and neither the order nor the blank form contained a statement of the time price differential or contract balance as required by automobile conditional sale contract statute, the agreement so made was illegal and unenforceable by seller, and buyer could recover payments made to seller because, as a member of the class for whose protection the statute was enacted, the buyer was not in pari delicto, notwithstanding that a few days later the seller's president signed conditional sale contract containing the required data and a copy thereof was delivered by mail to buyer. West's Ann.Civ. Code, § 2982(a).

2. Sales ⚷461

The provision in the automobile conditional sale contract statute, requiring recital in conditional sale contract of all the items there enumerated, is for the protection of the purchaser. West's Ann.Civ. Code, § 2982(a).

3. Sales ⚷461

The provision in the automobile conditional sale contract statute, requiring the express statement of the time price differential and the contract balance, was enacted to insure that the buyer, when he enters into the contract, is aware of the additional expense the payment in installments will cause him and the total extent of the indebtedness to which he will become subjected, and if this information is omitted at the time the buyer signs the contract and is provided only in a copy after seller has filled in and executed the contract, the intended warning will be of no avail to the buyer, who will already be bound when he receives the copy. West's Ann.Civ.Code, § 2982(a).

4. Sales ⚷461

The provision in the automobile conditional sale contract statute, requiring the express statement of the time price differential and the contract balance and that other enumerated items be stated, requires that such matters be stated in the contract at the time the buyer signs it. West's Ann. Civ.Code, § 2982(a).

5. Sales ⚷461

Where automobile conditional sale contract, when it was signed by buyer, contained no express statement of time price differential and contract balance as required by automobile conditional sale contract statute, the fact that the buyer could then ascertain the amounts of the missing items by calculation based on the figures appearing in the sales order did not show substantial compliance with the statute. West's Ann.Civ.Code, § 2982(a).

6. Sales ⚷461

If buyer of automobile cannot see at first glance the data which the automobile conditional sale contract statute requires to be called to his attention, the intended warning will not be effective. West's Ann.Civ. Code, § 2982(a).

7. Sales ⚷461

Where revision agreement executed by assignee of conditional sale contract and buyer of automobile related solely to the date on which payments should be made and was not intended as a new conditional sale agreement, the revision agreement was not such a re-execution or complete substitution of the original conditional sale contract as would render immaterial the illegality therein due to omission of statement of time price differential and contract balance as required by automobile conditional sale contract statute. West's Ann.Civ.Code, § 2982(a).

8. Sales ⚷461

Buyer of automobile did not waive and was not estopped to assert illegality of conditional sale contract due to omission therefrom of statement of time price differential and contract balance as required by automobile conditional sale contract, by reason of having entered into revision agreement with assignee of contract, where the revision was only a minor amendment relating solely to the date on which payments should be made and was not intended as a new conditional sale agreement. West's Ann. Civ.Code, § 2982(a).

9. Contracts ⚷134, 138(4)

A party to an illegal contract cannot ratify it and cannot be estopped from relying on the illegality and cannot waive his right to urge that defense.

10. Sales ⚷479(11)

Where automobile conditional sale contract was void due to omission of statement of time price differential and contract balance as required by automobile conditional sale contract, and buyer returned the automobile to the seller and the seller resold the automobile, the seller could not recover the amount of the deficiency. West's Ann. Civ.Code, § 2982(a).

11. Sales ⚷481

Where automobile conditional sale contract was void due to omission of statement of time price differential and contract balance as required by automobile conditional sale contract, buyer's recovery was limited to amount of cash payments which he had made and to actual retail value of his old automobile which he had traded in, without regard to the amount which the contract allowed in trade for the old automobile. West's Ann.Civ.Code, § 2982(a).

12. Sales ⚷481

Where automobile conditional sale contract was void due to omission of statement of time price differential and contract balance as required by automobile conditional sale contract statute but the seller did not act maliciously and fraudulently in violating the statute, the buyer was not entitled to punitive damages. West's Ann.Civ. Code, § 2982(a).

13. Sales ⚷481

Where automobile conditional sale contract was void due to omission of statement of time payment differential and contract balance as required by automobile conditional sale contract and buyer invoked aid of court to obtain return of what he had paid under the contract, such statute permitted allowance of offset to seller as result of detriment to seller from buyer's use or treatment of the automobile. West's Ann.Civ.Code, § 2982(a, c–e).

14. Penalties ⚷1

The courts will not impose penalties for noncompliance with statutory provisions in addition to those that are provided expressly or by necessary implication.

15. Contracts ⚷138(1)

Generally, guilty party to illegal contract cannot bring an action to enforce contract or to recover on principles of quasi contract the benefits he has conferred under the contract.

16. Sales ⚷481

Where automobile conditional sale contract was void due to omission of statement of time price differential and contract balance as required by automobile conditional sale contract and buyer sued for recovery of what he had paid under the contract and buyer had made an extensive use of the automobile and it had greatly depreciated in value when he returned the automobile to the seller, seller was entitled to an offset to the extent of the detriment the seller had sustained. West's Ann.Civ.Code, § 2982(a).

Victor Bewley, Los Angeles, for appellant.

Delbridge, Hamblin & Linton and Donald W. Hamblin, Pasadena, for respondent.

GIBSON, Chief Justice.

This case involves the questions whether a contract for the conditional sale of a motor vehicle violated the requirements contained in subdivision (a) of section 2982 of the Civil Code and, if so, what was the effect of the violation.[1]

On October 22, 1954, L. V. Lindsey bought from City Lincoln-Mercury Company, herein called the seller, a new Lincoln automobile. He immediately took delivery of the car and left with the seller a 1948 Packard sedan which he traded in as the sole down payment. At the time of this transaction Lindsey and a salesman of the seller signed a sales order, and Lindsey also signed a blank form of conditional sale contract. The sales order specified a price of $6,047.38 for the automobile, including accessories, sales tax, and license fee, a trade-in of $1,815, an unpaid balance of $4,232.38, and a provision that the "time sale price balance," the amount of which was not filled in, was to be paid in 30 monthly installments of $166.75. The sales order recited $100 as the cash value of the Packard.

The "time price differential" and the "contract balance," which are required to be stated in a conditional sale contract by subdivision (a) of section 2982, were not filled in on the sales order at the time it was signed.[2] The order contained a provision authorizing the seller to fill in all blanks on the conditional sale contract in conformity with the order. Lindsey was furnished with a copy of the sales order, and, after the conditional sale contract was signed by the seller's president about October 26, 1954, Lindsey was sent a complete and executed copy containing all the data required by the statute.

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[1] Subdivision (a) of section 2982 of the Civil Code, as it read at the date of the contract, provided: "Every conditional sale contract for the sale of a motor vehicle, with or without accessories, shall be in writing and shall contain all of the agreements between the buyer and the seller relating to the personal property described therein. It shall be signed by the buyer or his authorized representative and by the seller or its authorized representative, and when so executed an exact copy thereof shall be delivered by the seller to the buyer at the time of its execution. It shall recite the following separate items as such, in the following order: 1. The cash price of the personal property described in the conditional sale contract. 2. The amount of the buyer's down payment, and whether made in cash or represented by the net agreed value of described property traded in, or both, together with a statement of the respective amounts credited for cash and for such property. As soon as received by the dealer the dealer shall refund to the buyer or credit to the buyer on the next payment due the amount realized on any insurance policy, or rights thereunder, assigned to the seller by the buyer in connection with the conditional sale. Failure of the dealer to comply with the foregoing provision shall in no way affect the validity or enforceability of the conditional sale contract. 3. The amount unpaid on the cash price, which is the difference between Items 1 and 2. 4. The cost to the buyer of any insurance, the premium for which is included in the contract balance. 5. A description and itemization of amounts, if any, which will actually be paid by the seller or his assignee to any public officer as fees in connection with the transaction, which are included in the contract balance. 6. The amount of the unpaid balance, which is the sum of Items 3, 4, and 5. 7. The amount of the time price differential. 8. The contract balance owed by the buyer to the seller, which is the sum of Items 6 and 7. 9. The number of installments required to pay the contract balance, the amount of each installment, and the date for payment of the installments."

[2] The "time price differential," as defined by subdivision (h) of section 2981, refers to the increase in cost of the automobile to the buyer resulting from the fact that payment is to be made by installments under a conditional sale contract.

"Contract balance," as defined by subdivision (i) of section 2981, refers to the amount which the buyer agrees to pay in installments.

On October 26, 1954, the seller assigned the conditional sale contract to the Bank of America, and thereafter Lindsey and the bank executed a "Revision Agreement" which provided for an extension of the time of the payments and added that, except for this modification, the original agreement should remain in full force and effect. Lindsey paid two installments of $166.75 each and $100 as part payment of the third installment, and on March 10, 1955, he returned the Lincoln automobile to the seller. In April the bank reassigned the conditional sale contract to the seller, and the seller resold the Lincoln car secondhand for $3,238 after having made some repairs to it.

The seller sued Lindsey for the deficiency. Lindsey answered and filed a cross-complaint based on the theory that the contract was void because of violations of section 2982 of the Civil Code, that therefore the seller could not enforce it, and that Lindsey was entitled to recover the entire consideration he had paid, including $2,000 as the reasonable value of the Packard, and also exemplary damages. In the answer to the cross-complaint, the seller denied that the contract was void and alleged that Lindsey had waived and was estopped to allege any defect in the contract.

The trial court determined that the contract was void at the outset because, when signed by Lindsey, it did not contain the information required by subdivision (a) of section 2982 but that Lindsey's execution of the revision agreement, after he received a copy of the contract with all the required information, was equivalent to a re-execution of that contract in a complete form and that Lindsey was thereby estopped from claiming that the contract was unenforceable. The court further concluded that, even if the contract had remained unenforceable, Lindsey could not have recovered anything on his cross-complaint. This was based upon the court's conclusions that Lindsey could recover no more than the installments which he had paid, totaling $433.50, together with the actual retail market value of the Packard, found to be $195, and that the seller was entitled to offset against these sums the depreciation in value of the Lincoln caused by Lindsey's use of the car, which the court found exceeded the amount due Lindsey. Judgment was for the seller as to both the deficiency action and the cross-complaint, and Lindsey has appealed.

[1, 2] The agreement as made on October 22, 1954, was illegal and unenforceable by the seller. This is true even if the sales order is considered part of the conditional sale contract, because at the time Lindsey signed the documents neither the sales order nor the blank form of conditional sale contract contained a statement of the time price differential or the contract balance. The provision of section 2982, subdivision (a), requiring recital of all the items there enumerated is for the protection of the purchaser; a violation of the subdivision in this respect makes the contract unenforceable by the seller, and the buyer may recover payments made to the seller because, as a member of the class for whose protection the statute was enacted, the buyer is not in pari delicto. Estrada v. Alvarez, 38 Cal.2d 386, 389, 240 P.2d 278; Carter v. Seaboard Finance Co., 33 Cal.2d 564, 573-574, 203 P.2d 758.

[3, 4] We cannot properly hold that there was compliance with the requirements of subdivision (a) of section 2982 on the theory that the conditional sale contract was executed only when it was signed by the president of the seller, at which time it contained all required data, with a copy thereafter delivered by mail to Lindsey. Such a conclusion would require a construction of the subdivision which would wholly frustrate its purpose. Obviously the provision requiring the express statement of the time price differential and the contract balance was enacted to ensure that the buyer, when he enters into the contract, is aware of the additional expense the payment in installments will cause him and the total extent of the indebtedness to which he will become subjected. If, as in

the present case, this information is omitted at the time the buyer signs the contract and is provided only in a copy after the seller has filled in and executed the contract, the intended warning will be of no avail to the buyer, who will already be bound when he receives the copy. Subdivision (a) of Section 2982 must be construed as requiring that the enumerated items be stated in the contract at the time the buyer signs it.

[5, 6] The fact that Lindsey, when signing the contract, could ascertain the amounts of the missing items by calculation based on the figures appearing in the sales order does not show substantial compliance with subdivision (a). The intended warning will not be effective if the buyer cannot see at first glance the data which the statute requires to be called to his attention. Adams v. Caruso Enterprises Inc., 134 Cal.App.2d 403, 408–409, 285 P.2d 1022.

[7–9] The "Revision Agreement" executed by Lindsey and the bank was not a re-execution or complete substitution of the original contract so as to render the illegality immaterial, because the revision was only a minor amendment relating solely to the date on which payments should be made and obviously was not intended as a new conditional sale agreement. Moreover, no waiver or estoppel can be based on the revision agreement. A party to an illegal contract cannot ratify it, cannot be estopped from relying on the illegality, and cannot waive his right to urge that defense. Wells v. Comstock, 46 Cal.2d 528, 532, 297 P.2d 961; Fewel & Dawes, Inc. v. Pratt, 17 Cal.2d 85, 91, 109 P.2d 650; Mary Pickford Co., v. Bayly Bros., Inc., 12 Cal.2d 501, 524, 86 P.2d 102; First Nat. Bank of Calexico v. Thompson, 212 Cal. 388, 405, 298 P. 808; Pollak v. Staunton, 210 Cal. 656, 663, 293 P. 26; Industrial Indemnity Co. v. Golden State Co., 117 Cal.App.2d 519, 540, 256 P.2d 677; Stockton Morris Plan Co. v. California Tractor & Equipment Corp., 112 Cal.App.2d 684, 690, 247 P.2d 90; see Black v. Cutter Laboratories, 43 Cal.2d 788, 806, 278 P.2d 905; American Nat. Bank of San Francisco v. A. G. Sommerville, 191 Cal. 364, 371, 216 P. 376. This rule has been applied in cases where the person asserted to have waived the illegality was not in pari delicto and was one of those for whose protection the statute involved was enacted. Mary Pickford Co. v. Bayly Bros., Inc., 12 Cal.2d 501, 524, 86 P.2d 102; First Nat. Bank of Calexico v. Thompson, 212 Cal. 388, 405–406, 298 P. 808; Pollak v. Staunton, 210 Cal. 656, 663, 293 P. 26; Industrial Indemnity Co. v. Golden State Co., 117 Cal.App.2d 519, 540, 256 P.2d 677. Even if we were to assume that there are exceptions to the rule, as might be suggested by language used in the Wells case, 46 Cal.2d at page 532, 297 P.2d at page 963, we find nothing in the record which would justify the making of an exception here.

[10] It thus appears that the seller may not enforce the conditional sale contract, and the judgment must be reversed insofar as it allows the seller to recover the amount of the deficiency.

[11] The next question is whether Lindsey is entitled to anything under his cross-complaint. As we have seen, the buyer under an agreement which is illegal because of a failure to comply with subdivision (a) of section 2982 may recover the consideration that he has given. The trial court found that any recovery by Lindsey must be limited to the amount of the cash payments which he made, totaling $433.50, plus the retail market value of the Packard, fixed by the court at $195, less an offset in the amount of the depreciation resulting from Lindsey's use of the Lincoln.

There is no dispute as to the amount of the cash payments, but Lindsey contends that his recovery for the loss of the Packard should not be limited to its actual cash value and that he is entitled to the trade-in value, which he testified was $2,000, or at least to $1,815, the amount which the contract allowed in trade for the Packard. The trade-in value, however, is not a correct measure of the detriment suffered by the loss of a used automobile because such a value does not depend solely on the qualities of the automobile and its attractiveness in the market but is also affected by the variable factor of the dealer's interest in making the sale of the new car to which the trade-in is applied. The trial court was not required to consider the fact that the contract accepted the Packard as a trade-in in the amount of $1,815, since there was substantial evidence that at the time Lindsey signed the sales order it contained an evaluation of the Packard at $100 as the wholesale used car price and that Lindsey knew that the amount entered as the trade-in was fictitious. The actual retail value of the automobile was correctly held to be the test, and the amount of $195 is supported by the evidence.

[12] The court determined that Lindsey was not entitled to punitive damages, and its determination must be sustained because it found, on the basis of substantial evidence, against Lindsey's allegations that the seller acted maliciously and fraudulently in violating the statute.

[13] It follows from the foregoing that, apart from the seller's right to an offset, if any, Lindsey's recovery would amount to $628.50, representing his cash payments of $433.50 and the value of the Packard, fixed at $195. Whether the seller may have an offset depends upon whether such relief is permitted by section 2982 and whether, if so, an offset is justified under the circumstances presented here.

[14] Although section 2982 does not contain any express provision governing offsets, the intention of the Legislature with respect to this problem can be ascertained from subdivision (e), which provides for recovery of "the total amount paid on the contract balance" from a seller who has violated the provisions of subdivisions (c) or (d).[3] We held in Lewis v. Muntz Car Co., 50 Cal.2d 681, 686, 328 P.2d 968, which involved a violation of subdivision (c) that the quoted words provided a penalty for the violation and precluded the right to an offset. The facts that the applicability of sub-

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[3] Subdivision (e) of section 2982 of the Civil Code provides: "If the seller, except as the result of an accidental or bona fide error in computation, shall violate any provision of subdivisions (c), or (d) of this section the conditional sale contract shall not be enforceable, except by a bona fide purchaser for value, and the buyer may recover from the seller in a civil action the total amount paid on the contract balance by the buyer to the seller or his assignee pursuant to the terms of such contract."

Subdivision (c) provides: "The amount of the time price differential in any conditional sale contract for the sale of a motor vehicle, with or without accessories, shall not exceed 1 per cent of the unpaid balance multiplied by the number of months, including any excess fraction thereof as one month, elapsing between the date of such contract and the due date of the last installment, or twenty-five dollars ($25), whichever is greater, provided that such contract may provide for interest on any delinquent installment from and after the date of delinquency, and for reasonable collection costs and fees in the event of delinquency."

Subdivision (d) provides: "Any provision of any conditional sale contract for the sale of a motor vehicle to the contrary notwithstanding, the buyer may satisfy in full the indebtedness evidenced by such contract at any time before the final maturity thereof, and in so satisfying such indebtedness shall receive a refund credit thereon for such anticipation of payments. The amount of such refund shall represent at least as great a proportion of the time price differential, after first deducting from such time price differential a minimum charge of not to exceed twenty-five dollars ($25), as the sum of the periodic time balances after the month in which such contract is paid in full bears to the sum of all of the periodic time balances under the schedule of payments in the contract, both sums to be determined according to the monthly balances which would result if the indebtedness were paid according to the terms of the contract; provided, however, that the provisions of this subsection shall not impair the right of the seller or his assignee to receive a minimum time price differential of twenty-five dollars ($25), or to receive interest on delinquent installments or reasonable collection costs and fees, as provided in subsection (c) of this section; and provided further, that where the amount of such refund credit would be less than one dollar ($1), no refund need be made."

division (e) is limited to situations where subdivisions (c) and (d) have been violated and that no provision whatever is made governing the effect of violations of other subdivisions indicate that with respect to the latter subdivisions the Legislature did not wish to impose the penalty which precludes the granting of an offset. The courts will not impose penalties for noncompliance with statutory provisions in addition to those that are provided expressly or by necessary implication. Grant v. Weatherholt, 123 Cal.App.2d 34, 43, 266 P.2d 185; Comet Theatre Enterprises v. Cartwright, 9 Cir., 195 F.2d 80, 81, 30 A.L.R.2d 1229. Section 2982 thus recognizes in effect the possibility of an offset where there have been violations of subdivisions other than (c) or (d). Such a situation is presented here because the seller, who violated subdivision (a), is not claimed to have violated subdivisions (c) or (d) and it does not appear that there was any infraction of the latter subdivisions.

[15] It is true that as a general rule the guilty party to an illegal contract cannot bring an action to enforce the contract or to recover on principles of quasi contract the benefits he has conferred under the contract. Tiedje v. Aluminum Taper Milling Co., 46 Cal.2d 450, 453, 296 P.2d 554; Fong v. Miller, 105 Cal.App.2d 411, 413, 233 P.2d 606; Owens v. Haslett, 98 Cal.App.2d 829, 833, 221 P.2d 252; Rest., Contracts, § 598, and Comment c on that section. However, it does not follow that, when the buyer invokes the aid of the court to obtain return of what he has paid under the contract, the court cannot, to reach a more just result, charge him with any detriment caused to the seller as a result of the buyer's use or treatment of the car. Since section 2982 recognizes the possibility of an offset where only subdivision (a) is violated, we conclude that a seller who has suffered such a detriment should be allowed an offset. The same conclusion has been reached, without discussion of the statutory language, in a number of cases. Williams v. Caruso Enterprises, 140 Cal.App.2d Supp. 973, 976, 295 P.2d 592, et seq.; Baum v. Aleman, 139 Cal.App.2d Supp. 929, 933, 293 P.2d 162; see United States Credit Bureau v. Sanders, 103 Cal.App.2d 806, 816, 230 P.2d 849; cf. Adams v. Caruso Enterprises Inc., 134 Cal.App.2d 403, 409, 285 P.2d 1022.

[16] A detriment to the seller entitling it to an offset was shown by evidence that Lindsey made an extensive use of the Lincoln and that, when he returned the car, it had greatly depreciated in value. Lindsey has not attacked the finding made with respect to the amount of the offset, namely, that the offset would exceed the sum which Lindsey could recover from the seller if he were entitled to recover the consideration he had given. Under these circumstances there is no occasion for us to determine the proper method of calculating the offset. Since the offset is larger than the sum due Lindsey, it is clear that he can recover nothing on his cross-complaint.

Insofar as the seller's action for a deficiency is concerned, the judgment is reversed with directions to enter judgment for Lindsey, and, insofar as Lindsey's cross-complaint is concerned, the judgment is affirmed.

SHENK, TRAYNOR, SCHAUER, SPENCE, McCOMB, and PETERS, JJ., concur.

171 Cal.App.2d 206

William A. BALLARD, Plaintiff and Respondent,

v.

Thomas AUGUSTINE et al., Defendants and Appellants.

Peter Lawrence DIVIZICH, Plaintiff and Respondent,

v.

William A. BALLARD et al., Defendants,

Pete Jurkovich et al., Appellants.

Civ. 6009.

District Court of Appeal, Fourth District, California.

June 8, 1959.

Action for personal injuries sustained by plaintiff when his automobile skidded into collision with oncoming vehicle while endeavoring to avoid defendants' truck, which was being used to extricate other equipment of defendant, which had theretofore been left on shoulder of highway. From a judgment of the Superior Court of Tulare County, Frederick E. Stone, J., the defendants appealed. The District Court of Appeal, Mussell, J., held that the evidence supported a reasonable inference that truck had been blocking highway and had necessitated plaintiff's application of his brakes in an attempt to avoid collision.

Affirmed.

1. Automobiles 🔑244(2, 41)

In action for personal injuries sustained by plaintiff when his automobile skidded into collision with oncoming vehicle while endeavoring to avoid defendants' truck which was being used to extricate other equipment of defendant which had theretofore been left on shoulder of highway, evidence was sufficient to sustain finding that defendant had been negligent and that plaintiff had not been contributorily negligent.

2. Trial 🔑296(3)

In consolidated actions arising out of collision between oncoming vehicles, one of which had skidded out of control while endeavoring to avoid a collision with truck blocking its lane, instruction that each of persons whose negligence contributed concurrently to injury could be held liable was not reversibly erroneous when considered in connection with other instructions given.

3. Appeal and Error 🔑216(2)

Where general instruction is given which is correct as far as it goes, being deficient merely by reason of its generality, injured party may complain on appeal only in case he requested that charge be made more specific or asked for other qualified instructions and his request was denied.

4. Appeal and Error 🔑1064(1)

In action for personal injuries sustained by plaintiff when his automobile skidded into collision with oncoming vehicle while endeavoring to avoid defendants' truck which was being used to extricate other equipment of defendant which had theretofore been left on shoulder of highway, it was not reversible error to give instruction on Vehicle Code section relating to turning movements and required signals. West's Ann.Vehicle Code, § 544.

5. Appeal and Error 🔑1067

In action for personal injuries sustained by plaintiff when his automobile skidded into collision with oncoming vehicle while endeavoring to avoid defendants' truck which was being used to extricate other equipment of defendant which had theretofore been left on shoulder of highway, it was not reversible error to refuse requested instruction on duty of plaintiff to use ordinary care and skill to keep his automobile under such control as to avoid collision, where last sentence in such instruction was faulty in imposing duty upon plaintiff under all circumstances and at all times to anticipate that road was not clear.

6. Appeal and Error 🔑1064(1)
Automobiles 🔑246(21)

In consolidated actions arising out of collision occurring when automobile skidded into oncoming vehicle while endeavoring to avoid defendants' truck, which was being used to extricate other equipment of defendant which had theretofore been left on shoulder of highway, imminent peril instruction was proper insofar as driver of vehicle with which skidding vehicle collided was concerned and was not prejudicially erroneous insofar as driver of skidding vehicle was concerned, in view of substantial evidence that he had been suddenly confronted with truck blocking highway and moving across it.

◆

Hanna & Brophy, San Francisco, and Oren, McCartney, Sells & Edman, Fresno, for appellants.

Bradley, Wagy, Bunker & Hislop, Bakersfield, for respondent Ballard.

Fuller, Christenson & Kralowec, Porterville, for respondent Divizich.

MUSSELL, Justice.

This is an appeal in two personal injury actions which were consolidated for trial by stipulation of the parties. The appellants, Thomas Augustine, an individual, Bob Jurkovich, Nina Jurkovich, Vincent Jurkovich, and Peter Jurkovich, individually and as copartners doing business as Porterville Cement Pipe Company (hereinafter referred to as defendants Jurkovich) were named as defendants in the first action, Superior Court No. 50167, in which William A. Ballard was plaintiff. The second action, Superior Court No. 50399, was brought by Peter Lawrence Divizich against William A. Ballard and defendants Jurkovich. A jury trial resulted in a verdict in each case against the defendants Jurkovich and exonerated Ballard and Divizich in their respective capacities as defendants.

The collision out of which these actions arose occurred at approximately 5:35 p. m. on December 14, 1956, on Highway 65 about a mile north of Ducor in Tulare county. The highway, with two traffic lanes, runs north and south, and the macadam portion at the place of the accident is approximately 22 feet wide. Ballard was traveling north in his Chevrolet automobile when his car struck a G.M.C. pickup being driven south in the southbound traffic lane.

After noon on the day of the accident, Thomas Augustine, an employee of the Porterville Cement Company, was operating an International pickup truck and pulling a large two-wheel trailer in a northerly direction on Highway 65, approximately one mile north of Ducor. On the two-wheel trailer was loaded a T.D.–6 International bulldozer with a blade attached. Augustine's truck developed motor trouble and he pulled his equipment off the paved portion of the highway and parallel to it, with the left side of the equipment approximately nine feet from the east edge of the asphalt portion of the highway. Augustine hitchhiked to Terra Bella, where he phoned the yard of the Porterville Cement Pipe Company and talked to Pete Jurkovich, who then drove to Terra Bella and picked up Augustine at a service station. Augustine and Jurkovich then drove south past the stalled equipment in a two-ton International truck. Jurkovich made a "U" turn and parked on the east side of the highway south of the equipment. It was then about 5:00 p. m. and was getting dark. Augustine and Jurkovich unhooked the trailer from the stalled pickup truck and backed the tractor off of the trailer. Jurkovich then got in the stalled pickup truck and Augustine, driving the tractor, pushed the pickup truck about 75 feet north of the trailer to get it out of the way so that the two-ton truck could be attached to the front of the trailer. The bulldozer tractor was then maneuvered into a position at a 45 degree angle to the west side of the two-wheel trailer and the blade put underneath the tongue at the front of the trailer. The left rear corner of the bulldozer was then partially in the northbound traffic lane of the traveled portion of the highway. Immediately thereafter Jurkovich drove the two-ton truck out onto the main traveled portion of the highway, blocking the northbound lane. At this time it was dark.

Ballard, in his Chevrolet sedan, approached the scene from the south. He was traveling between 55–60 miles per hour. The highway was straight and there were dips or swales in it. As he approached the equipment he saw two or three clearance lights along the side of a truck bed which was crossing the highway, traveling from east to west. He applied his brakes hard, laying down 65 paces of skid marks. Ballard's car skidded broadside into the southbound traffic lane and struck the Divizich G.M.C. truck, which was traveling south. The record shows that Divizich applied his brakes but that he had no recollection of the accident due to injuries sustained.

Both Augustine and Jurkovich admitted that the two-ton truck had pulled onto the highway from the east side, moving to the west immediately before the impact; that they did not use flares until after the accident; and that they loaded the bulldozer on the trailer after the accident and before the highway patrol officer arrived at the scene. Jurkovich testified that he moved the tractor after the collision because it might be in the way of oncoming traffic and the record shows that he stated to a highway patrol officer that he had just pulled off the road when the accident happened.

[1] Appellants' first contention is that the verdict against defendants Jurkovich is not supported by any substantial evidence of record. In Realty Co. of America v. Burton, 160 Cal.App.2d 178, 190, 325 P.2d 171, 178, the court said:

> "The function of and limitation upon an appellate tribunal in the determination of a claim of 'insufficiency of the evidence' is thus enunciated in Bedford v. Pacific S. W. Corp., 121 Cal. App. 162, 163, 8 P.2d 558, 559:
>
> " 'It is a common-place of appellate procedure that every intendment is to be indulged by the appellate court in favor of the trial court's findings; that only the evidence most favorable to the successful litigant is to be considered, that, where divergent inferences reasonably may be drawn from the evidence, that inference is to be indulged which will support the trial court's action; and that with all this in mind, unless the court can say on appeal that the findings are wholly without substantial support in the evidence, they cannot be disturbed. It is not sufficient that upon the same evidence the appellate court might have reached a different conclusion as triers of the facts. The burden is upon the appellant to demonstrate that as a reasonable man the trial judge could not reasonably have reached the conclusion that he did from the evidence before him.' "

The record shows that Ballard, who was an experienced driver, was driving on a straight and open highway; that he was well acquainted with this particular stretch of highway; that he was traveling between 55–60 miles per hour; that when he was about 300 feet from the scene of the accident he first saw the clearance lights along the truck bed and the truck going across the highway; that the truck continued to block the highway and that he put on his brakes hard and skidded into the Divizich pickup truck. There were no flares on the highway and the evidence supports a reasonable inference that the Jurkovich truck was blocking the highway, causing Ballard to suddenly apply his brakes in an attempt to avoid a collision.

It is next argued that the physical facts and Ballard's own testimony show negligence on his part as a matter of law. This argument is based on the contention that Ballard did not have his automobile under control and was traveling at an excessive rate of speed. This question was one of fact for the jury and the trial jurors found that Ballard was free of negligence. The trial court confirmed this finding when it ruled against appellants on their motion for a new trial. There is substantial evidence in the record to support the inference that Ballard was not exceeding the legal speed limit.

[2, 3] Appellants claim that it was prejudicial error to instruct the jury, at the request of plaintiff Divizich, as follows:

> "When the *negative* acts or omissions of two or more persons, whether committed independently or in the course of jointly directed conduct, contribute concurrently and as proximate causes to the injury of another, each of said persons is liable. This is true regardless of the relative degree of contribution." (Italics ours.) (It appears that the use of the word "negative" instead of "negligent" was a clerical error.)

Appellants argue that this instruction is fatally erroneous in this respect and in directing a verdict on a finding of negligence alone, without requiring a different result upon a finding also of contributory negligence. However, the court gave the following instruction on contributory negligence:

> "Contributory negligence is negligence on the part of a person injured, which, cooperating with the negligence of another, helps in proximately causing the injury of which the former thereafter complains.
>
> "One who is guilty of contributory negligence may not recover from another for the injury suffered. The reason for this rule of law is not that the fault of one justifies the fault of another, but simply that there can be no apportionment of blame and damages among the participating agents of causation."

When the entire instructions given are considered together and when the questioned instruction is considered in connection with the instruction the court gave on contributory negligence, no reversible error appears.

In Gordon v. Aztec Brewing Co., 33 Cal.2d 514, 519, 203 P.2d 522, 525, the court said:

> "In determining the propriety of an instruction the reviewing court should examine the charge as a whole. Wells v. Lloyd, 21 Cal.2d 452, 458, 132 P.2d 471; Douglas v. Southern Pacific Ry. Co., 203 Cal. 390, 396, 264 P. 237. If when considered together the instructions are found generally to state the applicable law, reversible error is not necessarily present even though an isolated instruction is defective in not containing all of the essential elements. Westover v. City of Los Angeles, 20 Cal.2d 635, 637, 128 P.2d 350; Callet v. Alioto, 210 Cal. 65, 70, 290 P. 438."

In the instant case the jurors were told that they were not to single out any certain sentence or any individual point or instruction and ignore the others, but that they were to consider all the instructions as a whole and to regard each in the light of all the others. In this connection it may be observed that in Taylor v. Luxor Cab Co., 112 Cal.App.2d 46, 51, 246 P.2d 45, the court approved an instruction containing substantially the same language as that which is here questioned. No request was made that the questioned instruction be made more specific. And as is said in Shook v. Beals, 96 Cal.App.2d 963, 972, 217 P.2d 56, 62, 18 A.L.R.2d 919:

> "The general rule is that where a general instruction is given which is correct as far as it goes, being deficient merely by reason of its generality, the injured party may complain on appeal only in case he requests that the charge be made more specific or asks for other qualified instructions, and his request is denied. Peckham v. Warner Bros. Pictures, 42 Cal.App.2d 187, 189, 108 P.2d 699; Eubanks v. Milton G. Cooper & Son, Inc., 68 Cal.App.2d 366, 156 P.2d 775; 24 Cal.Jur. 796, sec. 74."

[4] It is contended that the giving of an instruction on section 544 of the Vehicle Code relative to turning movements and required signals upon a roadway constituted reversible error. This contention

cannot be successfully maintained. Ballard testified that the reason he applied his brakes was because he saw the truck of defendants Jurkovich moving across the highway from east to west and that the roadway was blocked. The driver of the Jurkovich truck pulled out from behind the tractor into the northbound traffic lane at a time when it can be reasonably inferred that such a move could not have been made with safety and the driver gave no signal.

[5] It is further claimed that the refusal of the court to give defendants' Jurkovich requested instruction on the duty of Ballard to use ordinary care and skill to keep his automobile under such control as to avoid a collision constituted reversible error. This offered instruction is as follows:

> "It was the duty of defendant William A. Ballard to use ordinary care and skill to keep the automobile he was driving always under control so as to avoid a collision with any other person lawfully using the highway. He did not have the right to assume that the road was clear, but under all circumstances and at all times he was required to anticipate and expect the presence of others lawfully upon the highway."

The record shows that the jury was instructed clearly and concisely as to all of the issues in the instant case and that the last sentence in the offered instruction is faulty in that it imposed a duty upon Ballard under all circumstances and at all times to anticipate that the road was not clear. No prejudicial error appears in the refusal of this instruction.

[6] Finally, appellants argue that under the evidence showing that any position of peril in which defendant Ballard may have found himself resulted from his own negligence, the giving of an instruction on the doctrine of imminent peril constituted error. This instruction was proper insofar as Divizich was concerned and was not prejudicially erroneous insofar as Ballard was concerned for the record contains substantial evidence that Ballard was suddenly confronted with a truck blocking the highway and moving across it from east to west.

Judgment affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur.

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171 Cal.App.2d 196

Hermina Goncalves TEIXEIRA et al., Plaintiffs and Respondents,

v.

Emily L. DOMINGOS, Individually and as Administratrix of the Estate of Frank G. Domingos, Deceased, Defendant and Appellant.

Civ. 5694.

District Court of Appeal, Fourth District, California.

June 8, 1959.

Action to establish resulting trust. The Superior Court, Tulare County, W. G. Machetanz, J., entered judgment, and the defendant appealed. The District Court of Appeal, Shepard, J., held that the evidence was sufficient to establish the existence of the trust.

Affirmed.

See, also, 151 C.A.2d 380, 311 P.2d 634.

1. Trusts ⚷110

In action to establish resulting trust, the evidence, including evidence that brothers established and operated a dairy ranch and herd and purchased parcel of realty to which dairy was about to be removed when one son died, leaving his mother as his sole heir, and that mother deeded her one-half interest in realty to surviving son in consideration of his promise to hold realty in trust for use and benefit of mother's heirs until two of mother's grandchildren became age 21 at which time surviving son was to distribute mother's one-half interest to mother's heirs, established existence of confidential relationship between the surviving son and mother's heirs.

2. Appeal and Error ⚷930(1)

In reviewing the evidence on appeal, all conflicts must be resolved in favor of respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible.

3. Appeal and Error ⚷989

When a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury.

4. Appeal and Error ⚷996

When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.

5. Appeal and Error ⚷1010(1)

The rule that clear and convincing evidence is required to justify a court in finding that a deed which purports to convey land absolute in fee simple was intended to be, in fact, one creating a trust is primarily for the trial court's guidance, and if there is substantial evidence to support its conclusion the determination is not open to review on appeal.

6. Trusts ⚷110

In action to establish resulting trust, evidence was sufficient to support findings that son and his mother together owned and operated a dairy on the real estate and that they possessed livestock thereon and that mother conveyed her interests in realty to son on condition that he hold realty in trust for himself and mother's other heirs and to distribute to her heirs at the time that two of her grandchildren reached their majority. West's Ann.Civ.Code, §§ 2223, 2224.

7. Trusts ⚷372(3)

In action to establish resulting trust, the evidence, including evidence that mother conveyed property to son in trust for mother's heirs, that son absorbed and retained for his own use all of the rents, issues, and profits of the trust property and commingled them with his own funds, that the only property which son's widow received, owned or operated was that which came to her from son without valuable consideration, and that she retained the rents and issues and profits therefrom and commingled them and imposed a deed of trust upon the original trust property in order to purchase a dairy ranch, was sufficient to support finding that the widow held the dairy ranch in trust to the extent of the interest of the mother's heirs.

8. Trusts ⚷79

Where one party pays only a part of the consideration, the party taking the title to the whole land becomes a trustee for the other party, pro tanto.

9. Trusts ⚷358(1)

When the money or property of the trustor can be traced into a particular fund or deposit, where it remains, though mingled with other money, the beneficiary may seek to follow the specific personal property and enforce the trust.

10. Trusts ⚷371(7)

It is unnecessary for a beneficiary who seeks the court's help in imposing a resulting trust to file a new or amended complaint when the trustee, after the filing of the original action, continues to deal in the trust property, encumber it and buy new property; the trial court has the right once the action is filed to adjudicate the trusteeship in all directions that the trustee may move with the property during the time following the filing of the original action.

11. Limitation of Actions ⚷102(4)

Where conveyance of mother's interest in realty to son was on condition that son hold such interest in trust for use and benefit of mother's heirs and distribute such interest to heirs when two of mother's grandchildren should reach age 21, and son died in 1949, and such grandchildren reached age 21 on December 4, 1950, their action to establish the trust, commenced on February 13, 1951, was not barred by statute of limitations.

12. Trusts ⚷356(1)

Where decedent, in his lifetime, held parcel of realty in trust for himself and for the plaintiffs, and he received all of the rents, issues and profits therefrom and he converted the accumulations thereof to the purchase of a second parcel and received the rents, issues and profits thereof and the plaintiffs knew nothing of this nor of the transfer to such person's wife until after the death of such person in 1949 and the conveyance to the wife was without consideration, the wife held all of the parcels in trust for the plaintiffs.

13. Appeal and Error ⚷1050(1)

In action to establish trust in land which mother allegedly conveyed to son under agreement that son would hold the land for mother's heirs until two of mother's grandchildren should reach age 21, admission of testimony that son had said that agreement had been made by mother's attorney was not prejudicial, where the son's statement was made at a time when the son still held title to the land.

◆

Lopez & Hyde, Fresno, Clarence H. Wilson, Hanford, for appellant.

John H. Machado, San Jose, for respondents.

SHEPARD, Justice.

This is an action seeking the declaration of a resulting trust respecting land alleged to have been received under trust conditions, and also to impress the same resulting trust on the rents, issues and profits thereof.

Maria Delfina Domingos (hereinafter referred to as Delfina) was the mother of four children, John, Frank, Maria (Domingos) Toste and Hermina Goncalves Teixeira. Plaintiffs herein are Delfina's daughter Hermina Goncalves Teixeira and Defina's grandchildren (by her deceased daughter Maria Domingos Toste), Joe Toste, Frank Toste, Jr., Manuel Toste, Mary Toste, Rose Drewes and Alice (Toste) Carrigg. Rose Drewes and Alice (Toste) Carrigg will hereinafter be referred to as the twins. Emily L. Domingos, the surviving wife of Frank G. Domingos, is sued herein in her individual capacity and also as administratrix of the estate of Frank G. Domingos, and will hereinafter be referred to as the defendant. John Domingos will hereinafter be referred to as John, and Frank Domingos as Frank. Defendant (Emily Domingos) has remarried and now uses the name of Verissimo.

Prior to February, 1933, John and Frank established and operated a dairy ranch and herd in Kings County, later moving to Tulare County, and finally purchased a 420-acre tract of land in Tulare County, which will hereinafter be referred to as Parcel 1. John died on March 1, 1933, shortly after this purchase took place. His estate was probated and his undivided one-half interest in Parcel 1 was distributed to Delfina, the mother. In 1937, Frank approached Delfina to secure from her a deed for her one-half interest in Parcel 1, and it is alleged that as a consideration for this deed he promised her to hold such one-half interest during the minority of the twins for the use and benefit of Delfina's heirs, and upon the twins reaching their majority to distribute such trust property to her heirs. Delfina did execute a gift deed from herself to Frank covering her one-half interest in said Parcel 1. She died on October 6, 1937. Prior to her death Frank went on a visit to the Azores Islands, Portugal, and the deed was recorded on his return. Frank continued to operate the property, retaining the rents, issues and profits thereof. On April 28, 1943, Frank married this defendant. On December 31, 1945, Frank acquired through probate sale certain property in Kings County which, together with other property acquired by him in the same county, totaled 141.38 acres. This property will hereinafter be referred to as Parcel 2. His separate interest in this property was cleared up by quitclaim deed. On July 21, 1948, Frank executed deeds of gift transferring both Parcel 1 and Parcel 2 to this defendant. Frank continued to operate these properties and retained for his own use all of the rents, issues and profits thereof, but in the spring of 1948 sold all of the livestock, rented out the ranch and left for the Azores Islands, the defendant accompanying him. Frank died on March 2, 1949 and the defendant returned to America when the gift deeds above referred to, from Frank to herself, were delivered to her and recorded August 16, 1949. The twins reached their majority on December 4, 1950 and this action was commenced on February 13, 1951. In April, 1952, this defendant purchased 320 acres more in Tulare County for the agreed purchase price of $81,180, of which $19,180 was paid in cash and a trust deed given in the amount of $62,000 covering Parcel 1. This land we will hereinafter refer to as Parcel 3. The trial court gave judgment for the plaintiffs against the defendant declaring ownership in the plaintiffs of an undivided one-third interest in Parcels 1 and 2, and an undivided one-sixth interest in Parcel 3. Defendant appeals.

[1–4] Defendant's first contention is that the evidence is insufficient to support the court's finding "That subsequent to the death of said Maria Delfina Domingos and that to the date of death of said Frank G. Domingos, also known as Frank Domingos, on the 2nd day of March, 1949, there existed a confidential relationship between said Frank G. Domingos and the plaintiffs herein." At the outset it is well to have in mind that rule of appellate procedure which has been heretofore so often repeated, but which appellants seem constantly to forget.

> "In reviewing the evidence on such an appeal all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429 [1], 45 P.2d 183, 184; Bellon v. Silver Gate Theatres, Inc., 4 Cal.2d 1, 47 P.2d 462; Raggio v. Mallory, 10 Cal.2d 723, 725 [1], 76 P.2d 660; Estate of Bristol, 23 Cal.2d 221, 223 [2], 143 P.2d 689.

[5] Likewise, while it is true that the courts have frequently stated that clear and convincing evidence is required to justify a court in finding that a deed which purports to convey land absolute in fee simple was intended to be, in fact, one creating a trust, such rule is primarily for the trial court's guidance and if there is substantial evidence to support its conclusion the determination is not open to review on appeal. Stromerson v. Averill, 22 Cal.2d 808, 815 [6], 141 P.2d 732; Beeler v. American Trust Co., 24 Cal.2d 1, 7 [1], 147 P.2d 583; Viner v. Untrecht, 26 Cal.2d 261, 267 [2], 158 P.2d 3; Hansen v. Bear Film Co., Inc., 28 Cal.2d 154, 173 [4], 168 P.2d 946.

The evidence in this case shows that Frank approached Delfina to secure a deed to her one-half interest in the 420 acres; that she at first refused; that later, under persuasions of Frank's attorney and under Frank's promise to hold the property in trust for the use and benefit of her heirs until the twins reached the age of majority and to thereupon distribute it to her heirs, she did make a deed to Frank; and that the consideration for such deed was such promise. Numerous witnesses testified to statements made by Frank to this effect, and likewise that Delfina herself made such a statement which was immediately communicated by the witness to Frank. Under this state of facts the law itself imposes a trust relationship and this trust relationship continues during the life of the trust. It is fiduciary in nature, and places the trustee in a fiducial relationship with the beneficiaries of the trust. Devers v. Greenwood, 139 Cal.App.2d 345, 348, 293 P.2d 834; South v. Wishard, 146 Cal. App.2d 276, 284 [6], 303 P.2d 805; In re Estate of Cover, 188 Cal. 133, 143 [4], 204 P. 583; Walter H. Leimert Company v. Woodson, 125 Cal.App.2d 186, 189, 270 P. 2d 95; Kinert v. Wright, 81 Cal.App.2d 919, 925, 185 P.2d 364. The cases of Bacon v. Soule, 19 Cal.App. 428, 126 P. 384; Cohn v. Goodday, 191 Cal. 615, 217 P. 756; In re Estate of Lingenfelter, 38 Cal.2d 571, 241 P.2d 990; In re Estate of Jamison, 41 Cal.2d 1, 256 P.2d 984, cited by defendant, are entirely consistent with the views above expressed.

[6] Defendant contends that the evidence is insufficient to support the finding that Delfina and Frank together owned and operated a dairy on the real estate, and that they possessed livestock thereon. We are unable to agree with this contention. The evidence shows that Frank and John operated and apparently owned the dairy, together with the livestock. That dairy was about to be moved to Parcel 1 when John died. The livestock did not go to Delfina by the decree of distribution from John's estate, but she apparently believed she owned an interest therein and Frank, in 1937, was attempting to secure a transfer thereof to him from her so that he also apparently believed she had an interest in the stock. We are unable to discover any evidence as to how the ownership of John's share in the stock ever passed to Frank. Delfina was John's sole heir. Defendant herself testified that she knew Frank and John were running a dairy business together, and she knew of no transfer or bill of sale from John or Delfina to Frank.

Defendant next contends that the finding that the conveyance of Parcel 1 to Frank was made on condition that he agree to hold the property in trust for himself and plaintiffs and that no gift was intended by deed, is not supported by the evidence. While it is true that the evidence is conflicting and that the trial court, depending on the credibility it gave to various witnesses and how it weighed the evidence, might have decided differently, it is also true that there was evidence from several witnesses that both Frank and Delfina had stated to them that the trust arrangement whereby Frank was to hold the property in trust for Delfina's heirs (of which Frank was one) and to distribute to her heirs at the time the twins reached majority, was the real consideration for the transfer to Frank of Parcel 1. The evidence here discloses a close family relationship between John, Frank and Delfina, and also for several years between all of them and the twins. Putting together all of the evidence it indicates not only close family ties but also confidential relationships between Delfina, Frank and John. The various statements made by Frank as to the actual conversation and the existence of the trust itself forces us to the conclusion that the finding of the trial court was amply supported by the evidence. Civil Code, Secs. 2223, 2224; Atwood v. Elwood, 132 Cal. App.2d 761, 768 [2], 283 P.2d 43; Steinberger v. Steinberger, 60 Cal.App.2d 116, 121 [2], 140 P.2d 31; Airola v. Gorham, 56 Cal.App.2d 42, 47 [5], 133 P.2d 78; O'Brien v. O'Brien, 50 Cal.App.2d 658, 659 [1], 123 P.2d 877; Leemhuis v. Leemhuis, 137 Cal.App.2d 117, 122 [2], 289 P.2d 852. The cases of Cox v. Schnerr, 172 Cal. 371, 156 P. 509, Gamill v. Nunes, 104 Cal.App.2d 185, 231 P.2d 86, and Kent v. First Trust & Savings Bank, 101 Cal.App.2d 361, 225 P.2d 625, cited by defendant, entirely support the views hereinbefore stated.

[7-10] Defendant next contends that there is no evidence to support the finding of the trial court that the defendant held in trust a 1/6th interest in what is known as the dairy ranch, herein referred to as Parcel 3. We think this contention is not well founded. The trial court was entitled to take the view from the evidence adduced that from the inception of the transfer to

Frank from Delfina, Frank absorbed and retained for his own use all of the rents, issues and profits of the trust property; that they were entirely commingled; that the only property this defendant received, owned or operated was that which came to her from Frank without valuable consideration; that she herself retained all of the rents, issues and profits and that they were all commingled together and formed a part of the whole; that this action was filed February 13, 1951, and fully informed her of the intention, desire and purpose of plaintiffs to have the court declare a resultant trust and to pursue the trust property; that she imposed a $62,000 deed of trust on the original trust property (Parcel 1) in order to make the purchase of Parcel 3; and that she presented no evidence of any kind to indicate a segregation of Frank's own interest from the trust property nor of her own interest from the trust property. It has long been the rule in California that where "the one party pays only a part of the consideration, the party taking the title to the whole land becomes a trustee for the other party, *pro tanto*." Gerety v. O'Sheehan, 9 Cal.App. 447, 449, 99 P. 545, 546. "When the money or property of the trustor can be traced into a particular fund or deposit, where it remains, though mingled with other money, the beneficiary may seek to follow the specific personal property and enforce the trust." Newport v. Hatton, 195 Cal. 132, 150 [15], 231 P. 987, 993. We deem it unnecessary for a beneficiary who seeks the court's help in imposing a resulting trust to file a new or amended complaint when the trustee, after the filing of the original action, continues to deal in the trust property, encumber it and buy new properties. In our view, if this were required there would never be an end to this class of litigation. The trial court has the right once the action is filed to adjudicate the trusteeship in all directions that the trustee may move with the property during the time following the filing of the original action. Newport v. Hatton, supra; Church v. Bailey, 90 Cal.App.2d 501, 504 [2], 203 P.2d 547; Mitchell v. Dunn, 211 Cal. 129, 136 [5], 294 P. 386.

[11] Defendant's next contention is that the court's finding that the second cause of action of the plaintiffs is not barred by the statute of limitations is not supported by the evidence. With this we cannot agree. The twins did not become of age until December 4, 1950, and the trust did not mature for distribution until that time. This action was commenced February 13, 1951. Androski v. Thurber, 136 Cal.App.2d 471, 478, 288 P.2d 898; Dabney v. Philleo, 38 Cal.2d 60, 66, 237 P.2d 648; Airola v. Gorham, supra, 56 Cal.App.2d 54 [9], 133 P.2d 78. The cases of Brazil v. Silva, 181 Cal. 490, 185 P. 174 (alleging fraud in procuring a will and starting the toll date of the statute of limitations as of the filing of the complaint), Cox v. Schnerr, supra (being an action to quiet title based on a deed procured by fraud), Campbell v. Genshlea, 180 Cal. 213, 180 P. 336, Page v. Garver, 146 Cal. 577, 80 P. 860, and Murphy v. Crowley, 140 Cal. 141, 73 P. 820 (imposing a five-year statute of limitations on cancellation of deeds procured by fraud) in no way contravene views we have expressed.

[12] The defendant next contends that there was no sufficient finding that defendant held Parcel 2 in trust for plaintiffs. The findings of ultimate fact are, in general, that Frank held Parcel 1 in trust for himself and for these plaintiffs; that he received all the rents, issues and profits thereof; that he converted the accumulations thereof to the purchase of Parcel 2 and received the rents, issues and profits thereof; that plaintiffs knew nothing of this nor of the transfer to defendant until after the death of Frank in 1949; and that the conveyance to defendant was without consideration. We think these, coupled with the other findings, are sufficient to support the trial court's conclusion of law that defendant holds all of these parcels in trust as therein described. Atwood v. Elwood, supra, 132 Cal.App.2d at page 770 [5], 283 P.2d at page 49; Airola v. Gorham,

supra, 56 Cal.App.2d at page 45 [3], 133 P.2d at page 79; O'Brien v. O'Brien, supra, 50 Cal.App.2d at page 660 [2], 123 P.2d at page 878; Church v. Bailey, supra, 90 Cal.App.2d at page 504 [2], 203 P.2d at page 549; Bryan v. Prescott, 57 Cal. App. 779, 783 [2], 207 P. 1028; Mitchell v. Dunn, supra, 211 Cal. at page 136, 294 P. at page 389; Leemhuis v. Leemhuis, supra, 137 Cal.App.2d at page 123 [8], 289 P.2d at page 856. We find nothing in the authorities cited by defendant in any way contrary to the above view.

[13] Next, defendant contends that the trial court committed reversible error in admitting the testimony of a witness that Frank said that the contract was made by his (Frank's) attorney John de Freitas. It must be remembered that the word "contract" here used apparently referred to and was a part of a previous recitation of the witness relating to a statement of Frank, in which Frank said of Delfina: "She made a contract with him for him to hold the ranch and the cows and the rents until the two twin children were 21 years. When they had attained 21 year, he was to divide with the heirs, the inheritance of his mother." Delfina was illiterate, which made the question of who the attorney de Freitas was acting for of additional importance in determining both Frank's and Delfina's state of mind. Whitlow v. Durst, 20 Cal. 2d 523, 525, 127 P.2d 530; Lauricella v. Lauricella, 161 Cal. 61, 71, 118 P. 430; Grace v. Rodrigues, 111 Cal.App.2d 131, 137, 243 P.2d 906; Airola v. Gorham, supra, 56 Cal.App.2d at page 49, 53, 133 P.2d at page 83. Defendant comments that the statement "made no sense". If so, it was not of such prejudicial character as to warrant a reversal. Furthermore, this statement was apparently made at a time when Frank still held title. In any event, in view of the very substantial character of the other evidence we are unable to declare this to be reversible error. The cases cited by defendant all relate to statements in derogation of title, made after declarant parted with title, and are clearly distinguishable.

Defendant next complains that the court failed to directly state in its judgment that the property would remain subject to the $62,000 deed of trust. We think the wording of the court's judgment clearly and inevitably is to that effect, and that the obligation of the $62,000 deed of trust is one which under the judgment must be paid pro rata by the persons decreed by the court to have interests in the properties subject thereto.

Other objections raised by the defendant are fully covered by the views hereinbefore expressed and need not be discussed in further detail.

The judgment is affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.

170 Cal.App.2d 559

BERG METALS CORPORATION, a corporation, Plaintiff and Respondent,

v.

Harry R. WILSON, Jeanette Reif Snyder, also known as Janet Reif Snyder, Alford P. Olmstead, Nathan Hochman, Bruce Irwin Hochman, individually, and International Steel, Inc., a corporation, Defendants,

Harry R. Wilson, Jeanette Reifsnyder and Alford P. Olmstead, Appellants.

Civ. 23375.

District Court of Appeal, Second District, Division 2, California.

May 22, 1959.

Hearing Denied July 15, 1959.

Successor in interest to broker of corporation brought action against certain stockholders of corporation on written guaranty whereby stockholders guaranteed indebtedness of corporation to broker up to $15,000. The Superior Court of Los Angeles County, Kenneth E. Sutherland, J., entered judgment adverse to the stockholders, and they appealed. The District

Court of Appeal, Ashburn, J., held that corporation's stockholders, who guaranteed up to $15,000 of amount owed by corporation to its broker, were not released from liability to broker because of fact that total of fluctuating loan by broker to corporation exceeded $15,000 at times, where giving of a note has been abandoned because of fluctuating nature of debt, and at time guaranty was made indebtedness actually amounted to $16,783.43.

Judgment affirmed.

1. Guaranty ⚷1

Agreement whereby stockholders of corporation agreed personally and individually to indemnify corporation's broker and hold broker harmless for any loss or damage for any unpaid balance owing by corporation to broker up to $15,000 was a "guaranty," since the agreement was to protect broker from loss due to default of another.

See publication Words and Phrases, for other judicial constructions and definitions of "Guaranty".

2. Guaranty ⚷27

Agreement whereby stockholders of corporation guaranteed payment to corporation's broker of balance due from corporation to broker up to $15,000 and brokerage agreement between corporation and broker were to be construed as one agreement, where they were but parts of a single transaction, though not executed contemporaneously. West's Ann.Civ.Code, § 1642.

3. Contracts ⚷175(2)

When language used in agreement is fairly susceptible to either of two constructions, extrinsic evidence may be considered, not to vary or modify terms of the agreement, but to aid court in ascertaining the true intent of the parties, and not to show the parties meant something other than what they said, but to show what they meant by what they said.

4. Contracts ⚷169

When any doubt exists as to purport of parties' dealings as expressed in the wording of parties' contract, court may look to circumstances surrounding execution of contract, including object, nature, and subject matter of contract, as well as subsequent acts or declarations of parties shedding light on question of their mutual intention at time of contracting.

5. Contracts ⚷175(2)

Unless a court can to a certainty and with sureness, by a mere reading of document, determine which is the correct interpretation, extrinsic evidence becomes admissible as an aid to interpretation.

6. Evidence ⚷450(5)

Where there was a perplexing problem of interpretation which could not be determined satisfactorily from face of guaranty agreement and brokerage agreement, which were to be construed as one agreement, there was no error in receiving parol evidence as an aid in interpretation of the instruments.

7. Guaranty ⚷53(1)

Corporation's stockholders, who guaranteed up to $15,000 of amount owed by corporation to its broker, were not released from liability to broker because of fact that total of fluctuating loan by broker to corporation exceeded $15,000 at times, where giving of a note has been abandoned because of fluctuating nature of debt, and at time guaranty was made indebtedness actually amounted to $16,783.43.

8. Guaranty ⚷38(1)

Question whether a guaranty is a continuing one is to be determined by reference to all relevant surrounding circumstances.

9. Guaranty ⚷38(3)

Where loan by broker to corporation was arranged to enable corporation more successfully to carry on business in the future, and indebtedness was intended to be result of advances, and no interest was to be charged for the loan, and it was a means of holding for broker the exclusive brokerage agency for corporation, and stockholders of corporation guaranteed payment of corporation's indebtedness to broker up to $15,000, the guaranty was a continuing one.

10. Guaranty ⚷72

Where corporation's broker made repeated requests for execution by corporation of second lien trust deed to secure indebtedness of corporation to broker or for payment of corporation's indebtedness to broker, and corporation's stockholders assured broker that trust deed would be executed and delivered and that it would be safe for broker to continue making advances to corporation because advances were within guaranty by stockholders of indebtedness of corporation up to $15,000, stockholders waived any right they might have had to require broker to pursue the corporation and principal debtor. West's Ann.Code Civ.Proc. § 1962, subd. 3.

11. Appeal and Error ⚷931(1)

District Court of Appeal would accept as established all facts and inferences favorable to respondent, if they found substantial support in the evidence.

12. Guaranty ⚷72

The right to complain of delay in enforcing a guaranty of collection may be waived expressly by guarantors or by conduct.

13. Corporations ⚷46

Where corporation, which was doing business under fictitious firm name, filed certificate stating that it was conducting business at certain address in city under the fictitious firm name, and certificate then named president and secretary of corporation and residence address of each, certificate was sufficient, since substantial compliance with statute dealing with such certificates is all that is required. West's Ann.Civ.Code, §§ 2466, 2468.

14. Assignments ⚷34

An oral assignment of a contract or chose in action is sufficient.

◆

Wendell P. Hubbard and Alford P. Olmstead, Los Angeles, for appellants.

J. George Bragin, Hollywood, and Sidney Munshin, Beverly Hills, for respondent.

ASHBURN, Justice.

Plaintiff, as successor in interest to Berg Metals Company, recovered judgment for $14,374.58 from defendants-appellants Harry R. Wilson, Jeanette Reifsnyder (frequently written Reif Snyder in the record), and Alford P. Olmstead upon a written guaranty. Other guarantors were Nathan Hochman and Bruce Irwin Hochman, but they were not served with summons.

Appellants raise two major points, (1) that the guaranty was not a continuing one and did not cover the indebtedness upon which the judgment is based, (2) that the guaranty was one of collection and the defendants were released by failure of plaintiff to proceed diligently in an effort to collect from International Steel, Inc., the principal debtor.

Berg Metals Company and International Steel, Inc., were both engaged in the business of buying, preparing and selling scrap iron and steel, the former acting as broker for the latter. In January and February, 1950, they made two written agreements which constituted Berg Metals the sole broker for International Steel, provided for certain advances to be made by Berg to International and specified that such indebtedness be paid by application thereto of one dollar per ton for each ton of scrap sold by International through Berg. Bruce Irwin Hochman, Jeanette Reifsnyder, Harry R. Wilson and Alford P. Olmstead, owned all the stock of International, which needed additional operating funds. Acting principally through Olmstead, who was an attorney and an officer of International, they induced Berg Metals to make the two contracts and to furnish such additional funds to International. The agency and authority of Olmstead to act for the other stockholders, especially the appellants, is not questioned.

The first agreement is dated January 3, 1950, signed by International, all of its stockholders and Berg Metals. At that time Berg Metals was already acting as broker for International, which was indebted to Berg, the debt having arisen through brokerage transactions as follows: When a car of scrap was shipped or about to be shipped by International it would notify Berg Metals which would forthwith advance 90 per cent of the estimated selling price (dependent upon ultimate weight) to International, later reimbursing itself from the proceeds of sale when received from the buyer. Some of these advances were made against bills of lading, some upon oral advice from International. This course of business had been established at the time the contracts under consideration were made. Later it developed that in certain instances the shipment was not actually made or was rejected by the buyer.

The agreement of January 3, 1950 (which counsel term the indemnity agreement) starts with these recitals: "Whereas, International Steel, Inc., has from time to time borrowed money from Berg Metals Co., and is now indebted to it on account of said loans; and Whereas, International Steel, Inc., desires to borrow additional sums of money from Berg Metals Co., the total indebtedness of which at any one time shall not exceed Fifteen Thousand ($15,000.00) Dollars; and Whereas, Berg Metals Co. has agreed to lend International Steel, Inc., a sum of money up to the extent of Fifteen Thousand ($15,000.00) Dollars, provided the monies and sums already loaned and the monies to be loaned shall be secured as hereinafter provided for in this agreement." These are followed by a recital of the stock holdings in International. Next are recitals as to the ownership of the land and plant on and in which International was doing business, it being stated that same were owned by the estates and heirs of J. C. Wilson, deceased, and Robert Wilson, deceased, and certain others including defendants Harry R. Wilson and Jeanette Reifsnyder; that it was intended upon the closing of those estates that the land and plant would be transferred to International for a price that would be represented by a first trust deed and chattel mortgage for approximately $75,000; that this would be done as soon as said estates were closed and that an estimated period of six months from date would be sufficient time to accomplish same; that the stockholders of International desired Berg Metals to make said loans to International "so that the latter may better continue its operations to the benefit of the undersigned." It was therefore agreed "as an inducement and consideration to Berg Metals Co. to make the additional loans to International Steel, Inc.": 1. That the stockholders would cause said transfer to be made to International in exchange for a first trust deed and chattel mortgage of $75,000 or thereabouts; 2. International agrees with Berg immediately upon receiving title to said land, buildings and equipment, to execute in favor of Berg a second lien trust deed and chattel mortgage, subject to said $75,000 lien, which second liens "shall be executed for the purpose of securing payment of the Fifteen Thousand ($15,000.00) Dollar indebtedness to Berg Metals Co. herein referred to, and which indebtedness shall be repaid in the manner and at the times as is set forth in an agreement of even date hereof entered into between Berg Metals Co. and International Steel, Inc." Paragraph 3 provides that in the event of failure of International to pay its indebtedness "as provided for in the said agreement between International Steel, Inc. and Berg Metals Co.," or should the holders of the first liens be compelled to foreclose, thereby rendering the second liens valueless, Berg should receive an assignment of an interest in the first liens "sufficient to protect it * * * from any loss for any money or sums remaining unpaid pursuant to the *loans up to* Fifteen Thousand ($15,000.00) Dollars herein referred to." Emphasis added.) Paragraph 4 provides that if International should fail to receive complete title to the plant property "or in the event International Steel, Inc. for any reason whatsoever fails to deliver and give to Berg Metals Co. a Second Trust Deed and Second Chattel Mortgage as hereinbefore mentioned within six (6) months hereafter, that then, and in either one of said events, Alford P. Olmstead, Bruce

Irwin Hochman, Janet Reif Snyder, Harry R. Wilson and Nathan Hochman hereby agree to personally and individually indemnify Berg Metals Co. and hold it harmless from any loss or damage that it may sustain thereby, limiting, however, said loss and damage to the extent of any unpaid balance owing by International Steel, Inc. to Berg Metals Co." Paragraph 5 states that in the event of inability of the undersigned (meaning the guarantors) to cause the Wilson estates to perform the acts designated for them, then "Alford P. Olmstead, Bruce Irwin Hochman, Janet Reif Snyder, Harry R. Wilson and Nathan Hochman do hereby agree to personally and individually indemnify Berg Metals Co. and hold it harmless for any loss or damage that it may sustain thereby, limiting, however, said loss and damage to the extent of any unpaid balance owing by International Steel, Inc. to Berg Metals Co."

The reference in paragraph 2 to "an agreement of even date hereof" is inaccurate; there is no other agreement bearing that date, but the proof plainly shows that this language referred to a so-called brokerage agreement which bears date January 6, 1950, and was actually executed and delivered in the month of February, on or after the 15th.

That agreement recites that "International Steel has heretofore borrowed certain monies from Berg Metals and now requires an additional amount of money, the total of the monies heretofore borrowed and presently to be borrowed, totalling Fifteen Thousand ($15,000.00) Dollars, which sum International Steel requires to operate its business." It was therefore agreed that "in consideration of the sum of Fifteen Thousand ($15,000.00) Dollars loaned by Berg Metals to International Steel, receipt of which is hereby acknowledged by International Steel"; "1. International Steel does hereby acknowledge that as of this day, January 6th, 1950, it is indebted to Berg Metals in the sum of Fifteen Thousand ($15,000.00) Dollars as evidenced by a promissory note of even date repayable in the manner as hereinafter set forth, without interest."

Parenthetically it should be observed that the $15,000 had not been advanced in a single sum on January 6, 1950, or at any other time; that the debt on that date was $16,783.43, all of which had been built up through a series of advances made against shipments. Likewise, the reference to a promissory note of even date evidencing a $15,000 debt is a false one, for there never was any such note and the attorneys who handled the matter for the respective parties (i. e., Mr. Bragin for Berg Metals, and Mr. Olmstead for appellants) agreed that a note would be impractical because of the fluctuating amount of the debt. They also expressly agreed that the guaranty would pertain only to advances up to $15,000 and for anything beyond that amount "they would not be responsible for under the guaranty."

Paragraph 2 of said agreement dated January 6, 1950 specifies that Berg shall be International's exclusive broker in the sale of scrap iron and steel so long as any part of the loan should remain unpaid. "For the purpose of repaying the aforementioned Fifteen Thousand ($15,000.00) Dollar loan, International Steel does hereby agree to pay to Berg Metals one ($1.00) Dollar per ton for each ton of scrap iron and steel sold through Berg Metals pursuant to the aforementioned brokerage arrangement; at the time of each said sale the aforementioned $1.00 per ton shall become due and owing to Berg Metals and the payment thereof shall be made by International Steel at such time as the latter shall be paid for each shipment by the purchaser thereof; said payments of $1.00 per ton shall be applied by Berg Metals toward the reduction and payment of the said loan of Fifteen Thousand ($15,000.00) Dollars; mill specifications and weight receipts shall govern the final settlement of each shipment."

[1] Counsel in their arguments term the January 3 instrument an indemnity agreement, but those arguments are predicated upon the assumption that it is a guaranty.

This seems to be correct, for the agreement was to protect plaintiff from loss due to default of another, not its own failure to perform any obligation which it had undertaken. See, Mahana v. Alexander, 88 Cal. App. 111, 116–117, 263 P. 260; Ingalls v. Bell, 43 Cal.App.2d 356, 367, 110 P.2d 1068; Somers v. United States F. & G. Co., 191 Cal. 542, 547, 217 P. 746; Fageol Truck & Coach Co., v. Pacific Indemnity Co., 18 Cal. 2d 748, 751, 117 P.2d 669; Everts v. Matteson, 21 Cal.2d 437, 446, 132 P.2d 476; 26 Cal.Jur.2d, § 4, p. 332; 46 Cal.Jur.2d, § 7, p. 194; 42 C.J.S. Indemnity § 3, p. 567.

Appellants argue that the two instruments are to be construed as a single agreement and that it is limited to the guaranty of a single loan of $15,000, which was paid with resulting release of their obligation as guarantors; also that plaintiff's permitting the debt to exceed $15,000 from time to time worked a material change in the contract and hence released the guarantors. Respondent takes the position that the contracts were separate and to be construed independently; that the indemnity agreement is a continuing guaranty and the fact that the debt may have exceeded $15,000 from time to time is legally inconsequential, for the $15,000 is a limit upon the guarantors' obligation, but not a limit upon the permissible debt of International.

[2] While we do not consider this matter important to the result, we agree with appellants that the two instruments are to be construed as one agreement. They are but parts of a single transaction; this is manifest on their face and plainly appears from the oral evidence. The fact that they were not executed contemporaneously is not decisive (Goodspeed v. Great Western Power Co., 33 Cal.App.2d 245, 266, 91 P.2d 623, 92 P.2d 410; Lynch v. Bank of America N. T. & S. Ass'n, 2 Cal.App.2d 214, 223, 37 P.2d 716; Cadigan v. American Trust Co., 131 Cal.App.2d 780, 786, 281 P.2d 332; 12 Cal.Jur.2d, § 123, p. 334). Nor is identity of parties always necessary (Peterson v. Miller Rubber Co. of New York, 8 Cir., 24 F.2d 59, 62; McCulloch v. Canadian Pac. Ry. Co., D.C. Minn., 53 F.Supp. 534, 541; MacDonald v. Wolff, 40 Mo.App. 302, 309; Schlein v. Gairoard, 127 N.J.L. 358, 22 A.2d 539, 541). Here the main agreement was signed by all parties to the transaction; the brokerage agreement was signed by International and Berg Metals; it provided the manner of payment of the debt and was incorporated by reference into the guaranty contract notwithstanding the erroneous reference to an agreement of even date. We entertain no doubt that the two agreements "are to be taken together" pursuant to § 1642, Civil Code, which is a restatement of the common law on the subject (Cadigan v. American Trust Co., supra, 131 Cal.App.2d 780, 787, 281 P.2d 332).

[3–6] Over objection the court received parol evidence as an aid in the interpretation of the instruments. "When the language used is fairly susceptible to one of two constructions, extrinsic evidence may be considered, not to vary or modify the terms of the agreement but to aid the court in ascertaining the true intent of the parties [citation], not to show that 'the parties meant something other *than* what they said' but to show 'what they meant *by* what they said' [citation]. Where any doubt exists as to the purport of the parties' dealings as expressed in the wording of their contract, the court may look to the circumstances surrounding its execution—including the object, nature and subject matter of the agreement [citation]—as well as to subsequent acts or declarations of the parties 'shedding light upon the question of their mutual intention at the time of contracting' [citation]." Barham v. Barham, 33 Cal.2d 416, 422, 202 P.2d 289, 293. "Since the phrase is capable of two meanings, parol evidence is admissible to explain it. As this court stated in Bartel v. Associated Dental Supply Co., 114 Cal.App.2d 750, 752, 251 P.2d 16, 17: 'Unless a court can "to a certainty and with sureness, by a mere reading of the document, determine which is the correct interpretation * * * extrinsic evidence becomes admissible as an aid to interpretation * * *." [Citation.]'" Associated Lathing & Plastering Co. v. Louis C. Dunn, Inc., 135 Cal.App.2d

40, 46, 286 P.2d 825, 828. We have here a perplexing problem of interpretation which could not have been determined satisfactorily from the face of the instruments alone. There was no error in the receiving of parol evidence.

[7] Respondent's contention that this was a continuing guaranty upon which less than $15,000 was due at the time of suit, and that the guarantors were not released through the fact that the total of the fluctuating loan exceeded $15,000 at times, is well grounded. The giving of a note was abandoned because of the fluctuating nature of the debt. Indeed, the guaranty agreement refers in paragraph 3 to "any loss for any money or sums remaining unpaid pursuant *to the loans up to* Fifteen Thousand ($15,000.00) Dollars." (Emphasis added.) At the time the guaranty was made the indebtedness actually amounted to $16,783.43; appellants' contention would strangle the obligation of the guarantors at birth. There never was any intention that a single lump sum loan should be made; while there is some evidence to the contrary the trial court, not without good reason, rejected it. Plaintiff's method of handling its own books does not affect the result for appellate purposes; it merely furnishes some evidence, the effect of which we do not weigh.

The loan was arranged to enable International more successfully to carry on business in the future. The indebtedness was intended to be the result of advances made by plaintiff against cars of scrap already shipped or about to be shipped. The loan was to be paid off through the application of one dollar a ton for each car of scrap. No interest was to be charged on the debt for it was a means of holding for plaintiff the exclusive brokerage agency for International, which agency was expressly declared to continue so long as the debt remained unpaid in any part. The applicable principles of law are well settled.

[8] The question of whether a guaranty is a continuing one is to be determined by reference to all relevant surrounding circumstances. "The Civil Code defines a continuing guaranty as one relating to a future liability of the principal under successive transactions which either continue his liability or from time to time renew it after it has been satisfied. Whether or not a guaranty is continuing must be determined from the language of the instrument, or, in case of ambiguity, by resort to parol evidence of the circumstances under which it was made. Where by the terms of the instrument it is evident that the object is to give a standing credit to the principal, to be used from time to time either indefinitely or for a certain period, it is deemed a continuing guaranty. And it has been stated that unless the words of the guaranty fairly imply that the guarantor's liability is to be limited, it will be regarded as continuing until the guaranty is revoked. * * *

"A guarantor may limit the amount for which he will be liable, or the time for which his guaranty will run, or may limit his liability to a single transaction between the principal debtor and the creditor, as distinguished from a continuing guaranty. However, a limitation on the amount for which the guarantor will be liable does not necessarily mean that the guaranty is not continuing. Such a limitation is not construed as a condition to the extent of credit to be given the debtor, breach of which would release the guarantor; and the guarantor may still be liable though the principal debtor has at various times contracted and paid debts equal to or greater than the amount of the guaranty." 46 Cal. Jur.2d, § 14, pp. 207–209.

Goldman v. Dangerfield, 101 Cal.App 67, at page 68, 281 P. 400, at page 401, dealt with a guaranty reading: "We hereby guarantee payment for all merchandise purchased * * * up to the amount of Fifteen Hundred Dollars ($1500.00)." Holding this to be a continuing guaranty the court quoted from 28 Corpus Juris 961, as follows: "'Where the guaranty contains a limitation as to the amount for which the guarantor will be bound, but contains no limitation as to time, and there is nothing in the circumstances surrounding the execution of the contract to evince a contrary intention, it will, in general, be construed to be a continuing guaranty and operative without limitation, except as to the amount of liability, until revoked. The limit mentioned in such a guaranty has reference to the amount of dealing between the principal and the guarantee and the guarantor will be held liable to the extent of his guaranty, notwithstanding the principal debtor may have, during the existence of the contract, contracted debts to an amount equal to, or greater than, the sum named in the guaranty, and paid them. But where it is apparent, either from the language of the guaranty itself or from such language in connection with the circumstances, that the intention was to limit the guaranty to the amount specified for the first transaction, or series of transactions, it is not a continuing one and will not extend to other transactions after such limit has once been reached.' In the case at bar it is evident that there is nothing in the surrounding circumstances to show that the intention was to limit the guaranty to any particular transaction. It was simply a guaranty covering 'all merchandise purchased,' without any limitation as to time, and had no reference whatever to any initial stock of goods or any particular order for goods." 101 Cal.App. at pages 72–73, 281 P. at page 402.

"'A continuing guaranty contemplates a succession of liabilities for which, as they accrue, the guarantor becomes liable. It is prospective in its operation, and is generally intended to provide security in respect to future transactions, within certain limits.' * * * On the same page, citing a number of authorities, we find the following: 'Unless the words in which a guaranty is expressed, fairly imply that the liability of the guarantor is to be limited, it is generally regarded as continuing until the guaranty is revoked.' And further: 'While the courts differ as to what words constitute a continuing guaranty, they seem to agree that if the contract is found to be a continuing guaranty, the payments by the principal do not discharge the guarantor unless they discharge the full debts to which the guaranty attaches.'" 101 Cal. App. at page 75, 281 P. at page 403.

In Lean v. Geagan, 20 Cal.App. 260, 261, 262, 128 P. 792, the guaranty applied to "any and all indebtedness which may hereafter become due from said W. B. Provan to said Hitchcock-Hill Company, provided the amount due or to become due shall at no time exceed the sum of one thousand dollars." The court said, in part: "We think the court was right in the first instance, and that the mere extension of credit to Provan beyond the sum named did not exonerate the obligor. * * *

"It is well settled that any ambiguity in a contract of guaranty, concerning the liability of the guarantor, will be resolved in favor of protecting the creditor to the extent of the sum named therein; in other words, that such a provision will be construed as a limitation upon the amount of the guarantor's liability rather than as a condition upon which any liability whatever attaches.

"In the present case we think the words, 'provided that the amount due or to become due shall at no time exceed the sum of $1,000' refer to the liability to be assumed by the guarantor." 20 Cal.App. at page 262, 128 P. at page 793.

To the same effect, see, Sinnige v. Oswald, 170 Cal. 55, 59, 148 P. 203; Bank of America Nat. Trust & Savings Ass'n v. Hunter, 8 Cal.2d 592, 596, 67 P.2d 99; Kierulff & Ravenscroft v. Koping, 94 Cal.App. 473, 476, 271 P. 353; Bank of America Nat. Trust & Savings Ass'n v. Sage, 13 Cal.App. 2d 171, 175, 56 P.2d 565; Annotation, 57 A.L.R.2d 1209, 1211.

[9] The court correctly held that the guaranty at bar was a continuing one from which appellants had not been released and did not err in awarding judgment for the amount due at the time of suit, a sum less than the specified maximum of $15,000.

[10, 11] Appellants' second major claim is: "The Indemnity Agreement was a guaranty of collectibility and since Berg failed to use reasonable diligence in collecting

from the principal, the guarantors were released." It is doubtful whether this is a guaranty of collection, but we need not decide the question for, assuming that we deal with such an undertaking it appears that the guarantors, through estoppel (Code Civ.Proc. § 1962, subd. 3), waived any right to have the creditor pursue the principal debtor. In this, as in other aspects of the case, we accept as established all facts and all inferences favorable to respondent which find substantial support in the evidence. New v. New, 148 Cal.App.2d 372, 383, 306 P.2d 987; Nichols v. Mitchell, 32 Cal.2d 598, 600, 197 P.2d 550.

Beginning shortly after the six months prescribed by the contract plaintiff requested delivery of the second trust deed and chattel mortgage and notified the guarantors that International was then in default and they were personally liable under their guaranty. This was in July, 1950. Repeated requests for said liens or payment of the indebtedness followed. Appellants, acting through Mr. Olmstead, assured plaintiff and its attorney that the Wilson Estates would soon be closed and the agreed liens executed and delivered; he also impressed upon them the need of continuing advances to International to enable it to successfully carry on business; assured them that this would be safe because such advances were within the guaranty and the individual guarantors were then liable and were amply able to pay. Plaintiff, its officers and attorney believed these representations and relied thereon and continued to make such advances until November 30, 1951. When it demanded payment of its debt on December 17, 1951, the insolvency of International was revealed. This was followed by discontinuance of business on January 15, 1952, International having no assets with which to meet its obligations. Up to that time the guarantors' active efforts had prevailed upon plaintiff to refrain from taking advantage of the existing default and to continue making advances to International. They were thereby estopped to complain of any delay on plaintiff's part in endeavoring to enforce payment from the principal debtor.

The court found that after the discontinuance of International's business on January 15, 1952, Mr. Olmstead, acting for appellants Harry R. Wilson and Jeanette Reifsnyder as well as himself, requested plaintiff on several occasions to refrain from bringing suit against them upon the guaranty, representing that all defendants were attempting to reorganize International, to recapitalize it so that it could resume operations, and that as soon as these things were accomplished plaintiff would be paid the sum due it from International or, in lieu thereof, would receive upon closing of the Wilson Estates a second trust deed and second chattel mortgage. Plaintiff believed said statements and representations and relied on them and was induced thereby to refrain from filing suit until November of 1953, at which time it learned that there was no possibility of rehabilitating International.

[12] The right to complain of delay in enforcing a guaranty of collection may be waived expressly or by conduct. 38 C.J.S. Guaranty § 64, p. 1226: "The acts or steps heretofore considered as being necessary on the part of the guarantee in order to fix liability on the guarantor, being intended for the benefit and protection of the guarantor, may be either expressly or impliedly waived by him; or he may be estopped by his conduct from taking advantage of the failure to perform such acts or take such steps. Thus the necessity for diligence in prosecuting a claim against the principal debtor may be waived by the guarantor, and this waiver may be by parol agreement." To the same effect, see, Bastian Bros. Co. v. Brown, 293 Mich. 242, 291 N.W. 644, 647; Mead v. Parker, 111 N.Y. 259, 18 N.E. 727, 729; Bogardus v. Phoenix Mfg. Co., 134 Ill.App. 456, 460. When insolvency intervened that put an end to any obligation to pursue the principal debtor. Civ.Code, § 2801; Irving v. Irwin, 133 Cal. App. 374, 378–379, 24 P.2d 215.

At the time the contracts were made California Mill Supply Corporation, a corporation, was doing business under the fictitious firm name of Berg Metals Company, having complied with § 2466, Civil Code, by filing an appropriate certificate on October 31, 1947, and thereafter publishing same as required by the statute. On or about January 1, 1952, plaintiff Berg Metals Corporation became the corporate successor of California Mill Supply Corporation in the manner hereinafter detailed. Appellants say that plaintiff cannot maintain this action as assignee of California Mill Supply Corporation, because § 2468 Civil Code[1] forbids. The crux of the argument is that the certificate was not executed in the manner required by § 2466, Civil Code, which at the time of filing the certificate provided: "Except as otherwise provided in the next section every person transacting business in this State under a fictitious name and every partnership transacting business in this State under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, must file with the clerk of the county in which his or its principal place of business is situated, a certificate, stating the name in full and the place of residence of such person and stating the names in full of all the members of such partnership and their places of residence."

The certificate in question states that California Mill Supply Corporation is conducting business at 2652 East Long Beach Avenue East, in the city of Los Angeles, under the fictitious firm name of Berg Metals Company; it then names the president and secretary of the California Mill Supply Corporation and gives the residence address of each. The purpose of the section with respect to a partnership is thus stated in Andrews v. Glick, 205 Cal. 699, 701, 272 P. 587, 588: "The object of section 2466, supra, is that public notice shall be given and a public record made of the individual members of partnerships with such definiteness and particularity that those dealing with them may at all times know who are the individuals with whom they are dealing, or to whom they are giving credit or becoming bound." Speaking of an individual doing business under a fictitious name the opinion in Ray v. American Photo Player Co., 46 Cal.App. 311, 314, 189 P. 130, 131, says: "The purpose of these provisions is to prevent fraudulent trading."

[13] It is generally recognized that the statute applies to a corporation which is doing business under a fictitious name. To bring a corporation within the statute it must be held to be a person (Civ.Code, § 14), surely not a partnership. Manifestly, the full purpose of the statute was subserved by the certificate in question. It discloses the name of the "person" doing business under a fictitious name, gives its business address, names its president and secretary and gives their respective residence addresses. One who would know in advance the person who is to become responsible to him, or who would sue after a breach of contract, has before him all the data he can possibly use. No concealment, nothing misleading, is found in the certificate, which obviously was an adaptation to a corporation of a statutory provision relating to a natural individual. A corporation has no residence except its place

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[1] Civ.Code § 2468: "The certificate filed with the clerk as provided in Section 2466 must be signed by the person therein referred to, or by the partners, as the case may be, and acknowledge before some officer, authorized to take the acknowledgment of conveyances of real property, by personally appearing before such officer, notwithstanding the provisions of Section 1195 of the Civil Code. * * * No person doing business under a fictitious name, or his assignee or assignees, nor any persons doing business as partners contrary to the provisions of this article, or their assignee or assignees, shall maintain any action upon or on account of any contract or contracts made, or transactions had, under such fictitious name, or in their partnership name, in any court of this State until the certificate has been filed and the publication has been made as herein required."

of business and that is stated in the certificate. Substantial compliance with the statute is all that is required (Bank & Trust Co. of Central California v. Gearhart, 45 Cal.App. 421, 423, 187 P. 989), and the trial judge was correct in so holding.

It is further argued by appellants that the cause of action belonged to California Mill Supply Corporation, doing business as Berg Metals Company, and that no assignment in favor of the Berg Metals Corporation was proved, hence plaintiff has no standing to maintain the suit. The evidence shows that this asset vested in plaintiff by virtue of a reorganization of California Mill Supply Corporation.

That company had three separate divisions, one of them known as Berg Metals Company, each division operating a separate business and keeping separate accounts. The plan of reorganization called for the formation of three separate corporations, one of which is plaintiff Berg Metals Corporation, and the transfer to each of them of all assets pertaining to the division which preceded it,—in this case Berg Metals Company. The opening balance sheet of plaintiff showed net assets of $1,764,474.29 transferred to it, which item included cash on hand, accounts receivable, advances to dealers, notes receivable, inventories and fixed assets. Stock of plaintiff corporation was issued to shareholders of California Mill Supply Corporation in proportion to their holdings in that former corporation; 17,424 shares were issued to California Mill Supply Corporation itself, and the consideration therefor was the transfer to plaintiff of the assets of the Berg Metals Company division. Plaintiff corporation continued in every respect the activities of Berg Metals Company except for the adoption of the new name. Such is the effect of the oral evidence. Supporting corporate records of California Mill Supply Corporation were received in evidence and a stipulation was made that same be marked plaintiff's exhibit 13 for identification and withdrawn from the files. They are not before this court. In this state of the record we cannot say that the proof of assignment of the guaranty contract and the receivables was insufficient.

[14] Moreover, we recognize it to be California law that an oral assignment of a contract or chose in action is sufficient. Swing v. Lingo, 129 Cal.App. 518, 523, 19 P.2d 56; Ralph v. Anderson, 187 Cal. 45, 47, 200 P. 940; Hagge v. Drew, 73 Cal.App.2d 739, 745, 167 P.2d 263; Todd v. Temple Hospital Ass'n Inc., 96 Cal.App. 42, 46, 273 P. 595; 5 Cal.Jur.2d § 35, p. 310.

The judgment is affirmed.

FOX, P. J., and HERNDON, J., concur.

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170 Cal.App.2d 740

John S. BROOKES, Plaintiff and Respondent,

v.

ADOLPH'S LTD., a corporation, Defendant and Appellant.

Civ. 23544.

District Court of Appeal, Second District, Division 2, California.

May 28, 1959.

Action for balance allegedly due under employment contract. The Superior Court of Los Angeles County, Jesse J. Frampton, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Herndon, J., held that agreement, to pay employee a bonus at end of first year "if we feel that you have satisfactorily filled our requirements of increasing our sales, or at least not having them fall below the rate that they were before you came—plus, of course, our mutual desires to have you continue on with us", was reasonably susceptible of different and conflicting interpretations, and that parol evidence was properly admitted to aid court in determining true intent of parties.

Modified and affirmed.

1. Evidence ⚷461(1)

Agreement, to pay employee bonus at end of first year "if we feel that you have satisfactorily filled our requirements of increasing our sales, or at least not having them fall below the rate that they were before you came—plus, of course, our mutual desires to have you continue on with us" was reasonably susceptible of different and conflicting interpretations, and parol evidence was properly admitted to aid court in determining true intent of parties.

2. Evidence ⚷461(1)

When language used in written agreement is fairly susceptible of one of two constructions, extrinsic evidence may be considered, not to vary or modify terms of agreement but to aid court in ascertaining true intent of parties, and such evidence is received not to show that parties meant something other than what they said but to show what they meant by what they said.

3. Evidence ⚷458

When language of written agreement is not clear, evidence of negotiations of parties and surrounding circumstances is admissible for purposes of determining meaning of its provisions.

4. Frauds, Statute of ⚷158(3)

Parol evidence may not be resorted to for purpose of supplying an essential but missing element of contract within statute of frauds; but where meaning of language used in note or memorandum under statute of frauds is uncertain or ambiguous, parol evidence is admissible to show circumstances surrounding transaction for purpose of arriving at determination as to meaning intended and understood by parties.

5. Appeal and Error ⚷1008(3)

An appellate court will accept interpretation of contract adopted by trial court and will not substitute another of its own where parol evidence has been introduced in aid of interpretation and such evidence will support conflicting inferences.

* * *

Shaw & Miller, and Simon Miller, Beverly Hills, for appellant.

S. Dell Scott, No. Hollywood, and Forrest Latiner, Beverly Hills, for respondent.

HERNDON, Justice.

Appellant seeks reversal of a judgment which sustains respondent's claim to a $3,000 bonus under the terms of a contract of employment evidenced by a writing in the form of a letter.

Appellant is a California corporation engaged in the business of selling a product described as a "meat tenderizer". In 1955 respondent was an advertising executive residing in Chicago, Illinois. In the fall of that year appellant and respondent entered into negotiations which led to an agreement under which respondent was required to move to California and undertake the duties of an employment in appellant's organization. The agreement was reached after a series of meetings and discussions, and the terms thereof were confirmed in a letter dated November 21, 1955, addressed to respondent and signed by Mr. Rigler, appellant's president. This letter stated that Mr. Rigler and Mr. Deutsch, appellant's secretary-treasurer, had "both concluded that we would be happy to have you join our organization as soon as it is conveniently possible for you and would assume that you would be out here ready for work the first week in January." The parties are in agreement that the determination of this appeal must turn upon the proper interpretation of the following paragraph of said letter:

> *"As for compensation, we are agreed to the terms discussed at our last meeting which would be a base pay of $15,000 per year, with a bonus of $3,000 at the end of the first year if we feel that you have satisfactorily filled our requirements of increasing our sales, or at least not having them fall below the rate that they were before you came—plus, of course, our mutual desires to have you continue on with us."* (Emphasis added.)

The letter also contained a provision that respondent's moving expenses would be reimbursed within a limit of $1,500, and that respondent would assume the title of director. The closing sentence stated: "I would appreciate your finalizing your decision and confirming this letter to us as soon as possible and let us know when you expect to arrive here." Respondent replied to the foregoing in his letter dated November 26, 1955, stating, among other things, "I am glad to be able to accept your kind offer in essence, and will report early in January, not later than the 9th."

Respondent commenced working for appellant early in January, 1956, and continued in the employment until the latter part of November of that year. It appears to be undisputed that sales of appellant's product during 1956 exceeded those of the preceding year. On or about November 23, 1956, respondent was informed that his services were no longer needed and was tendered a check for his last month's salary bearing the notation "Balance of Salary in Full to 12–31–56." This check did not include the $3,000 bonus. Because appellant refused to remove the restrictive legend, respondent refrained from cashing the check. Subsequent to the trial, however, the parties entered into a stipulation that respondent might cash his last salary check without prejudice to his other claims, and that the issues in the litigation would be limited to respondent's right to receive the $3,000 bonus. It was further agreed that if respondent's right to the bonus was ultimately established, he would be entitled to recover the further sums of $308.39, representing accrued interest on the bonus to the date of judgment and $129.21, representing interest on the last installment of respondent's salary check to the date of judgment, together with trial court costs in the amount of $55.90.

At the trial, appellant's counsel took the position that since the employment contract was within the statute of frauds, it was necessary that the rights of the parties be determined solely by reference to the language of the writing; that parol evidence could not properly be admitted in aid of its interpretation, and that the writing in question was clear, unambiguous and susceptible of only one reasonable interpretation. Appellant urged in the trial court, as it urges here, that the only reasonable construction of the language in question is that payment of respondent's bonus was subject to the fulfillment of two independent conditions: (1) respondent's satisfactory fulfillment of appellant's requirements regarding sales, and (2) that there be a mutual desire of the parties to have the employment continue beyond the first year.

Respondent, on the other hand, took the position (a) that the only condition precedent to his right to the bonus was that appellant's sales in 1956 should exceed those of 1955; and (b) that the "plus" clause in appellant's letter of November 21, 1955, was intended merely to allay respondent's apprehension that he was being hired only to accomplish a certain limited objective without favorable prospect of long term employment.

In the face of these conflicting contentions, the trial court ruled that the language of the writing was sufficiently unclear to admit of different interpretations, and, therefore, that extrinsic evidence should be admitted to aid the court in arriving at the true intent of the parties. Accordingly, evidence was admitted over appellant's objection which included respondent's testimony as to his understanding of the purpose and meaning of the clause in question. This parol evidence also related to the circumstances of the parties at the time the agreement was negotiated, and to some of the oral discussions which preceded it. We shall briefly set forth the substance of this evidence:

In 1955 respondent was employed as an advertising executive by a Chicago firm at a yearly salary of $21,000 but was interested in living in Los Angeles. At a meeting in Burbank with appellant's principal officers, respondent's background and experience in the marketing field were discussed. Respondent stated that he would be willing to come to California to work for appellant at a salary of $18,000 per year.

Thereafter, in September of the same year, respondent met with Mr. Rigler in Chicago. Rigler explained to respondent that appellant's sales had fallen severely, and that the object of having respondent join the company was to stop the falling trend of sales. Rigler stated that he and Mr. Deutsch considered the figure of $18,000 to be rather high but that they felt that if that amount were to be paid, it should be paid on the basis of $15,000 for the year in equal monthly installments, plus $3,000 at the end of the year. Respondent expressed his belief that he could be helpful in reversing the adverse trend of sales, but stated that from what Mr. Rigler had said it appeared that the position being offered respondent was of a limited nature merely to stop the falling sales with no future beyond that. Rigler replied that this was not the situation, and assured respondent that a continuing position with future opportunity was being offered him. In later conversations respondent's concern about the limited aspect of the proposed employment was again expressed. In each instance, Rigler gave his assurance that a short term employment was not what appellant had in mind.

Finally in November of 1955, Mrs. Brookes in Chicago answered a long-distance telephone call from Mr. Rigler intended for respondent, who, at that time, was in Baltimore on business. Rigler told Mrs. Brookes that he had discussed the matter with Deutsch and that he would accept the terms on which he and respondent had agreed upon at their last meeting. Mrs. Brookes replied that she would prefer not to have the responsibility of relaying such a message to her husband, and asked Rigler to confirm the agreement by a letter addressed to respondent. Rigler's letter of November 21, 1955, was thereafter received by respondent. Respondent testified that in the light of previous conversations with Mr. Rigler, he considered this letter to be direct confirmation of their prior discussions to the effect that he would be entitled to the bonus payment if he succeeded in maintaining sales at the current level. He understood the so-called "plus" clause as merely a reaffirmation of the earlier oral assurances that he was not being hired on a stopgap basis but that a continuing employment was contemplated.

On the basis of this evidence the trial court made findings the effect of which was to sustain respondent's position regarding the proper interpretation of the agreement. Appellant does not deny fulfillment of the condition with respect to the maintenance of a satisfactory level of sales but rests its argument entirely upon the proposition that the agreement clearly and unequivocally stated a second condition precedent which was not satisfied.

[1] We hold that the trial court correctly ruled that the writing was reasonably susceptible of different and conflicting interpretations, and that parol evidence was properly admitted to aid the court in determining the true intent of the parties.

[2,3] When the language used in a written agreement is fairly susceptible to one of two constructions, extrinsic evidence may be considered, not to vary or modify the terms of the agreement, but to aid the court in ascertaining the true intent of the parties. Such evidence is received, not to show that the parties meant something other than what they said but to show what they meant by what they said. Beneficial Fire & Casualty Ins. Co. v. Kurt Hitke & Co., 46 Cal.2d 517, 524, 297 P.2d 428; Barham v. Barham, 33 Cal.2d 416, 422, 423, 202 P.2d 289; Union Oil Co. of California v. Union Sugar Co., 31 Cal.2d 300, 306, 188 P.2d 470; cf. Woodbine v. Van Horn, 29 Cal.2d 95, 104, 173 P.2d 17. When the language of a written agreement is not clear, evidence of the negotiations of the parties and of the surrounding circumstances is admissible for the purposes of determining the meaning of its provisions. Decter v. Stevenson Properties, Inc., 39 Cal.2d 407, 416, 247 P.2d 11. "It is a settled rule that, when the language employed is fairly susceptible of either one of two constructions contended for without doing violence to its usual and ordinary import an

ambiguity arises where extrinsic evidence may be resorted to for the purpose of explaining the intention of the parties, and that for this purpose conversations between and declarations of the parties during the negotiations at and before the execution of the contract may be shown." Beneficial Fire & Casualty Ins. Co. v. Kurt Hitke & Co., supra, 46 Cal.2d 517, 525, 297 P.2d 428, 432; Kenney v. Los Feliz Investment Co., Ltd., 121 Cal.App. 378, 386–387, 9 P.2d 225.

[4] Citing such cases as Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, and Ellis v. Klaff, 96 Cal.App.2d 471, 216 P.2d 15, appellant advances the proposition that if parol evidence was needed in order to ascertain the meaning of the writing, then as a matter of law the writing was insufficient to satisfy the requirements of the statute of frauds. This proposition is not in accord with the law and the cases cited do not support it. The essence of the holdings in Seymour v. Oelrichs, supra, and Ellis v. Klaff, supra, was to the effect that parol evidence may not be resorted to for the purpose of supplying an essential but missing element of a contract within the statute of frauds. In the latter case the court stated with reference to the rejection of certain oral evidence: "This was an attempt, not to resolve an ambiguity, but to supply essentials of a complete agreement which were lacking in the writing." Ellis v. Klaff, supra, 96 Cal.App.2d 471, 480, 216 P.2d 15, 21.

The rule applicable in the instant situation was stated in Gibson v. De La Salle Institute, 66 Cal.App.2d 609, 619, 152 P.2d 774, 780: "It is well established that where the meaning of language used in a note or memorandum under the statute of frauds is uncertain or ambiguous, parol evidence is admissible to show the circumstances surrounding the transaction for the purpose of arriving at a determination of the meaning intended and understood by the parties."

The lack of clarity and precision in the language employed by appellant in the third paragraph of its letter of November 21, 1955, is self evident. Indeed, the language may fairly be characterized as inept and inartificial. Had it been appellant's purpose to require fulfillment of a second condition to respondent's right to the bonus, such purpose could have been served by the use of a simple form of expression. Instead, however, appellant tacked on at the end of a lengthy and complex sentence an independent disconnected clause, containing a pronoun whose antecedents are obviously uncertain.

[5] In the light of the properly admitted extrinsic evidence, the trial court's interpretation of the unclear language of the writing under discussion appears to be entirely reasonable. It is well-settled that an appellate court will accept the interpretation of a contract adopted by the trial court and will not substitute another of its own where parol evidence has been introduced in aid of its interpretation and such evidence will support conflicting inferences. In re Estate of Rule, 25 Cal.2d 1, 11, 152 P.2d 1003, 155 A.L.R. 1319; Johnston v. Landucci, 21 Cal.2d 63, 69, 130 P.2d 405, 148 A.L.R. 1355; Universal Sales Corp. v. Cal. Press Mfg. Co., 20 Cal.2d 751, 772, 128 P.2d 665; Overton v. Vita-Food Corp., 94 Cal.App.2d 367, 370, 210 P.2d 757. "Where extrinsic evidence has been properly admitted as an aid to interpretation, and either the evidence or inferences therefrom are in conflict, any reasonable construction by the lower court will be upheld under the general rule of conflicting evidence." (3 Witkin, California Procedure, 2253, § 89.)

In accordance with the stipulation on appeal, the judgment is modified by reducing it to the sum of $3,437.60 and as thus modified it is affirmed. Respondent will recover in addition his costs as taxed and allowed in the trial court and his costs on this appeal.

FOX, P. J., and ASHBURN, J., concur.

171 Cal.App.2d 99

DEPARTMENT OF PUBLIC HEALTH of the State OF CALIFORNIA, Petitioner,

v.

BOARD OF SUPERVISORS OF the COUNTY OF LAKE; Board of Supervisors of the County of Amador; Board of Supervisors of the County of Sutter; City Council of the City of Amador; City Council of the City of Jackson; City Council of the City of Ione; City Council of the City of Sutter Creek, Respondents.

Civ. 9670.

District Court of Appeal, Third District, California.

June 3, 1959.

Rehearing Denied June 29, 1959.

Mandamus proceeding. The Third District Court of Appeal, Warne, J. pro tem., held that petition for writ of mandate, to compel respondents to enact ordinances to provide for maintenance of pound system and rabies control program for dogs as provided for in Health and Safety Code section, sufficiently alleged existence of rabies and compliance with Code section by Department of Public Health, and that petition was not demurrable for failure to state a cause or for ambiguity, unintelligibility or uncertainty.

Order accordingly.

1. Mandamus 🔑154(4)

Petition, for writ of mandate to compel respondents to enact ordinances to provide for maintenance of pound system and rabies control program for dogs as provided for in Health and Safety Code section, sufficiently alleged existence of rabies and compliance with Code section by Department of Public Health, and it was not demurrable for failure to state a cause, or for ambiguity, unintelligibility or uncertainty. West's Ann.Health & Safety Code, §§ 1901.2, 1902–1905, 1920.

2. Constitutional Law 🔑62
Health 🔑21

Code section, empowering director to determine area where existence of rabies constituted public health hazard, did not constitute unlawful delegation of legislative power; and neither that section nor section making it duty of governing bodies of state subdivisions to provide for maintenance of pound system and control program violated constitutional sections. West's Ann.Health & Safety Code, §§ 1901.2, 1902–1904, 1920; West's Ann.Const. art. 3, § 1; art. 4, § 1; art. 11, § 13.

3. Health 🔑21

The Rabies Control Act was not unconstitutional for failure to afford notice and opportunity to be heard to municipal and county officials required thereby to provide for maintenance of pound system and control program after determination by director that existence of rabies constituted a public health hazard. West's Ann.Health & Safety Code, §§ 1901.2, 1920; West's Ann.Const. art. 3, § 1.

4. Counties 🔑1

Counties are merely political subdivisions of state for purposes of government.

5. Municipal Corporations 🔑54

Municipal corporations are subdivisions of state, and are part of the machinery by which state conducts governmental affairs.

6. Health 🔑21

Administrative Code section is solely for the more efficient and uniform administration of Health and Safety Code sections providing for rabies control and is consistent and not in conflict with those statutes and is reasonably necessary to effectuate purposes of same. West's Ann.Gov. Code, § 11374.

◆

The Atty. Gen., by B. Abbott Goldberg, Asst. Atty. Gen., Elizabeth Palmer, and Wiley W. Manuel, Deputies Atty. Gen., for petitioner.

Fredric S. Crump, Dist. Atty., Lakeport, Pierce Deasy, City Atty., Jackson, Gard Chisholm, City Atty., Sutter Creek, A. Caminetti, Jr., Dist. Atty., Jackson, John G. Hauck, Dist. Atty., Yuba City, and Geoffrey Hughes, City Atty., Placerville, for respondents.

WARNE, Justice pro tem.

The Department of Health of the State of California seeks a writ of mandate to compel respondents, Boards of Supervisors and City Councils, to enact ordinances to provide for the maintenance of a pound system and rabies control program for dogs as provided for in section 1920 of the Health and Safety Code.

By section 1901.2 of the Health and Safety Code (all code section citations hereinafter will refer to the Health and Safety Code unless otherwise stated) the director of the Department of Public Health may declare an area a rabies area "where the existence of rabies constitutes a public health hazard, as found and declared by the director, after consultation with, and the approval of, the regional advisory committee," which shall consist of nine persons and shall include a health officer, a representative of the medical profession, a veterinarian, the mayor of the city having the largest population in the area, the chairman of the board of supervisors of the county having the largest population in the area, and such representatives of the livestock industry, civic, dog owning, and humane groups as may be appointed by the director. Once a rabies area has been declared the licensing of dogs and the maintenance of a pound system and rabies control program must be provided by the proper municipal or county bodies.

For the purposes of enforcement and administration of section 1920, the department adopted a regulation which is now section 2606.4 of Title 17 of the California Administrative Code, which sets up certain requirements as to vaccination and licensing, and which requirements are to be followed in administering the act. The regulation provides that vaccination is a prerequisite to licensing and it also provides the interval of time within which vaccination must be had. It further provides for certain reports to be filed with the department, the types of vaccine which must be used, and for confinement of the vaccinated dog for 30 days after the initial injection of vaccine.

On December 2, 1957, the areas involved herein were declared to be rabies areas. On December 2, 1958, the areas were again declared to be rabies areas. Thus, under the provisions of section 1920, the respondents were required to set up licensing programs and maintain a pound system and a rabies control program. None of the respondents have complied with the requirements of the statute, except the Board of Supervisors of Sutter County. The supervisors of Lake County have refused to enact any ordinance unless ordered to do so by a court. The other respondents attempt to excuse performance by alleging that they have not refused to comply with the provisions of the section. They assert they are endeavoring to formulate a cooperative plan whereby each of them may comply with the provisions and cooperate with each other, but they have been unable to agree on all of the details of the program. Nevertheless, they question the constitutionality of the statute and the proceedings.

Respondents have demurred generally and specially to the petition and have also filed a return and answer to the alternative writ and petition herein.

All of the respondents contend that no case of rabies has been reported in the area in which they have jurisdiction; that rabies does not exist in the area; and that the health and safety or welfare of the people is not in any way affected or endangered by their refusal to comply with the order of the director. Respondents also contend that no investigation was made as required by section 1902 to determine whether or not the disease exists and to determine the probable area in which the population or animals are endangered; that petitioner did not find and determine upon competent evidence that rabies existed or constituted a public health menace in any of the areas, and that no notice was given to respondents as to the meeting of the regional advisory committee; that no facts or evidence were presented to the regional advisory committee; that no facts or evidence of the existence of rabies were presented to the advisory committee; and that the finding that the areas were rabies areas, or that rabies therein constituted a public health hazard is not true and is not based on facts.

[1] The first claim is that the facts as alleged do not state a cause of action for mandamus. Specifically it is alleged that the petition does not allege compliance with sections 1902–1905 of the code. Section 1902 provides that whenever a case of rabies is reported a preliminary investigation must be made to determine whether or not rabies exists; and if so, the probable area of incidence of the disease. Section 1903 provides that if rabies is found to exist a quarantine shall be declared. Section 1904 provides that following the order of quarantine a thorough investigation shall be made as to the extent of the disease, the probable number of persons and animals exposed, and the area found to be involved. Section 1905 provides that the department may substitute such regulations as may be deemed adequate for control of the disease for the quarantine. Section 1901.2 provides for the establishment of a rabies area not less than a county as determined by the director within a region where the existence of rabies constitutes a public health hazard, as found and declared by the director, after consultation with, and the approval of, the regional advisory committee. It further provides that a region shall consist of two or more counties as determined by the director. Section 1920 is the licensing section. While it is true that the object sought to be accomplished in each instance is the same, the means resorted to for that purpose in the one instance is different from the means resorted to in the other.

The petition alleges the appointment of the regional advisory committees, that the county of Lake is in region V, the county of Amador and respondent cities are in region VI. The original declaration of the respondent counties as rabies areas, its effective date, and that notice thereof was given respondents is alleged. In connection with the present declaration of the respondent counties as rabies areas, petitioner alleged: "Because of the continued existence of rabies which has constituted a public health hazard in the three counties, the Director of Public Health after consultation with, and the approval of, the Rabies Regional Advisory Committee of Region V on October 16, 1958, redeclared the County of Lake to be a rabies area and such declaration became effective on December 2, 1958. A true and correct copy of said declaration dated December 1, 1958 addressed to the Board of Supervisors of the County of Lake is attached hereto, marked Exhibit 'B' and is incorporated herein as though fully set forth. The Director of Public Health after consultation with, and the approval of, the Rabies Regional Advisory Committee of Region VI on October 22, 1958, redeclared the Counties of Sutter and Amador to be rabies areas and such declaration became effective on December 2, 1958. A true and correct copy of such declaration dated December 1, 1958 addressed to the various respondents within Region VI is attached hereto, marked Exhibit 'C' and is incorporated herein as though fully set forth." The section provides, as hereinabove mentioned, for the declaration of a rabies area wherein "the existence of rabies constitutes a public hazard, as *found* and declared by the director, * * *" (Emphasis added.) The statement in the petition, "Because of the continued existence," implies that an investigation was made. Hence respondents' contention that there is no allegation of the existence of rabies is without merit. The demurrer on the ground that no cause of action is stated is overruled. We have also considered the special demurrers of respondents which contend the complaint is ambiguous, unintelligible and uncertain. These are without merit and are overruled.

[2] Respondents next contend that if the provisions of sections 1901.2 and 1920 are to be considered independent of sec-

tions 1902–1904, they are in violation of section 13 of Article XI, section 1 of Article IV, and Article III of the Constitution of the State of California, and more specifically that section 1901.2 is an unlawful delegation of a legislative power to an administrative officer in that no sufficient standard is provided therein to guide the director in determining the existence of rabies. We have concluded that respondents' contention should not be sustained.

Section 1901.2 provides in part: "'Rabies area' shall mean any area not less than a county as determined by the director within a region where the existence of rabies constitutes a public health hazard, as found and declared by the director, after consultation with, and the approval of, the regional advisory committee. * * *" Under the provisions of said section the director merely determines the facts upon which section 1920 becomes operative. Section 1920 clearly sets forth the duty of the governing body of each city, city and county, or county to provide for the maintenance of a pound system and a control program for the purpose of carrying out and enforcing provisions of said section. Clothing the Director of Public Health with the power to find and determine the facts upon which section 1920 became operative did not violate section 1 of Article III of the state Constitution. Escobedo v. State of California, 35 Cal. 2d 870, 222 P.2d 1; Dominguez Land Corp. v. Daugherty, 196 Cal. 468, 484–486, 238 P. 703; Brock v. Superior Court, 9 Cal.2d 291, 295, 71 P.2d 209, 114 A.L.R. 127; Olive Proration Program Committee v. Agricultural, etc., Comm., 17 Cal.2d 204, 208, 109 P.2d 918. Nor does it violate section 1 of Article IV of the state Constitution. Further, there is no merit in respondents' contention that section 13 of Article XI of the state Constitution is violated. Neither the director nor the regional advisory committee is given any power to interfere with purely local affairs of the respective cities or counties.

A somewhat similar contention to that of respondents was made in Jersey Maid Milk Products Co. v. Brock, 13 Cal.2d 620, 91 P.2d 577, where the court passed upon the grant of authority to the director of agriculture to designate a marketing area which he deems necessary or advisable to effectuate the purpose of chapter 10, division IV, of the Agricultural Code and to formulate a stabilization and marketing plan if he finds that such a plan is necessary to accomplish the purposes of the chapter. The authorization was upheld as being controlled by sufficient standards.

[3–5] Respondents also contend that the "rabies control act," and in particular sections 1901.2 and 1920, is in violation of their constitutional rights because of the lack of notice and opportunity to be heard at some stage of the proceedings. The answer to this contention, as stated in Town of Meredith v. State Board of Health, 94 N.H. 123, 48 A.2d 489, 496, is found in Willis v. Wilkins, 92 N.H. 400, 402, 32 A.2d 321, 322, where it is said: "Boards of health act summarily, and it is the prevailing rule that they 'need not give notice of hearing to any person before they can exercise their jurisdiction for the public welfare, unless the statute under which they are authorized to act expressly so requires.'" This is a sensible and logical rule since the protection of the public health often requires prompt and immediate action. To require that local agencies be given a notice and a hearing before determining that the existence of rabies constituted a public health hazard within the "rabies area" as determined by the director would mean the hazard of the disease would become critical before steps could be taken for the protection of the public against it. Such legislation is designed to protect the public health and therefore is clearly within the police power of the state.

Counties are merely political subdivisions of the state for the purposes of government (County of Los Angeles v. Riley, 6 Cal. 2d 625, 627, 59 P.2d 139, 106 A.L.R. 903), and municipal corporations are likewise subdivisions of the state, and are part of the machinery by which the state conducts its governmental affairs. Johnson v. City of San Diego, 109 Cal. 468–474, 42 P. 249, 30 L.R.A. 178. The duty imposed under section 1920 is absolute. The local agencies in carrying out state affairs perform a mere ministerial duty. "There is no theory upon which a mere agency of the state has a right to litigate the right of the state to enforce, through any agency it pleases, * * * rules and regulations for the preservation of the health and comfort of all the people of the state." State Board of Health v. City of Greenville, 86 Ohio 1, 98 N.E. 1019, 1023. And in Commonwealth v. Town of Hudson, 315 Mass. 335, 52 N.E.2d 566, 571–572, in an action by the Commonwealth against the town of Hudson and others to require the defendants to provide treatment equipment for chlorinating the water supply of the town of Hudson as ordered by the department of public health of the Commonwealth, the Supreme Judicial Court of Massachusetts said: "The order in question was plainly a valid exercise of the police power of the Commonwealth. Though made by the State department of public health, it was made under a valid delegation of power by the Legislature, and has the same force as though made by the Legislature itself. There was no constitutional need to give a hearing to the town. The Legislature was dealing with an emergency affecting many water systems throughout the Commonwealth. For the department to hold a hearing in each case would delay needed action and tend to defeat the purpose of the statute. * * The action of the department was of the very kind contemplated by the statute. The problem was the business of the Commonwealth, and not that of the town of Hudson alone. * * * *The town cannot ask the courts to try the legislative question whether chlorination is needed.* * * * *Still less has it the right to nullify the order because not convinced of its necessity.* There was never any sufficient reason for the town to doubt the validity of the order or to refuse to obey it." (Emphasis added.) The same reasoning applies to the instant case.

[6] Lastly, respondents contend section 2606.4 of Title 17 of the California Administrative Code enlarges the department's authority and exceeds the powers given it by statute. We are convinced that the section is solely for the more efficient and uniform administration of sections 1901.2 and 1920. It is consistent and not in conflict with the statutes and seems reasonably necessary to effectuate the purposes of the statute, i. e., the control of rabies. Gov.Code, sec. 11374.

Let a peremptory writ of mandate issue against all respondents except the Board of Supervisors of the county of Sutter who has already complied with the order.

VAN DYKE, P. J., and PEEK, J., concur.

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171 Cal.App.2d 15

PEOPLE of the State of California, Respondent,

v.

Bernard Ben FELDMAN, Appellant.

Cr. 3520.

District Court of Appeal, First District, Division 1, California.

June 1, 1959.

Rehearing Denied July 1, 1959.

Hearing Denied July 29, 1959.

Prosecution for conspiracy to commit grand theft and to receive stolen property, and for two counts of receiving stolen property. The Superior Court, City and County of San Francisco, C. Harold Caulfield, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Tobriner, J., held, inter alia, that where defendant did not agree to receive any stolen property as a part of his sale of license plates of two wrecked automobiles to persons who at the time of the sale of the plates, had stolen automobiles already in their possession, there could be no conspiracy by defendant and plate buyers to commit grand theft and to receive stolen property which were past and completed acts, and therefore defendant by sale of the plates did not and could not be deemed guilty of conspiracy to commit grand theft or to receive stolen property.

Judgment reversed as to Counts I and II and affirmed as to Count III.

1. Conspiracy 🔑41

A conspirator may not be held liable for criminal acts of his fellow conspirators committed prior to the time he joined the conspiracy.

2. Conspiracy 🔑40

Where defendant did not agree to receive any stolen property as a part of his sale of license plates of two wrecked automobiles to persons who at the time of the sale of the plates had stolen automobiles already in their possession, there could be no conspiracy by defendant and plate buyers to commit grand theft and to receive stolen property, which were past and completed acts, and therefore defendant by sale of the plates did not and could not be deemed guilty of conspiracy to commit grand theft or to receive stolen property. West's Ann. Pen.Code, §§ 182, 484, 487, 496.

3. Conspiracy 🔑43(12)

Where indictment described overt acts committed by defendant in furtherance of the object of a conspiracy to commit grand theft or to receive stolen property, as delivering certain automobile license plates to certain named persons, act of agreeing to dispose of a stolen automobile was not synonymous with act of delivering the license plates, and therefore the indictment alleged as the overt act a different act than the proved overt act which related to the conspiracy, and such fatally defective indictment was insufficient to sustain conviction of defendant for conspiracy to commit grand theft and to receive stolen property. West's Ann.Pen.Code, §§ 182, 484, 487, 496.

4. Receiving Stolen Goods 🔑6

Where certain persons had obtained possession of a stolen automobile before defendant agreed to sell such persons license plates from a similar wrecked automobile, fact that such persons had accepted illegal possession of the stolen automobile before defendant even met with them precluded conclusion that guilt attached to defendant on theory that he received, or aided and abetted receiving the stolen automobile, knowing it to have been stolen. West's Ann. Pen.Code, §§ 182, 496.

5. Receiving Stolen Goods 🔑6

The crime of "receiving stolen property" congeals upon taking possession of stolen property with guilty knowledge, and the aiding and abetting of that crime would call for the performance of the criminal act with guilty knowledge of the wrongful purpose of the perpetrator. West's Ann. Pen.Code, §§ 182, 496.

See publication Words and Phrases, for other judicial constructions and definitions of "Receiving Stolen Property".

6. Criminal Law 🔑991

A person cannot be convicted of an offense other than a necessarily included offense, not charged against him by indictment or information, whether or not there was evidence at his trial to show that he had committed that offense. West's Ann.Pen.Code, § 952.

7. Constitutional Law 🔑265

The very essence of due process lies in notification to the accused of the nature of the charge against him.

8. Receiving Stolen Goods 🔑7(6)

Concealing or aiding in concealing stolen property is not the same offense as receiving or aiding in receiving stolen property, and indictment which charged a defendant with violation of statute proscribing the receiving of stolen property but which did not allege offense of concealing stolen property was insufficient to support a conviction for violation of statute proscribing receiving of stolen property based on proof of acts of defendant in concealing stolen property. West's Ann.Pen.Code, § 496.

9. Receiving Stolen Goods 🔑5

Where defendant in prosecution for violation of statute proscribing receiving of stolen property accepted a stolen automobile, with knowledge it was stolen, defendant was guilty of a violation of such statute, and it was no defense that his action was not for personal gain, and that he took the automobile only to dispose of it. West's Ann.Pen. Code, § 496.

10. Criminal Law 🔑1186(4)

In prosecution for receiving stolen goods, crux of the crime is the taking of stolen goods, and fact the indictment fixed the date of receipt incorrectly, even if error, was not reversible error. West's Ann.Pen. Code, §§ 496, 955; West's Ann.Const. art. 6, § 4½.

11. Criminal Law 🔑678(1)

Where a transaction involving attempted disposal of a stolen automobile was continuing, and the whole course and conduct of defendant in regard to his attempted disposal of the automobile made up a single thread of action, the state was not required to elect as to which act it relied on to support the charge, even though evidence showed defendant attempted to dispose of the automobile on June 11, and the indictment fixed the date of receipt of the automobile as May 28. West's Ann.Pen.Code, § 496.

12. Receiving Stolen Goods 🔑1

Statute proscribing the receiving of stolen property would not be deemed unconstitutional because of its failure to repeat the words "knowing the same to be so stolen" after condemnation of concealment of stolen property, in view of fact the word "such" modifying the word "property," as used in the statute, relates to property which is stolen and known to be stolen. West's Ann.Pen.Code, § 496.

13. Criminal Law 🔑823(4)

In prosecution for receiving stolen property, instruction that even though a person is not aware that property is stolen when he first comes into possession of it, if he subsequently learns of its stolen nature and then conceals or withholds it from its true owner he is guilty of a violation, was not erroneous because of failure to repeat the words "knowing the same to be so stolen" after condemnation of the concealment, in view of fact that instructions given on subsequent concealment of stolen property included requirement of guilty knowledge. West's Ann.Pen.Code, § 496.

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Charles O. Morgan, Jr., San Francisco, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

TOBRINER, Justice.

Appellant was convicted of (1) violation of Penal Code, section 182, for conspiracy to commit grand theft (Pen.Code, §§ 484, 487) and to receive stolen property (Pen.Code, § 496) under Count I of the indictment, (2) violation of Penal Code, section 496, under Count II and (3) violation of Penal Code, section 496, under Count III. He was sentenced for the term prescribed by law (one to ten years) on all three counts, the sentences to be served concurrently.

We shall first recite the facts of the case and then consider separately the convictions under each of the three counts. Lastly we analyse appellant's arguments that one of the instructions given was prejudicial and that section 496 of the Penal Code is at least in part unconstitutional.

The persons involved in this case were engaged in the auto wrecking business. As the owner of Ben's Auto Wreckers, appellant bought, sold and dismantled used cars. Robert McClerkin, Homer McClerkin and Homer Drummond carried on a similar business although they had no license to do so. The McClerkins made use of Gordon Morgan as a "sort of salesman," who apparently, on a commission basis, sold stolen automobile parts procured by the McClerkins.

During the month of May, 1957, Morgan sold appellant stolen parts; appellant knew that these were stolen parts.

The facts of the case fall into three categories: a series of events leading up to appellant's sale to the McClerkins of license plates, a pink slip and identification of a wrecked Ford; a series of events culminating in appellant's sale to the McClerkins of license plates, pink slip, locks and identification of a wrecked Mercury and a final series of events leading up to the disposal of a stolen Ford and a stolen Mercury.

The first sequence begins with the advent of the McClerkins and Morgan at appellant's place of business in May, 1957. The McClerkins had purchased a stolen 1957 Ford. On appellant's lot there stood an identical wrecked 1957 Ford. Morgan asked appellant how much he wanted for the wrecked Ford. Appellant replied $1,150. Appellant finally agreed to sell the McClerkins the license plates, pink slip and identification of the wrecked Ford for $700. Appellant retained the Ford itself with the right to dispose of it for his own profit. No money and no papers changed hands; the parties merely entered into the agreement.

When, to keep the agreement, Homer McClerkin and Morgan came back to appellant's lot, Morgan made the crucial statement to appellant that they had a stolen Ford. But the McClerkins had not been able to raise the $700 nor had appellant obtained the pink slip from the insurance company from which he had purchased the wrecked Ford. Taking $500 as a down payment, appellant delivered to Homer McClerkin and Morgan the license plates and identification from the doors of the Ford and promised to turn over the pink slip as soon as he received it.

The license plates were exchanged. The valid license plate from the wrecked Ford (No. BWL 922) was placed on the stolen Ford. The rear license plate of the wrecked Ford, however, was badly burned; consequently it was wrapped in a May 29, 1957, edition of the San Francisco Examiner and placed in the trunk of the stolen Ford. Later, on June 7, 1957, a police officer saw a 1957 Ford with the license number BWL 922 pull away from the curb in front of Homer McClerkin's home.

The series of events as to the Mercury are reminiscent of those as to the Ford. The McClerkins had purchased a stolen 1953 Mercury. Appellant had in his lot an identical wrecked 1953 Mercury. Again, the McClerkins and Morgan, this time on June 5, 1957, approach appellant. Following the previous pattern, appellant agrees to sell the valid license plates, pink slip, locks and identification of the wrecked Mercury. Appellant gives Robert McClerkin a bill of sale to the Mercury and within the next day or so Robert McClerkin and Morgan return to take the license plates, pink slip, and locks. During this operation appellant tells Robert McClerkin and Morgan, "Make sure you have everything." Again, appellant agrees to dispose of the wrecked Mercury for his own benefit.

We come now to the final episode of the disposal of the stolen cars. Robert McClerkin was arrested on June 7, 1957, and on that night Morgan phoned appellant to tell him of that fact. Appellant said to Morgan, "Don't say anything and I won't say anything." On June 10, 1957, Homer McClerkin and Homer Drummond were arrested. The following day Morgan phoned appellant to tell him of the arrest, saying that the McClerkins wanted to get rid of the stolen Ford. When Morgan said that he refused to touch the Ford, appellant told Morgan, "Well, I'll get rid of it."

On June 11, 1957, appellant closed his business at an earlier hour than usual and went with Morgan to pick up the stolen Ford. Appellant then took the significant step of taking the Ford and driving it to San Mateo. Morgan, who was driving appellant's car, followed; Morgan's wife in turn followed him, driving Morgan's car. When he arrived in San Mateo, appellant pulled the car to the curb, Morgan parking appellant's car behind it. Morgan then joined his wife and returned in his car to San Francisco.

On June 14, 1957, a Millbrae police officer found the stolen Ford abandoned in Millbrae. Lee Cole, a special agent of the National Automobile Theft Bureau, examined the trunk of the stolen Ford and found the burned license plate (BWL 922) wrapped in the San Francisco Examiner of May 29, 1957.

On June 13, 1957, Cole, Officer Ed Hodgers of the San Francisco Police Department and Jack Thelan of the California Highway Patrol, went to appellant's place of business and there they found a 1957 Ford without license plates or identification plates on the doors. They found, too, a partially dismantled 1953 Mercury for which appellant lacked license plates and a pink slip. The identification plates on the doors and the locks had been removed from this Mercury. Admitting at the trial that he was well acquainted with the law which requires that before an automobile be dismantled the license plates and pink slip be surrendered to the Motor Vehicle Department, appellant, when questioned by the police officers about the 1953 Mercury, stated "they caught me in a moment of weakness." To the question as to who "they" were, appellant described a young man. The police officers showed appellant pictures of the McClerkins and Drummond and appellant identified Robert McClerkin as the man to whom he sold the items missing from the 1953 Mercury.

The stolen 1953 Mercury was found abandoned near Cotati. Homer McClerkin admitted abandoning it there.

Under Count I, the charge that appellant participated in a wrongful conspiracy to commit grand theft and to receive stolen property breaks down into two parts. The first contends that appellant joined the conspiracy by agreeing to sell the license plates of the wrecked Ford for the purpose of placing them upon the stolen Ford and that by this concurrence appellant inferentially adopted the previous criminal acts of his fellow conspirators. The second aspect concerns appellant's apparent agreement, when he was informed of the arrest of one of the trio, "to get rid of" the stolen Ford. When appellant joined the plan of Morgan and Robert McClerkin to dispose of the stolen car, respondent argues that appellant entered into a conspiracy to receive the stolen property. Conviction on Count I must stand on either or both of these contentions.

As to the first contention, the record discloses that the theft occurred prior to the first appearance of appellant in the whole matter. Before they even came to see appellant the McClerkins had obtained the stolen Ford. In a parallel situation with the Mercury, the same sequence occurred. Does appellant contract some retroactive liability by participation in transactions which occurred *after* the date of the receipt of the stolen goods by the McClerkins?

If, as wise commentators have suggested (see, for instance, Holmes, The Common Law (1881), p. 46), the mainspring of criminal sanction lies in its force as a deterrent, the sanction can hardly be applied retroactively by use of the conspiracy doctrine; and the decisions so hold.

[1] The United States Supreme Court in Bollenbach v. United States, 1946, 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350, reversed a conspiracy conviction in the face of evidence which established that the federal crime, which was the objective of the conspiracy, had been committed prior to defendant's joining of the conspiracy. In parallel fashion the Supreme Court of California, in People v. Weiss, 1958, 50 Cal.2d 535, 327 P.2d 527, likewise rejected the contention that a conspirator is liable for criminal acts of his fellow conspirators committed prior to the time he joined the conspiracy. Indeed the court specifically disapproves of previous California cases upholding such convictions: "Implications in the language of the following cases that a defendant could be held retroactively liable for such a substantive offense are disapproved [citing cases]." 50 Cal.2d at page 566, 327 P.2d at page 545. While the court points out that evidence of prior criminal acts is admissible at a trial of the later conspirator, "* * * this is not to

say that such a one becomes substantively liable for previous criminal acts of his fellow conspirators * * *. Rather, he 'adopts' the acts in the sense that evidence thereof is 'original evidence against [him]' * * * in a prosecution for the conspiracy or for a crime committed as an object of or in furtherance of or as a natural outgrowth of the conspiracy *after he joined it*." 50 Cal.2d at page 566, 327 P.2d at page 545.

[2] Respondent's argument that appellant adopted the previous acts of his fellow conspirators, making him equally *guilty* with the McClerkins of receiving the stolen cars, runs directly into this specific ruling of People v. Weiss, supra, 50 Cal.2d 535, 327 P.2d 527. Indeed, that decision expressly disapproves as to this issue People v. Brumback, 1957, 152 Cal.App.2d 386, 314 P.2d 98, the very case upon which respondent relies. Appellant did not agree to receive any stolen property as a part of his sale of the license plates of the Ford and the Mercury. Indeed, both the cars were already in the McClerkins' possession, and the crime of receiving stolen property had already been committed. There can be no conspiracy to commit the past and completed act; appellant did not, and could not have joined the conspiracy for the consummation of an objective already accomplished.

Turning to the second aspect of the alleged conspiracy we examine the theory that appellant's agreement to "get rid of" the Ford brought him under Count I.

The record shows that after the McClerkins and Drummond were released on bail, they wanted to give the Ford to Morgan so that evidence of the crime might be destroyed. But Morgan refused to take it. Appellant instead agreed to dispose of the car. While Morgan, Robert McClerkin and appellant were thus involved in a punishable conspiracy to receive stolen property, which they proposed to liquidate, the question arises whether Count I properly describes such action as the indicted offense.

Section 1104 of the Penal Code provides that in a trial for conspiracy a defendant cannot be convicted unless the indictment or information expressly specifies one or more overt acts. Section 184 of the Penal Code defines an overt act as an act done to effect the object of the conspiracy.

[3] The indictment describes the overt act in these terms: "Thereafter, in the City and County of San Francisco, in pursuance of and to carry out the object of the said conspiracy, Bernard Ben Feldman did deliver to Homer McClerkin, Robert McClerkin and Homer Drummond certain automobile license plates."

Clearly the overt act of agreeing to dispose of the car is not synonymous with the overt act of delivering the license plates. Hence the indictment alleged as the overt act a different act than the proved overt act which related to the conspiracy. The fatally defective indictment fails to sustain conviction under Count I.

The conviction under Count II rests upon the language of the indictment: that appellant "did buy and receive, and did aid and abet and not being present did advise and encourage the buying and receiving of a 1953 Mercury sedan automobile * * * which had been stolen, knowing the same to have been stolen." The conviction must stand upon either of these two propositions, which we discuss separately, infra: that appellant received, or aided and abetted the receiving of, the stolen car knowing it to have been stolen or that he concealed or aided in concealing the stolen property.

[4, 5] As to the receipt of the stolen Mercury, the record shows, as we have noted, that the McClerkins had obtained possession of the car before appellant's entrance upon the scene. Since the crime of receiving stolen property congeals upon taking possession of that property with guilty knowledge (People v. Scott, 1951, 108 Cal.App.2d 231 at page 233, 238 P.2d 659; People v. Smith, 1954, 26 Cal.2d 854 at page 859, 161 P.2d 941) and since the aiding and abetting of that crime would call for the performance of the criminal act with "guilty knowledge of the *wrongful purpose* of the perpetrator" (People v. Goldstein, 1956, 146 Cal.App.2d 268 at page

273, 303 P.2d 892, 895; emphasis added) the fact that the McClerkins had accepted illegal possession of the car before appellant even met with them precludes the conclusion that guilt attaches to him on either of these scores.

As to the second proposition, buttressed upon appellant's concealing or aiding in the concealing of the stolen goods, appellant's conviction again must rest upon the proposition that concealing or aiding in concealing stolen property is covered by the words of the indictment.

Section 950 of the Penal Code states: "The accusatory pleading must contain * * * 2. A statement of the public offense or offenses charged therein." Further amplifying the test Penal Code, section 952, states: "In charging an offense, each count shall contain * * * a statement that the accused has committed some public offense therein specified. * * *"

[6, 7] The decisions fortify the rule of the code sections. That a person "cannot be convicted of an offense (other than a necessarily included offense) not charged against him by indictment or information, whether or not there was evidence at his trial to show that he had committed that offense" is the principle announced in In re Hess, 1955, 45 Cal.2d 171, 174, 288 P.2d 5, 7. While People v. Williams, 1945, 27 Cal. 2d 220, 225, 163 P.2d 692, holds that every fact or circumstance essential to the commitment of the charged crime must be alleged and proved, discrepancies as to technical or trifling matter do not furnish grounds for reversal. In re Hess summarizes the issue in this sentence: "Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial." 45 Cal.2d at page 175, 288 P.2d at page 7. The very essence of due process lies in notification to the accused of the nature of the charge against him.

[8] Concealing or aiding in concealing the stolen property is manifestly not the same offense as receiving or aiding in receiving stolen property. The distinction between such forbidden conduct is not the trifling differential referred to in People v. Williams, supra, 27 Cal.2d 220, 163 P.2d 692. Neither is it an unsubstantial defect in the information or indictment upon which the ruling in People v. Leiva, 1955, 134 Cal. App.2d 100, 285 P.2d 46, rests. This is a difference in substance (2 Wharton Criminal Law and Procedure (Anderson, 12th ed. 1955) 275); appellant was not properly apprised in advance of the specific charge.

Nor does it avail respondent to argue that the California Constitution, article 6, section 4½, providing that "[n]o judgment shall be set aside * * * unless * * * the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice" sustains the conviction of concealing stolen property because it was supported by the evidence. The argument demonstrates the very danger which due process seeks to avert. The fact that the accused, charged with one crime, may in the course of trial be found to have committed another, must not deprive him of the full opportunity for defense of the crime not charged.

Although the prosecution charged appellant with violation of Penal Code, section 496, the charge did not allege the offense of concealing stolen property. The conviction of Count II cannot be sustained.

The conviction on Count III rests upon the charge that the appellant "on or about the 28th day of May, 1957, at the City and County of San Francisco, State of California, did * * * receive * * * and * * * did advise and encourage * * * receiving of a 1957 Ford * * * which had been stolen, knowing the same to have been stolen."

[9] Appellant took possession of the stolen Ford and drove it from San Francisco to San Mateo on June 11, 1957. Morgan had previously told appellant the Ford had been stolen. The fatal act of appellant lay in his acceptance of the car, with knowledge that it was stolen, even though he

took it only to dispose of it. Here the essentials of the crime coexist; the forbidden act of the taking concurs with concomitant guilty knowledge. The facts of this case are very similar to those of People v. Scott, supra, 108 Cal.App.2d 231, 233, 238 P.2d 659, 661, in which the court in holding defendant guilty of the crime pointed out: "After being told the facts, he took possession of and assumed control over the property, and proceeded to dispose of it. He hid the tool chest and tools, (which was also a violation of section 496bb of the Penal Code), and he disposed of the motor, either by selling it or by using it as security for a loan." Hence appellant's acceptance of the car constitutes the violation, and it is no defense that his action was not for personal gain. State v. Rushing, 1873, 69 N.C. 29. To the same effect, People v. Smith, supra, 26 Cal.2d 854, 161 P.2d 941.

It does not avail appellant to contend that since the evidence showed appellant drove the Ford on June 11, 1957, and the indictment fixed the date of receipt as May 28, that the prosecution was required to elect as to which "act" it relied upon to support the charge.

[10] In the first place, section 955 of the Penal Code provides that the precise time at which an accused committed an offense need not be alleged in the pleading unless time itself is a material ingredient of the offense. Obviously, the chronology here is not the vital point; the crux is the taking of stolen goods; whether such receipt occurred on May 28 or June 11 of 1957 is not vital. Finally, it would not be reversible error even if deemed error under Article 6, section 4½ of the California Constitution.

[11] In the second place, the cases cited by appellant involve situations in which the prosecution, having proved several disconnected culpable acts, was required to elect that one upon which it stood for conviction. In both People v. Fremont, 1941, 47 Cal.App.2d 341, 117 P.2d 891, and People v. Castro, 1901, 133 Cal. 11, 65 P. 13, in order to sustain the charge of rape the prosecution introduced proof of numerous acts of criminal sexual intercourse. The courts required the prosecution to elect the act, in each case, upon which it relied. In People v. Hatch, 1910, 13 Cal.App. 521, 109 P. 1097, the prosecution proved the defendant committed several distinct embezzlements at different times and in different amounts. Again the court required an election. Each case has the common characteristic that the crimes charged were separate and distinct. In the instant case the transaction involving the 1957 Ford was continuing; the whole course and conduct of appellant as to the car made up a single thread of action.

We must sustain the conviction on Count III.

The last two points raised by appellant merit only brief discussion.

Contending that the instruction could relate only to the driving of the Ford on June 11, 1957, appellant argues the giving of the following instruction constituted prejudicial error: "[e]ven though a person is not aware that property is stolen when he first comes into possession of it, if he subsequently learns of its stolen nature and then conceals or withholds it from its true owner, he is guilty of a violation of Section 496 of the Penal Code." The argument, however, rests upon the contention that the prosecution was required to elect between the "acts" of May 28, 1957, and June 11, 1957. We have disposed of the argument in our discussion of Count III.

[12, 13] Appellant's second contention, that section 496 is unconstitutional because it fails to repeat the words "knowing the same to be so stolen" after the condemnation of concealment, cannot stand. In the first instance the word "such" modifying "property" relates to property which is stolen and known to be stolen. In the second instance the court's instruction that "you are to consider all the instructions as a whole, and are to regard each in the light of the others," thereby incorporating the instruction given on subsequent concealment of the stolen property which did include the requirement of guilty knowledge,

cured any conceivable defect to which appellant alludes.

We reverse the judgment as to Counts I and II and affirm the judgment as to Count III.

BRAY, P. J., and FRED B. WOOD, J., concur.

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170 Cal.App.2d 693

Arthur DUSSAULT and David Dussault, by their Guardian ad litem, Walter Dussault, Plaintiffs and Appellants,

v.

George CONDON, Sergeant of Police of the City of San Mateo, and Theodore Hegedus, sued herein as First Doe, Defendants and Respondents.

Civ. 18223.

District Court of Appeal, First District, Division 1, California.

May 27, 1959.

Action for false arrest and imprisonment brought by two minor boys by their father as guardian ad litem against officer who arrested boys for breach of the peace when officer, investigating complaints by persons at race track, heard yelling and profanity emanating from clocker's booth and observed boy poised to throw rock, and against officer who drove patrol car. The Superior Court, County of San Mateo, Frank B. Blum, J., entered judgment for the officers and plaintiffs appealed alone from judgment for arresting officer. The District Court of Appeal, Hanson, J. pro tem., held that the evidence showed that the arrest was not made upon basis of complaints by informers but upon what actually occurred in presence of policeman which constituted a misdemeanor.

Judgment affirmed.

1. Witnesses 🔑276

In action for false arrest and false imprisonment, plaintiffs by asking questions which elicited testimony of defendant officer, called to witness stand as an adverse party, that his attention had been called to disturbance in vicinity of clocker's booth at race track by a gentleman who came to police headquarters to make a complaint, opened the case for questions by officer's own counsel as to what informer had said to him in making the complaint and what another informer had told him en route to clocker's booth. West's Ann.Code Civ. Proc. § 1872.

2. False Imprisonment 🔑31

In action for false arrest and false imprisonment of two minor boys against officer who arrested the boys for breach of the peace when officer, investigating complaints by persons at race track heard yelling and profanity emanating from clocker's booth and through door of booth observed boy poised to throw rock, evidence showed arrest was not made upon basis of complaints of informers but upon basis of misdemeanor committed in presence of arresting officer.

3. Evidence 🔑314(1)

Testimony not offered to prove the truth of the matter it asserts is not objectionable as hearsay.

4. Evidence 🔑317(2)

In action for false arrest and false imprisonment against officer who arrested boys in clocker's booth at race track, testimony as to what informers had said to arresting officer was admissible as having bearing on reasonableness of the officer's act in making arrest and was not objectionable as hearsay, in view of fact that testimony was not admitted to show that there had been a disturbance in the clocker's booth.

5. False Imprisonment 🔑7(3)

Where police officer had been informed that there was a disturbance in clocker's booth at race track, regardless of whether information was true or false it was duty of officer to investigate, and, if he personally found law was being violated, based upon his own knowledge ascertained at the scene, it was his duty to suppress immediately the violation of the law, and if need be, to arrest and imprison the culprits, as regards liability for alleged false arrest and false imprisonment.

6. Appeal and Error ⚷1053(3)

In action for false arrest and false imprisonment against officer who investigated complaint regarding disturbance in clocker's booth at race track and arrested two minor boys, error, if any, in admitting testimony concerning information received by arresting officer from informers was in effect abrogated by court's instruction to jury that they could not base their verdict, in whole or in part, on what the informers had said but solely upon what arresting officer saw or heard.

7. Trial ⚷296(1)

In action for false arrest and imprisonment, the use of the past tense rather than the present tense in instruction was not prejudicial where it was sufficiently cured by other instructions given.

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E. C. Mahoney, Burlingame, for appellants.

Hancock, Elkington & Rothert, Wayne D. Hudson, San Francisco, for respondents.

HANSON, Justice pro tem.

This is an action for false arrest and false imprisonment brought by two minor plaintiffs by their father as guardian *ad litem* against two police officers of the City of San Mateo. After a trial by jury a verdict was returned in favor of both defendants. The plaintiffs appeal alone from the judgment entered on the verdict in favor of Condon.

The errors assigned by the appellant's opening brief are three in number, but in the closing brief these are reduced to one, in effect, as the appellants say: "This case boils down to the question whether the offense in this case was committed 'in the presence' of the police officer. If it was not, he had no right to make the arrest."

The facts necessary to be considered in reaching a conclusion on the errors assigned are as follows:

On August 4, 1956, the two minors (aged 15 and 14) with their father were in attendance at the Bay Meadows Race Track where the father had entered two horses for racing. He left the boys at the clocker's booth on the barn side of the track while he himself went to the grandstand area. The inside of the booth was about 6 x 15 feet. It stood raised above the ground about five feet to the bottom of its floor. There are windows on three sides and a door opening to stairs which connect it to the ground on the fourth side.

On the day in question the defendant Condon was on duty patrolling the premises as a police officer. While thus engaged, a person unknown by name to him complained that there were three hoodlums cursing and raising a rumpus in the clocker's booth. As Condon proceeded on his way to the booth another man and his wife stopped to tell him that three boys in the booth were using loud profanity and when the man asked them to stop he was greeted with "Go to hell." It is undisputed that women and children were in the immediate vicinity at the racing rail. As Condon neared the booth he heard yelling, loud talking, and profanity emanating from the booth and through the door he observed a boy poised to throw a rock and another boy was heard to say "Damn you, put it down." The rock was thrown and instantly followed by a profane remark. Condon then called to the occupants of the booth to come down and a boy by the name of Gary Valine did so; the two Dussault minors did not, but instead "talked back" to the officer. On the officer's statement that if they did not come down he would go up after them they came down. When he ordered all three boys to leave the premises the Valine boy left but the Dussault boys refused. As a result he advised them they were under arrest and to accompany him. This they refused to do and were then placed in a patrol car driven by the defendant Hegedus and thereafter jailed for breach of the peace.

The main question in this case, as the appellants concede, is whether a misdemeanor was being committed in the presence of the arresting officer Condon. The appellants contend, in effect, that the arrests were made, not on what took place in the presence of the officer, but rather on the information given him by the informers, and that such information was hearsay and was objected to on that ground at the trial.

[1] The difficulty with appellant's position in that regard is twofold. *First,* by inquiring of defendant Condon, whom they called to the stand as an adverse party under Code of Civil Procedure, section 2055, they elicited from him that his attention had been called to a disturbance in the vicinity of the clocker's shack by a gentleman who came to the headquarters of the police for the purpose of making a complaint; that he did not know his name; that he had seen him before; that he thought he was a horse trainer. By the questions which elicited this testimony, counsel for the appellants opened the case for the questions which were then put to him by Condon's own counsel as to what the informer had said to him in making the complaint, and what another informer had told him enroute to the clocker's booth. See Code of Civ.Proc. § 1872; 7 Wigmore, Evidence (3rd Ed.1940) § 2113.

[2] *Second,* the further answer to the appellants' contention is, that regardless of what the informers said to Condon the evidence showed the arrest was not made upon the basis of the complaints by the informers, but upon what actually occurred in the presence of Condon, which, in fact, constituted a misdemeanor.

[3, 4] The further contention of the appellants that what the informers said to Condon was hearsay and accordingly inadmissible is not correct. In this state, as elsewhere, it is a well-established rule of law that testimony not offered to prove the truth of the matter it asserts is not objectionable as hearsay (People v. Fischer, 49 Cal.2d 442, 446, 317 P.2d 967; Smith v. Whittier, 95 Cal. 279, 293, 30 P. 529; 6 Wigmore, Evidence (3rd Ed.1940) § 1789). The court admitted the testimony of which complaint is made in order to show all the circumstances surrounding the arrest. And the testimony was admissible as having a bearing upon the reasonableness of Condon's act in arresting the Dussault boys. That is to say, that testimony was not admitted to show that there was a disturbance in the clocker's shack, for that fact was observed by Condon himself; rather, it was admissible to show that Condon believed three boys were involved and when he found but three boys at the shack (others having gotten out through a window according to appellants' testimony), he could reasonably believe they were the only ones disturbing the peace in his presence.

[5] Regardless of whether the information was true or false it was the duty of Condon to investigate whether the plaintiffs were or were not still, as reported, in the act of violating the law. If he personally found they were, based upon his own knowledge ascertained at the scene, it was his duty to suppress immediately the violation of the law, and if need be, to arrest and imprison the culprits.

[6] The contention of the plaintiffs that the policeman arrested them on the basis of what he heard from the informers and not on what he himself saw and heard has not a shred of evidence to support it. Moreover, the jury was specifically instructed by the trial judge that they could not base their verdict, in whole or in part, on what the informers had said, but solely on what Condon saw or heard. Hence, any error, if error there be, in admitting the information received by Condon from the informers, was in effect abrogated by the court's instruction to the jurors.

The testimony given by Condon as to what he personally saw and heard was adequate to sustain the verdict.

[7] The appellants contend that the instructions Nos. 6, 8, and 10 given by the court are contrary to the law of California, but we are not directed to any law or case so holding. The instructions as given were based on Coverstone v. Davies, 1952, 38 Cal.2d 315, 239 P.2d 876. Plaintiffs also contend that their requested instruction No. 9 should have been given, but the latter on the facts was not germane. We have read the instructions and find no error except in the use of the past tense rather than the present tense in instruction No. 10, but that was sufficiently cured by the other instructions given and so could have no prejudicial effect.

Affirmed.

BRAY, P. J., and FRED B. WOOD, J., concur.

171 Cal.App.2d 9

PEOPLE of State of California,
Plaintiff and Respondent,
v.
Henry KOT, Defendant and Appellant.
Cr. 3510.

District Court of Appeal, First District,
Division 1, California.
June 1, 1959.

Defendant was convicted of receiving stolen property. The Superior Court, City and County of San Francisco, C. Harold Caulfield, J., entered judgment of conviction and order denying a new trial, and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence, independent of defendant's statements, was sufficient to establish the corpus delicti, and that, where juror, who had previously served on jury in civil action, indicated on voir dire examination, that he understood difference between burden of proof on a plaintiff in a criminal case and burden on plaintiff in a civil case and that he would accept court's instructions on the People's burden of proof, refusal to instruct jury, as to such difference after all the evidence was in was not error in view of instruction given on prosecution's burden of proof in a criminal case.

Judgment and order affirmed.

1. Larceny 🔑64(1)

Recent possession of stolen property, with attending suspicious circumstances, is evidence of larceny and not evidence upon charge of stolen goods unless there is evidence that property charged to have been feloniously received was stolen by some one other than person charged with illicitly receiving it. West's Ann.Pen.Code, § 496.

2. Receiving Stolen Goods 🔑8(4)

Possession of stolen property accompanied by suspicious circumstances such as alteration of stolen property to prevent identification, will justify inference that property was received with knowledge that it had been stolen. West's Ann.Pen.Code, § 496.

3. Criminal Law 🔑412(1), 680(2)

In prosecution for receiving stolen property, prima facie showing that stolen property had been received with knowledge that it was stolen was all that was required as a foundation for introduction in evidence of defendant's extrajudicial statements, and the order of proof was discretionary. West's Ann.Pen.Code, § 496.

4. Receiving Stolen Goods 🔑8(3)

In prosecution for receiving stolen property, evidence, independent of defendant's statements, was sufficient to establish the corpus delicti. West's Ann.Pen.Code, § 496.

5. Criminal Law 🔑317

Where, in prosecution for receiving stolen property, defendant failed to take witness stand, although it was within his power to deny or explain the evidence against him, his failure to do so could be considered by trial judge as tending to indicate truth of such evidence and as indicating that, among inferences which could reasonably be drawn therefrom, those unfavorable to defendant were the more probable. West's Ann.Pen.Code, § 496.

6. Receiving Stolen Goods ⚿4

Possession which one obtains as a thief by a physical taking of property from owner is not the kind of "receiving" of goods which is envisaged by crime of receiving stolen property, and a thief cannot deliver the stolen goods to and "receive" them from himself. West's Ann.Pen.Code, § 496.

See publication Words and Phrases, for other judicial constructions and definitions of "Receive" and "Receiving".

7. Receiving Stolen Goods ⚿6

One who is a thief in sense of being liable as a principal, but who is a mere accessory and not an actual participant in the physical taking of the property, will be culpable under Penal Code provision defining crime of receiving stolen property if he later receives it from the actual perpetrator, and, therefore, to convict one of receiving stolen property, there need not be evidence that such one was not the thief. West's Ann.Pen.Code, § 496.

8. Receiving Stolen Goods ⚿6

A thief may dispose of fruits of his theft and, some time later, again take possession as part of a new transaction which is quite separate and distinct from original caption and asportation so that, while he would still be the thief, he would be quite capable of being a receiver punishable for crime of receiving stolen property. West's Ann.Pen.Code, § 496.

9. Criminal Law ⚿829(9)

Where juror, who had previously served on jury in civil action, indicated on voir dire examination, that he understood difference between burden of proof on a plaintiff in a criminal case and burden on plaintiff in a civil case and that he would accept court's instructions on the people's burden of proof in the criminal action, refusal to instruct, after all the evidence was in, as to such difference was not error in view of instruction given on prosecution's burden of proof in a criminal case. West's Ann.Pen.Code, § 1096.

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Edward L. Cragen, San Francisco, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Edward P. O'Brien, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Convicted of receiving stolen property (Pen.Code, § 496), defendant asserts in support of his appeal from the judgment and the order denying a new trial (1) insufficiency of the evidence and (2) error in the refusal of certain instructions requested by defendant.

(1) *The claim of insufficiency of the evidence* is predicated upon the asserted lack of evidence of the circumstances under which defendant obtained the stolen property; i. e., whether he obtained it by theft from the owner or from some other person after the theft had been accomplished. He cites three cases in support of this thesis.

In People v. Jacobs, 73 Cal.App. 334, 238 P. 770, (hearing by Supreme Court denied) the court was considering what inferences might be drawn from the fact that stolen property is found in the possession of a person immediately or soon after the property was stolen, and reviewed the case law of other states. It observed that in some states such facts would warrant an inference of guilt of larceny but not of receiving stolen goods; in some, that such possession when attended by suspicious circumstances will justify a conviction of receiving stolen property; and in others that such possession when not satisfactorily explained will support a conviction of receiving stolen goods.

[1] The court then formulated and declared for California a rule that recent "possession of the stolen property, with attending suspicious circumstances, is evidence of larceny, and not evidence upon the charge of stolen goods" unless "there is evidence that the property charged to have

been feloniously received was stolen by some person other than the individual charged with illicitly receiving it." 73 Cal.App. at page 341, 238 P. at page 773. It found in defendant's evidence proof that he was not at the scene of the theft at the time of its occurrence and in evidence which pointed to a certain other person as the thief, support for an implied finding of the jury that the property was stolen by some other person than the defendant, and affirmed the judgment of conviction.

In People v. Bausell, 18 Cal.App.2d 15, 62 P.2d 774, the court approved and similarly applied the rule enunciated in the Jacobs case. Three dresses had been stolen from a certain department store. They had been shown to three women, prospective customers, at 2:30 p. m. Between that hour and 4 p. m. of the same day, when the dresses were found in defendant's possession upon a street near the store, the sales clerk who exhibited the dresses was continuously on duty. She did not see defendant in the department concerned at any time during that period. The court held this was "some evidence that tends to prove that some person other than appellant stole the dresses" (18 Cal.App.2d at page 19, 62 P.2d at page 776), which satisfied the rule laid down in the Jacobs case.

People v. Foogert, 85 Cal.App.2d 290, 193 P.2d 14, involved a charge of unlawful concealment of an automobile (Pen.Code, § 496bb, now § 496). Defendant complained of an instruction which would have permitted the jury to find him guilty of the charge even if he were the thief. The court deemed it unnecessary to decide whether the rule of the Jacobs case applies to a concealment case. It found "in statements by defendant to police officers that he purchased the motor from a Los Angeles dealer; that the car was his; that he bought it from a veteran, and [in] his statement to the owner of the garage where it was stored that the car belonged to his brother," proof "which more than satisfies the evidentiary requirement as stated in" the Jacobs case. 85 Cal.App.2d at page 300, 193 P.2d at page 20.

[2–4] In our case also there is evidence that satisifies the requirement of the Jacobs case. A 1956 motorcycle belonging to Edwin Olson was stolen from him on November 8, 1956. On May 2, 1957, the engine which was attached to and a part of the Olson motorcycle at the time of the theft was found in the possession of defendant Kot. It had been installed in a 1950 motorcycle which he had bought in March of 1956. It had been substituted for the engine which was in that cycle when purchased by defendant. The number of the replaced engine had been stamped over the number of the stolen engine. This evidence would support an inference that defendant knew that the engine now in his motorcycle was stolen. "Possession of stolen property, accompanied by suspicious circumstances [such as alteration of stolen property to prevent identification], will justify an inference that the property was received with knowledge that it had been stolen." People v. Malouf, 135 Cal.App.2d 697, 706, 287 P.2d 834, 839, (hearing by Supreme Court denied), citing People v. Lopez, 126 Cal.App.2d 274, 278, 271 P.2d 874. This prima facie showing that the stolen engine was received with knowledge that it was stolen "is all that is required as a foundation for the introduction in evidence of extrajudicial statements of defendant; and the order of proof is discretionary." People v. Malouf, supra, 135 Cal.App.2d at page 706, 287 P.2d at page 839. Thus, by evidence independent of defendant's statements, just as in the Malouf case, the corpus delicti was established.

In his statements to the police officers defendant at first denied owning or driving the motorcycle and then admitted driving it. Later, he said the motorcycle was not stolen. He would not account for the altered engine number. He refused to state whether the engine now in the motorcycle was there when he purchased it. His declaration that the motorcycle was not stolen was some evidence that the engine in it was not stolen by him, thus making way for an inference that he "received" the engine, did not himself steal it.

[5] In addition, defendant failed to take the witness stand. "It was within his power to deny or explain the evidence against him. His failure to deny or explain such evidence could be considered by the trial judge 'as tending to indicate the truth of such evidence, and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable.' People v. Adamson, 27 Cal.2d 478, 488–489, 165 P.2d 3, 9; People v. Steccone, 36 Cal.2d 234, 239, 223 P.2d 17." People v. Malouf, supra, 135 Cal.App.2d 697, 708, 287 P.2d at page 840.

(2) *Was it prejudicial error to refuse defendant's instruction that there must be evidence that defendant was not the thief? No.*

Defendant's requested instruction[1] on this subject conditioned conviction upon proof that the stolen engine "was stolen by some person other than the" defendant. Indeed, it directed an acquittal should the jury find that "there is no evidence to show the defendant is not the thief of the property in question."

[6–8] This is not an accurate statement of the principle for which the Jacobs, Bausell and Foogert cases stand. That principle is that the possession which a person obtains as a thief by a physical taking from the owner is not the kind of "receiving" of the goods which is envisaged by section 496 of the Penal Code. Nor could such a thief deliver the stolen goods to and "receive" them from himself within the purview of that statute.[2] But if defendant is a thief in the sense of being liable as a principal when a mere accessory and not an actual participant in the physical taking of the property, he would be culpable under section 496 if he later receives it from the actual perpetrator. People v. Day, 30 Cal. App. 762, 159 P. 457. See also People v. Stoddard, 48 Cal.App.2d 86, 89–90, 119 P.2d 160. It is conceivable, also, that a thief might dispose of the fruits of his theft and some time later again take possession as a part of a new transaction quite separate and distinct from the original caption and asportation. He would still be the thief but, we think, under the circumstances described, quite capable of being a receiver punishable under section 496 of the code.

We find no error in the refusal of the requested instruction. The instructions which the court gave properly and adequately informed the jury of the elements of the crime charged and other pertinent factors. They were similar in all essential respects to the instructions that were approved in People v. Scott, 108 Cal.App.2d 231, 234, 238 P.2d 659.

[9] (3) *Was it error to refuse defendant's instruction concerning the difference between the burden of proof in civil and in criminal cases? No.*

The court gave the jury proper and adequate instructions on the prosecution's burden of proof in a criminal case, principally in the terms of the text of section 1096 of the Penal Code.

Defendant does not question the accuracy thereof but claims that in the instructions given the jury when the evidence was all in, the court should also have described the difference between the burden of proof of a plaintiff in a criminal case from that in a civil case because one of the jurors had previously served in a civil case.

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[1] "Possession of stolen articles, together with suspicious circumstances, justifies a conviction upon the charge of receiving stolen property, provided that there is evidence that the property charged to have been feloniously received was stolen by some person other than the individual charged with illicitly receiving it. If you find that there is no evidence to show that the defendant is not the thief of the property in question, you must then bring in a verdict of 'not guilty' of the crime of receiving stolen property."

[2] It seems pertinent to observe that the courts of the various states are not in harmony on the question of the legal effect of the unexplained possession of recently stolen goods; i. e., whether it is itself evidence of theft or of the receipt of stolen goods, or of both, or of neither.

But all courts appear to be in agreement that such possession is a circumstance to be considered with all other evidence in the case on the question of guilty knowledge. (See 68 A.L.R. 187.)

We find no merit in this point, especially in view of the fact that when that juror's previous service developed upon the voir dire examination of prospective jurors the court explained that difference, asked the juror if he understood the difference and if he would accept the court's instructions on the People's burden of proof in a criminal action, to which questions the juror gave affirmative answers.

The judgment and the order denying a new trial are affirmed.

BRAY, P. J., and TOBRINER, J., concur.

PEOPLE of State of California,
Plaintiff and Respondent,
v.
Robert BENFORD, Defendant and
Appellant.*
Cr. 6470.

District Court of Appeal, Second District,
Division 1, California.
June 8, 1959.
Hearing Granted Aug. 5, 1959.

Defendant was convicted of selling marijuana. The Superior Court of Los Angeles County, Edwin L. Jefferson, J., rendered judgment, and defendant appealed. The District Court of Appeal, Lillie, J., held that evidence clearly showed that defendant willingly obtained a narcotic and sold it to police officer and defendant did not sustain his burden of proving he was induced to commit the offense by entrapment.

Affirmed.

1. Criminal Law 🔑37, 330

Entrapment is a positive defense, and burden was upon defendant charged with violation of narcotic laws to prove that he was induced to commit the violation. West's Ann.Health & Safety Code, § 11500.

2. Criminal Law 🔑1159(3)

On appeal, when record discloses a conflict in the evidence, judgment will not be reversed.

3. Criminal Law 🔑1159(2, 4)

Function of determining credibility of witnesses, resolving factual conflicts and weighing evidence is one exclusively for trier of fact.

4. Criminal Law 🔑37

The development of the defense of entrapment is based upon the fundamental refusal of courts to countenance the solicitation of innocent people by law enforcement officers into the commission of crime.

5. Criminal Law 🔑37

If criminal intent originated in mind of defendant and offense was completed, fact that an opportunity was furnished by officer or that defendant was aided by him in the commission of the crime in order to secure the evidence necessary to prosecute him constitutes no defense.

6. Criminal Law 🔑37

Where officer uses no more persuasion than is necessary for an ordinary sale of narcotics and defendant is ready and willing to make it, there is no entrapment. West's Ann.Health & Safety Code, § 11500.

7. Criminal Law 🔑569

In prosecution for selling marijuana, evidence clearly showed that defendant willingly obtained narcotic and sold it to police officer and defendant did not sustain his burden of proving he was induced to commit the offense for which he was convicted by entrapment. West's Ann.Health & Safety Code, § 11500.

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Ellis J. Horvitz, Los Angeles, for appellant.

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* Opinion vacated 345 P.2d 928.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., John A. Vanderlans, Deputy Atty. Gen., for respondent.

LILLIE, Justice.

By indictment defendant was charged with selling marijuana in violation of Section 11500 of the Health & Safety Code. He waived his right to a trial by jury and by stipulation the cause was submitted on the transcript of the proceedings had before the Grand Jury, each side reserving the right to offer additional evidence. The trial court found defendant guilty as charged, found a prior narcotic conviction to be true, denied his application for probation, and sentenced him to the state prison. He appeals from the judgment.

The sole issue before this court is whether the evidence as a matter of law establishes the defense of entrapment.

Although it has been suggested by appellant that the testimony of the police officer supports that of appellant and his wife, it is obvious from the record before us that considerable conflict exists. The officer's version of what occurred discloses that approximately 30 days before December 11, 1957, he was introduced to defendant by a neighbor. Thereafter, he visited defendant's apartment and several times drank with him at a tavern. On two or three occasions, they discussed the subject of marijuana and on December 10, 1957, the officer asked defendant if they could get together the next day to go out and purchase some. On the evening of December 11, at approximately 7:45, they met in the Rainbow Cafe. The officer drove defendant to the Rosehills Project, parked his car and gave him $15. Defendant left the officer seated in the car, returning in about ½ hour when he handed him $1 and a paper bag containing marijuana.

After defendant's arrest, a conversation between him and Officer Salagi, which was recorded and played to the trial judge, disclosed that after claiming he did not remember the transaction, denying he got any marijuana, and asserting that he "didn't fool with it," defendant finally admitted that he secured the narcotic he sold to the officer, at Rosehills, got nothing for it and did it as a favor for a friend.

Defendant's wife testified that she had known Officer Pryor approximately 3 months, he was an occasional visitor at their apartment, went out with her husband and they appeared to be "pretty good friends"; and that once he asked defendant to go with him "to get some pod or weed" but her husband answered that he "wouldn't like to do that" because of his children who were growing up.

Defendant admitted in his testimony at the trial that he obtained the marijuana for the officer. He said he had known him for three months prior to the day in question and had been introduced to him by his next door neighbor, as a schoolmate; that he started coming over, they had a few drinks several times and the officer asked him if he knew where he could get some marijuana, to which he responded "no"; that he kept coming over, asking about the marijuana, buying candy for the children, and gained his "influence"; that the officer told him he and his wife used it and couldn't get any "down here"; and that he finally told the officer he would introduce him to the people so he wouldn't have to come by and bother him because he didn't want anything to do with it. He further testified he only did it because he was a friend and made no money on the transaction.

Appellant contends that the crime originated in the mind of the officer and except for the latter's persuasion, he would not have participated in the commission of the offense. Since appellant argues that even the evidence offered on behalf of the prosecution is such as to establish a good defense of entrapment, as a matter of law, we briefly review the salient points of the officer's testimony. The most it discloses is that he had known defendant 30 days before the sale and had visited him at his apartment, occasionally taking a drink with him; that they discussed marijuana several times and on the day before the sale asked defendant if they could get together the next day to buy some; and that they met the next evening at a cafe, drove to a location known to the defendant where he gave him the money, defendant went alone into the premises and returned with the narcotic. This is the extent of the prosecution's testimony and we fail to find any evidence therein from which any reasonable inference of "the trickery, persuasion, or fraud of the officer" required under our law to constitute entrapment, could be drawn. People v. Lindsey, 91 Cal.App.2d 914, 205 P.2d 1114, 1115; People v. Hall, 133 Cal.App. 40, 23 P.2d 783.

[1] Since entrapment is a positive defense, the burden is upon the defendant to prove that he was induced to commit the violation (People v. Braddock, 41 Cal.2d 794, 264 P.2d 521; People v. Schwartz, 109 Cal.App.2d 450, 240 P.2d 1024; People v. Grijalva, 48 Cal.App.2d 690, 121 P.2d 32; People v. Lee, 9 Cal.App.2d 99, 48 P.2d 1003). Defendant's attempt to offer such defense was as unsuccessful as his contention on this appeal that the People's evidence establishes entrapment as a matter of law. It appears to us that even if the testimony of the defendant and his wife in its entirety had been believed by the trial court, the evidence would have fallen short of establishing the necessary elements of the defense of entrapment.

[2] As seen from a brief summary of the defense testimony, the evidence is clearly not free of conflict, and it is the rule on appeal that when the record discloses a conflict in the evidence, the judgment will not be reversed (People v. Braddock, 41 Cal.2d 794, 264 P.2d 521; People v. Crawford, 105 Cal.App.2d 530, 234 P.2d 181). The defendant's wife testified that the officer for three months before was an occasional visitor and he and defendant appeared to be "pretty good friends"; and that one evening when he asked defendant to go with him to get some marijuana, he refused because of his children. The defendant in his testimony admitted he obtained the marijuana for the officer, but said that the latter had been introduced by a neighbor as a schoolmate, came to his apartment often and repeatedly asked him if he knew where he could get some marijuana; that he kept asking him and buying candy for the children until he gained his "influence"; and that when the officer said that he and his wife used the narcotic but could not get any, he finally said he would introduce him to some people so they wouldn't bother him further.

[3] Since the function of determining the credibility of witnesses, resolving factual conflicts and weighing the evidence is one exclusively for the trier of fact, the question before this court is not whether his defense presented enough to show entrapment but whether, as appellant himself states the issue, "the testimony of Officer Pryor establishes the defense of entrapment as a matter of law." In finding him guilty, it is obvious that the trial court rejected defendant's claim of so-called "reluctance" to become involved in the commission of the offense. Indeed, the testimony of the officer reveals no hint of any reluctance on the part of defendant to go with him to buy the narcotic, but clearly shows that his participation in the crime was solely the result of defendant's willingness to go along with what was no more than a simple request that they get together the next night, go out and buy some marijuana. The truth of defendant's testimony that he told the officer he would introduce him to a contact so he wouldn't be bothered further because he wanted nothing to do with it, is not borne out by the evidence. It is obvious even from his own testimony that defendant never made any arrangements for the officer to meet a contact, but instead kept the matter within his entire control, personally going into the premises alone, finishing the transaction and later returning to the officer's car where he gave him the narcotic and his change without advising him where he went and with whom he had done business.

[4–6] There appears to be little reason to discuss at length the law relative to the defense of entrapment since the issue before us seems to be primarily a factual one. Rejecting the defendant's version of why he committed the offense, the court believed the testimony of the officer, and in his testimony we find a complete absence of evidence of any element of entrapment. The development of this defense in our law is based upon the fundamental refusal of our courts to countenance the solicitation of innocent people by law enforcement officers into the commission of crime (People v. Roberts, 40 Cal.2d 483, 254 P.2d 501; People v. Schwartz, 109 Cal.App.2d 450, 240 P.2d 1024; People v. Lindsey, 91 Cal.App.2d 914, 205 P.2d 1114; People v. Malone, 117 Cal.App. 629, 4 P.2d 287). If the criminal intent originated in the mind of the defendant and the offense was completed, the fact that an opportunity was furnished by the officer or that the defendant was aided by him in the commission of the crime in order to secure the evidence necessary to prosecute him therefor, constitutes no defense. Where the officer uses no more persuasion than is necessary for an ordinary sale and defendant is ready and willing to make it, there is under our law no entrapment. People v. Braddock, 41 Cal.2d 794, 264 P.2d 521; People v. Lindsey, 91 Cal.App.2d 914, 205 P.2d 1114. "Where an accused has a pre-existing criminal intent, the fact that when solicited by a decoy he committed a crime raises no inference of unlawful entrapment." People v. Schwartz, 109 Cal. App.2d 450, 240 P.2d 1024, 1027; People v. Roberts, 40 Cal.2d 483, 254 P.2d 501; People v. Braddock, 41 Cal.2d 794, 264 P.2d 521.

[7] The evidence presented by the prosecution and believed by the trial court clearly shows that defendant willingly obtained the narcotic and sold it to the officer, when the latter merely furnished him an opportunity to do so. The fact defendant claims he received no profit from the transaction does not change the illegality of his act. There is in the record before us no showing of trickery, pretense or persuasion, or that defendant in any respect sustained his burden of proving he was induced to commit the offense for which he was convicted.

For the foregoing reasons the judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

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170 Cal.App.2d 758

PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Victor BLANCO and Naomi Utley,
Defendants,

Victor Blanco, Defendant and Appellant.
Cr. 6501.

District Court of Appeal, Second District,
Division 3, California.
May 28, 1959.
Hearing Denied July 22, 1959.

Defendant was convicted in the Superior Court of Los Angeles County, LeRoy Dawson, J., for violations of Penal Code, § 288a, and he appealed. The District Court of Appeal, Vallée, J., held that boys, each of whom witnessed, but did not aid, abet, assist, or participate in, defendant's criminal act with other, were not accomplices in acts which they merely witnessed.

Affirmed.

1. Criminal Law 🔑635

An order excluding all persons except officers of court and defendant is in violation of Constitution section guaranteeing right to public trial. West's Ann.Const. art. 1, § 13.

2. Criminal Law 🔑635

Defendant may waive his right to public trial, either expressly or by failure seasonably to object to an exclusion order; and if he does so he may not thereafter complain. West's Ann.Pen.Code, § 868.

3. Criminal Law ⟹245

Where defendant made no objection when trial judge announced that all persons except officers of the court were to be excluded from courtroom, and first sought to make point on appeal, he waived right to public trial at preliminary hearing.

4. Criminal Law ⟹507(1)

Boys, each of whom witnessed, but did not aid, abet, assist, or participate in, defendant's criminal act with other, were not accomplices in acts which they merely witnessed. West's Ann.Pen.Code, § 288a.

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Robert M. Maslow, Beverly Hills, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and Marvin L. Part, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

By information defendant was charged in five counts with violations of Penal Code, section 288a. In a nonjury trial he was convicted of the offenses charged and sentenced to state prison. He appeals from the judgment.

[1-3] The cause was submitted on the transcript of the preliminary examination and additional evidence. Defendant first contends he was denied a public trial at the preliminary hearing in violation of article I, section 13, of the Constitution. The following is the record of what transpired at the preliminary, on which the contention is based:

"The Court: The People versus Victor Blanco and Naomi Utley.

"Mr. Parsons [attorney for defendant]: Blanco is present and ready, your Honor. At this time I understand there are two civilian witnesses and we ask for an order excluding the witnesses. There are apparently two young men involved in this and we feel that they shouldn't be present when the other one is testifying.

"The Court: I will exclude all people from the courtroom and the witnesses will be excluded and the Marshal will indicate where they are to remain until such time as they are needed for their testimony.

"Mr. Mead: Ready for the defendant Utley.

"The Court: All people are excluded from the courtroom. This is a closed session.

"Mr. McCormick [district attorney]: Was that request for all people?

"The Court: Not the officers?

"Mr. Parsons: No, not the officers, but for all witnesses other than the officers."

In criminal prosecutions, "in any court whatever," the accused has the right to a public trial. Const., art. I, § 13. An order excluding all persons except the officers of the court and the defendant is in violation of this section. People v. Hartman, 103 Cal. 242, 243-244, 37 P. 153. It is settled, however, that the defendant may waive his right to a public trial either expressly or by failure seasonably to object to an exclusion order. If a defendant waives the right, he may not thereafter complain. After quoting section 868 of the Penal Code[1] and the provision of the Constitution, the court in People v. Tarbox, 115 Cal. 57, at page 61, 46 P. 896, at page 897, stated:

> "In People v. Swafford, 65 Cal. 223, 23 P. 809, an order of exclusion was sustained. The record being silent, it was assumed that the defendant assented to or demanded the order. That cause was reviewed and materially qualified in People v. Hartman, 103

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[1] Penal Code, section 868: "The magistrate must also, upon the request of the defendant, exclude from the examination every person except his clerk, court reporter and bailiff, the prosecutor and his counsel, the attorney general, the district attorney of the county, the defendant and his counsel, and the officer having the defendant in custody; provided, however, that when the prosecuting witness is a female she shall be entitled at all times to the attendance of a person of her own sex."

> Cal. 245, 37 P. 153, [42 Am.St.Rep. 108]; and upon that case appellant relies to sustain his contention. But People v. Hartman, supra, is not in point. Not only was the order of exclusion in that case made against the objection of the defendant, but, as was there held, there is no provision of the Code relating to or authorizing such exclusion during the trial in the superior court. There can be no question that a defendant has the 'right' to a public examination before the committing magistrate; but under the provisions of the Penal Code above quoted, he may waive that right whenever he deems it to his interest to do so."

People v. Tugwell, 32 Cal.App. 520, at page 525, 163 P. 508, at page 510, says:

> "This right so accorded by the Constitution, like the right to a speedy trial, being for the benefit of the defendant, may be waived by him. 'It is a well-settled maxim that a party may waive the benefit of any condition or provision made in his behalf, no matter in what manner it may have been made or secured.' Broom's Legal Maxims, 547; Knarston v. Manhattan Life Ins. Co., 140 Cal. 57, 73 P. 740. As said in Goit v. National Protection Ins. Co., 25 Barb. (N.Y.) [189], 191: 'The law will not compel a man to insist upon any benefit or advantage secured to him individually,' whether such benefit be constitutional or statutory. Like the record in the case of People v. Swafford, 65 Cal. 223, 3 P. 809, that here presented is silent in showing whether or not defendant in express terms consented to the closing of the door. From aught that appears to the contrary, he may have done so. At all events, he did not, as did defendant in the case of People v. Hartman, 103 Cal. 242, 37 P. 153, 42 Am.St.Rep. 108, upon which appellant relies, enter any objection to the action of the bailiff, nor call the attention of the court thereto, until during the noon recess, after which there appears to have been no cause for complaint. Under these circumstances, we are constrained to hold, even if the conduct of the trial was lacking in the character of being public in the ordinary sense, that defendant must by his conduct as shown be deemed to have assented thereto and waived any objection on account thereof."

We are of the opinion that defendant assented to the order of the court and waived his right to a public trial at the preliminary hearing. When the court stated, "All people are excluded from the courtroom," defendant made no objection. Cf. People v. Buck, 46 Cal.App.2d 558, 561–562, 116 P.2d 160. See annotation 48 A.L.R.2d 1452. When asked by the district attorney if the request was for all people, the court said "Not the officers," and counsel for defendant said "not the officers, but for all witnesses other than the officers." Defendant made no complaint because "all people" other than the officers were ordered excluded. The point is made for the first time on appeal. No motion was made to set the information aside on the ground defendant had not been accorded a public trial at the preliminary hearing, nor did he raise the question at any time in the superior court, and his trial in the latter court was public. The contention cannot be sustained.

[4] The participants in the offenses charged were James Stock, a boy of 14 years, Roger Carey, a boy of 15 years, defendant, and Naomi Utley. The evidence was of incidents highly revolting, shocking and offensive. Count I charged and the evidence showed that defendant committed an act upon James denounced by Penal Code, section 288a. Roger witnessed the act. Count II charged and the evidence showed that defendant committed the same act upon Roger. James witnessed the act. Count III charged and the evidence showed that defendant participated in an act of the same character committed by James. Roger witnessed this act. Count IV charged and the evidence showed that defendant participated in an act of the same character committed by Roger. James witnessed this

act. Count V charged and the evidence showed that defendant committed an act of the same character upon Naomi. Defendant contends that James and Roger were accomplices; that their testimony with respect to all of the counts was not corroborated; therefore the judgment is not supported by the evidence. The point is without merit.

With respect to each of the counts, one of the boys did not aid, abet, assist, or participate in the criminal act. See People v. Wertz, 145 Cal.App.2d 395, 397, 302 P.2d 613. James testified to the act committed upon him and to the act he committed upon defendant. Roger did not participate in those acts. He was an onlooker, and corroborated James as to both acts. Roger testified to the act committed upon him and to the act he committed upon defendant. James did not participate in those acts. He was an onlooker, and corroborated Roger as to both acts. Neither James nor Roger was an accomplice as to count V.

People v. McMahon, 116 Cal.App.2d 883, 254 P.2d 903, is in point. In that case counts III and IV charged violations of Penal Code, section 288a. The court stated 116 Cal.App.2d at page 887, 254 P.2d at page 905:

> "Defendant's second contention is predicated upon the action of the trial court in denying his motion to dismiss Counts 3 and 4. His argument in support of this contention proceeds upon the theory that since both of the boys involved in these counts were over the age of fourteen years they were therefore accomplices, and since their testimony was not corroborated it was error for the court to deny his motion. Our examination of the record does not sustain such a contention. While each of the boys was an accomplice with respect to the particular act in which he participated the evidence does not disclose as a matter of law that he was an accomplice with respect to the acts perpetrated by defendant on the other. Both of the complaining witnesses were present at the time and place; each was the recipient of the same offer and proposition and each identified the defendant as the one who had picked them up in his car and made the propositions to them. The mere fact that each was an accomplice of the defendant with respect to the particular act engaged in by each did not in and of itself render him an accomplice as a matter of law as to the act charged against defendant with the other complaining witness. This was a question of fact to be determined by the jury and the court properly left that to the jury for its determination. People v. Griffin, 98 Cal.App.2d 1, 219 P.2d 519."

Also see People v. Wertz, 145 Cal.App.2d 395, 397–398, 302 P.2d 613.

In the present case the trier of fact impliedly found that Roger was not an accomplice as to the acts committed upon and by James, and that James was not an accomplice as to the acts committed upon and by Roger. The evidence supports the findings. The testimony of James as to the acts committed upon and by him was corroborated by the testimony of Roger, a nonaccomplice, and the testimony of Roger as to the acts committed upon and by him was corroborated by the testimony of James, a nonaccomplice.

We find no error in the record.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

171 Cal.App.2d 107

Gail E. TAYLOR, a Minor, by Clifford Gerlach, her Guardian ad litem, Plaintiff and Appellant,

v.

Vincent Anthony VALLELUNGA et al., Defendants and Respondents.

Civ. 18278.

District Court of Appeal, First District, Division 2, California.

June 4, 1959.

Plaintiff father under first count of complaint sought to recover damages, on ground that defendants struck and beat him, causing him bodily injury, and in the second count plaintiff daughter incorporated by reference the charge in the allegations of the first count and alleged that she was the daughter of the plaintiff father, that she was present and witnessed beating inflicted on plaintiff father by defendants, and that, as a result thereof, she suffered severe fright and emotional distress. The Superior Court, County of Santa Clara, Marshall S. Hall, J., entered judgment dismissing the second count, and the plaintiff daughter appealed. The District Court of Appeal, O'Donnell, J. pro tem., held that count of complaint alleging that plaintiff daughter was present and witnessed beating inflicted on her father by defendants, and that as a result, she suffered severe fright and emotional distress, for which she sought to recover damages, failed to allege a cause of action by plaintiff daughter, where there were no allegations that any physical disability or injury resulted from mental distress, or that defendants knew that plaintiff daughter was present and witnessed beating administered to her father, or any allegation that beating was administered to cause her to suffer emotional distress, or that defendants knew that severe emotional distress was substantially certain to be produced by their conduct.

Judgment affirmed.

1. Torts ⚷26(1)

Count of complaint alleging that plaintiff daughter was present and witnessed beating inflicted on her father by defendants, and that as a result, she suffered severe fright and emotional distress, for which she sought to recover damages, failed to allege a cause of action by plaintiff daughter, where there were no allegations that any physical disability or injury resulted from mental distress, or that defendants knew that plaintiff daughter was present and witnessed beating administered to her father, or any allegation that beating was administered to cause her to suffer emotional distress, or that defendants knew that severe emotional distress was substantially certain to be produced by their conduct.

2. Appeal and Error ⚷863

Where complaint failed to allege facts which would entitle one of the plaintiffs to recover, and she was granted leave to amend, but failed to do so, District Court of Appeal was limited on appeal to a determination whether complaint stated a cause of action, and not whether it might be amended to do so.

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MacLeod & Gunn, Palo Alto, for appellant.

Hoge, Fenton, Jones & Appel, Charles H. Brock, San Jose, for respondent Vallelunga.

Thomas J. Randazzo, San Jose, for respondent Gattos.

O'DONNELL, Justice pro tem.

The complaint in this action contains three counts. We are concerned here, however, only with the allegations of the first two counts. In the first count, plaintiff Clifford Gerlach alleges that on December 25, 1956, defendants struck and beat him causing him bodily injury for which he seeks damages. In the second count, plaintiff and appellant Gail E. Taylor incorporates by reference the charging allegations of the first count and proceeds to allege that she is the daughter of plaintiff Clifford Gerlach, that she was present at and witnessed the beating inflicted upon her father by defendants, and that as a result thereof, she suffered severe fright and emotional distress. She seeks damages for the distress so suffered. It is not alleged that any physical disability or injury resulted from the mental distress. A general demurrer to the second count of the complaint was interposed by defendants. The demurrer was sustained and appellant was granted ten days leave to amend. Appellant failed to amend and judgment of dismissal of the second count was entered. The appeal is from the judgment of dismissal.

The California cases have for some time past allowed recovery of damages where physical injury resulted from intentionally subjecting the plaintiff to serious mental distress. See cases cited in State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal.2d 330, 337, 240 P.2d 282. In the Siliznoff case the Supreme Court extended the right of recovery to situations where no physical injury follows the suffering of mental distress, saying that "a cause of action is established when it is shown that one, in the absence of any privilege, intentionally subjects another to the mental suffering incident to serious threats to his physical well-being, whether or not the threats are made under such circumstances as to constitute a technical assault." 38 Cal.2d at page 336, 240 P.2d at page 284. In arriving at this result the court relied in substantial part upon the development of the law in this field of torts as traced by the American Law Institute, and it quotes with approval (38 Cal.2d at page 337, 240 P.2d at page 285) section 46, as amended, of the Restatement of Torts, (Restatement of the Law, 1948 Supplement, Torts, § 46) which reads: "One who, without a privilege to do so, intentionally causes severe emotional distress to another is liable (a) for such emotional distress, and (b) for bodily harm resulting from it." In explanation of the meaning of the term "intentionally" as it is employed in said section 46, the Reporter says in subdivision (a) of that section: "An intention to cause severe emotional distress exists when the act is done for the purpose of causing the distress or with knowledge on the part of the actor that severe emotional distress is substantially certain to be produced by his conduct. See Illustration 3." Illustration 3 referred to reads as follows: "A is sitting on her front porch watching her husband B, who is standing on the sidewalk. C, who hates B and is friendly to A, *whose presence is known to him,* stabs B, killing him. C is liable to A for the mental anguish, grief and horror he causes." (Emphasis added.)

[1] The failure of the second count of the complaint in the case at bar to meet the requirements of section 46 of the Restatement of Torts is at once apparent. There is no allegation that defendants knew that appellant was present and witnessed the beating that was administered to her father; nor is there any allegation that the beating was administered for the purpose of causing her to suffer emotional distress, or, in the alternative, that defendants knew that severe emotional distress was substantially certain to be produced by their conduct.

Appellant cites the following cases in support of her contention that the second count of the Complaint states facts sufficient to constitute a cause of action. Lindley v. Knowlton, 179 Cal. 298, 176 P. 440; Webb v. Francis J. Lewald Coal Co., 214 Cal. 182, 4 P.2d 532, 77 A.L.R. 675; Medeiros v. Coca-Cola Bottling Co., 57 Cal. App.2d 707, 135 P.2d 676; Jeppsen v. Jensen, 47 Utah 536, 155 P. 429, L.R.A.1916D, 614; Lambert v. Brewster, 97 W.Va. 124, 125 S.E. 244 and Rogers v. Williard, 144 Ark. 587, 223 S.W. 15, 11 A.L.R. 1115. Each of those cases met all of the requirements of one or the other of the rules discussed above, that is, either physical injury followed the emotional distress or, the actor knew that severe emotional distress was substantially certain to be produced by his conduct. They are all, therefore, distinguishable from the instant case on their facts.

[2] Appellant argues that the intent to cause her severe emotional distress or knowledge that such distress was substantially certain to be produced might be proved upon the trial. Her complaint failed to allege such facts and since she was granted leave to amend and failed to do so, we are limited on appeal to a determination of whether the complaint states a cause of action, not whether it might be amended to do so. Levinson v. Bank of America, 126 Cal.App.2d 122, 125, 271 P.2d 632.

Judgment affirmed.

DOOLING, Acting P. J., and DRAPER, J., concur.

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171 Cal.App.2d 62

In the Matter of the ESTATE of Olga BELL, Deceased.

Edna Earl GRAPES, Mary Elizabeth Grapes, Sidney Bell Goetzfried, Bessie Floy Day, Ruth Day, Hoy Claude Day and Clyde W. Day, Appellants,

v.

Harry SCHAFFNER, Respondent.

Civ. 18527.

District Court of Appeal, First District, Division 2, California.

June 3, 1959.

Proceeding by heirs for a distribution of decedent's entire estate to them. Heirs of decedent's predeceased husband objected to petition and prayed that estate be distributed in accordance with statute. The Superior Court, County of Alameda, A. T. Shine, J., entered order determining that property of estate was decedent's separate property and that it should be distributed to her heirs and predeceased husband's heirs appealed. The District Court of Appeal, O'Donnell, J. pro tem., held that notwithstanding fact that at time of husband's death decedent and husband owned as joint tenants an amount of property almost equal to valuation of property in estate of decedent some 19 years later, trial court was fully warranted in concluding that predeceased husband's heirs had not sustained their burden of proving that property was a community property of the spouses and that specific property in estate of surviving spouse was proceeds of such community property.

Affirmed.

1. Husband and Wife 🔑262(2)

Fact that property owned by husband and wife at time of husband's death was community property did not entitle heirs of predeceased husband to one half of surviving wife's estate at her death, and burden was upon heirs of predeceased husband to establish that property was community property of spouses, and since the identical property was not found in the estate of surviving spouse, to prove that specific property in that estate was the proceeds of such community property. West's Ann. Prob.Code, § 228.

2. Trial 🔑142

Whether a particular inference should be drawn is a question of fact for the trier of fact in the absence of evidence to the contrary.

3. Husband and Wife 🔑264

In proceeding by heirs of estate of surviving spouse for distribution to them of all of the assets of estate, evidence sustained finding of trial court that heirs of predeceased husband had not sustained burden of proving that assets were community property or that property found in surviving wife's estate was proceeds from community property. West's Ann.Prob. Code, § 228.

◆

Harry M. Gross, Oakland, for appellants.

Kahle & Adams, San Jose, for respondents.

O'DONNELL, Justice pro tem.

This is an appeal from a decree of distribution wherein the lower court ordered distribution of all of the property of the above entitled estate to the heirs of decedent, to the exclusion of the heirs of decedent's predeceased spouse.

Olga Bell, the decedent died intestate on October 23, 1955. The administrator of decedent's estate filed, in due course, his petition for distribution in which he alleged that the entire estate was the separate property of decedent and prayed that it be distributed to her heirs. The appellants, as heirs of decedent's predeceased husband Glenn R. Bell, filed objections to the petition and prayed that the estate be distributed in accordance with the provisions of section 228 of the Probate Code. After a hearing, the lower court found that the property of the estate of Olga Bell was her separate property and therefore ordered it all distributed to her heirs.

Glenn and Olga married in 1923. Glenn died in 1936. At the time of his death Glenn and Olga held in joint tenancy real and personal property of the value of $23,661.48. It has been stipulated in this proceeding that said property was community property. At the time of Olga's death in 1955, she left estate appraised at $26,661.12. The estate consisted of jewelry appraised at $490, and cash in the sum of $26,171.12.

Neither Glenn nor Olga left any surviving issue. Appellants are the nieces and nephews of Glenn. Respondents are the nephew, nieces and sisters of Olga. Section 228 of the Probate Code reads:

"If the decedent leaves neither spouse nor issue, and the estate, or any portion thereof was community property of the decedent and a previously deceased spouse, and belonged or went to the decedent by virtue of its community character on the death of such spouse, or came to the decedent from said spouse by gift, descent, devise or bequest, or became vested in the decedent on the death of such spouse by right of survivorship in a homestead, or in a joint tenancy between such spouse and the decedent or was set aside as a probate homestead, such property goes in equal shares to the children of the deceased spouse and their descendants by right of representation, and if none, then one-half of such community property goes to the parents of the decedent in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to the brothers and sisters of the decedent and their descendants by right of representation, and the other half goes to the parents of the deceased spouse in equal shares, or if either is dead to the survivor, or if both are dead, in equal shares to the brothers and sisters of said deceased spouse and to to their descendants by right of representation."

[1] Appellants contend that by virtue of the fact that the property owned by Glenn and Olga at the time of Glenn's death was community property, appellants are, under the provisions of section 228, entitled to succeed to one-half of Olga's estate. The matter is not that simple, for appellants have a further burden which is thus stated in Re Estate of Anderson, 142 Cal.App.2d 391, 392, 298 P.2d 105, 107:

"The burden is on the heirs of a predeceased spouse seeking to inherit through the estate of the surviving spouse under Probate Code, section 228, to establish that the property was the community property of the spouses and, where the identical property is not found in the estate of the surviving spouse, to prove that specific property in that estate is the proceeds of such community property."

Appellants are frank to admit in their opening brief that, "It is true that an exact tracing of assets from Glenn's estate to the decedent's was not made, * * *." They contend, however, that In re Estate of Rattray, 13 Cal.2d 702, 91 P.2d 1042; In re Estate of Taitmeyer, 60 Cal.App.2d 699, 141 P.2d 504; In re Estate of Ball, 92 Cal.App.2d 93, 206 P.2d 1111; and In re Estate of Jolly, 196 Cal. 547, 238 P. 353 are authority for the proposition that the heirs of the predeceased spouse are not required to trace the property from the first estate into the second estate in order to share in distribution of the second estate. None of those cases so holds. In fact, quite to the contrary, it is stated in Re Estate of Rattray, supra, 13 Cal.2d at pages 705–706, 91 P.2d at page 1044, that, "If no evidence of probative value was offered by respondents in proof of the fact that the source of this property was the community property of the spouses, respondents would necessarily fail to establish their right to inherit by virtue of their relationship to the predeceased spouse of the decedent." In re Estate of Taitmeyer, supra, was not at all concerned with the problems of tracing assets and is therefore not in point. That case involved the right of a child of one of the spouses to inherit the whole of the estate as against the collateral heirs of the other spouse. Neither was In re Estate of Ball, supra, concerned with tracing assets. The only issue involved in that case was whether section 228 applied to property acquired in a common law state. In re Estate of Jolly, supra, does not hold that it is unnecessary to trace the assets of the first estate into the second estate. The court merely held in that case that all of the evidence pointed to the conclusion that all of the property in the hands of the surviving spouse was acquired during the marriage as community property.

[2, 3] The only circumstance in the instant case that might possibly give rise to an inference that Glenn's estate was the source of Olga's estate was the similarity of the appraised values of the two estates. Whether that single circumstance would warrant the drawing of such an inference we need not decide, for the fact is that the trial court rejected such inference. "* * * whether a particular inference shall be drawn is a question of fact for the [trier of fact], even in the absence of evidence to the contrary." Hardin v. San Jose City Lines, Inc., 41 Cal.2d 432, 436, 260 P.2d 63, 65. Moreover, opposed to such circumstance was the evidence introduced by respondent to the effect that Olga had, after Glenn's death, been variously employed as a seamstress, an apartment house manager, and in the real estate business.

We conclude that the trial court was fully warranted in concluding that appellants had not sustained their burden of proof, and in finding that Olga's entire estate was separate property.

The judgment is affirmed.

DOOLING, Acting P. J., and DRAPER, J., concur.

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170 Cal.App.2d 619

TUSTIN HEIGHTS ASSOCIATION, T. Cecil Ostrander, and F. N. Clark, Petitioners and Appellants,

v.

BOARD OF SUPERVISORS OF COUNTY OF ORANGE et al., Respondents.

Civ. 5917.

District Court of Appeal, Fourth District, California.

May 25, 1959.

Hearing Denied July 22, 1959.

Mandamus proceeding. The Superior Court of Orange County, Raymond Thompson, J., entered judgment after the demurrer to the second amended petition had been sustained without leave to amend, and the petitioners appealed. The District Court of Appeal, Stone, J. pro tem., held that where county zoning ordinance treated conditional uses and variances separately, and separately stated conditions for each, and made hardship the essence of a variance but not of a conditional use and the variance sections vested in board of supervisors the authority to grant variance without approval of planning commission and the sections relating to conditional use contained no provision for such overriding action by the board, it was improper, by reading the variance and conditional use sections together, to construe the ordinance as permitting board of supervisors to grant conditional use permit contrary to recommendation of planning commission.

Reversed.

Opinion, 334 P.2d 1017, vacated.

1. Municipal Corporations ⚷621.23

Where county zoning ordinance treated conditional uses and variances separately, and separately stated conditions for each, and made hardship the essence of a variance but not of a conditional use and the variance sections vested in board of supervisors the authority to grant variance without approval of planning commission and the sections relating to conditional use contained no provision for such overriding action by the board, it was improper, by reading the variance and conditional use sections together, to construe the ordinance as permitting board of supervisors to grant conditional use permit contrary to recommendation of planning commission.

2. Municipal Corporations ⚷601(3)

Classically, a master zoning ordinance establishes the basic uses permitted within the particular zoned area, and usually such permitted uses are not exclusive, and the zoning ordinance also enumerates certain other uses known as exceptions which do not comply with the ordinance but which may nonetheless be permitted upon application and hearing.

3. Municipal Corporations ⚷601(23)

A "nonconforming use" is a use of property that was in effect prior to enactment of zoning ordinance, and such a use, although prohibited, may be permitted if shown that it is not a menace to the health, welfare and safety of the public.

See publication Words and Phrases, for other judicial constructions and definitions of "Nonconforming Use".

4. Municipal Corporations ⚷621.23

A "conditional use" may be permitted if it is shown that its use is essential or desirable to the public convenience or welfare and at the same time that it will not impair the integrity and character of the zoned district; it must also be shown that it is not detrimental to public health, public morals, or public welfare.

See publication Words and Phrases, for other judicial constructions and definitions of "Conditional Use".

5. Municipal Corporations ⚷621.23, 621.46

Hardship is not a prerequisite to the issuance of a conditional use permit and there is no burden on the applicant to show hardship in any nature.

6. Municipal Corporations ⚷621.17

The essential requirement of "variance" is a showing that strict enforcement of the zoning limitations would cause unnecessary hardship.

See publication Words and Phrases, for other judicial constructions and definitions of "Variance".

7. Municipal Corporations ⚷621.46

The burden of showing hardship is on applicant for zoning variance.

8. Municipal Corporations ⚷601(18), 621.9

A "conditional use" and "variance" are not one and the same and the provisions for each of them in a zoning ordinance are not to be construed together as reciprocal parts of an integrated ordinance unless the particular act in question specifically and unequivocally so provides.

9. Municipal Corporations ⚷621.39

Where county zoning ordinance authorized board of supervisors, on recommendation of planning commission, to issue conditional use permit and the planning commission recommended to the board that it deny the permit and the applicant amended the application, the board should not have acted on the amended application without referring the amended application to the planning commission.

10. Constitutional Law ⚷211

Municipal Corporations ⚷601(9)

County zoning ordinance permitting only conditional uses of land in small estate district for schools is not unconstitutional as discriminating against private schools, and as denying equal protection of the law when applied to private schools, notwithstanding that ordinance cannot be enforced against public schools inasmuch as the State of California has occupied the field of public education.

11. Schools and School Districts 🔑20

Public schools cannot be regulated by city or county ordinances in a field occupied by the state.

12. Constitutional Law 🔑209, 251

Due process and equal protection of the law are not synonymous with equal treatment of private citizens and the sovereign, and equal protection of the law does not require an equating of private rights with those of the sovereign.

13. Municipal Corporations 🔑601(7)

Where primary requirement of county zoning ordinance is that conditional uses and variances must be such that they will preserve the integrity and character of the district, the utility and value of adjacent property and the general welfare of the neighborhood and the ordinance then vests in the discretion and judgment of the planning commission the determination of when the applicant has presented a request for a use which is an exception but which will nonetheless preserve the integrity and character of the district, and the utility and value of adjacent property, and the general welfare of the neighborhood, the ordinance is not unconstitutional even though it does not provide detailed standards to govern the planning commission or the board of supervisors which must pass upon the application for conditional use or variance.

14. Municipal Corporations 🔑601(7)

If the purposes of zoning are to be accomplished, the master zoning restrictions or standards must be definite while the provisions pertaining to a conditional use or a variance, designed to relieve against uncertain eventualities, must of necessity be broad and permit an exercise of discretion.

15. Mandamus 🔑187(9)

Where owners of land in zoned area petitioned for writ of mandate requiring county board of supervisors to vacate and set aside their order granting conditional use permit and owners appealed from judgment after demurrer to their second amended petition was sustained without leave to amend, the question whether it was necessary for petitioners to attach to their petition the record of the proceedings before the planning commission and the board of supervisors was not an issue on the appeal inasmuch as the clerk's transcript reflected that the trial court had ordered the record of the planning commission and the record of the board of supervisors to be filed.

16. Mandamus 🔑154(2)

Where owners of land in zoned area petitioned for writ of mandate requiring county board of supervisors to vacate and set aside their order granting conditional permits, the action was not a request for a review of discretionary administrative proceedings, rather, the gist of the action was a violation of the county zoning ordinance and the principal question was the interpretation of the ordinance, and it was not necessary in order to state a cause of action that a copy of the transcript of the proceedings before the planning commission and the board of supervisors be attached to the petition.

17. Mandamus 🔑163

If petition for writ of mandate requiring county board of supervisors to vacate and set aside their order granting conditional permits was defective because a transcript of the proceedings before the planning commission and board of supervisors had not been attached to the petition, such procedural defect would not justify an order sustaining the demurrer without leave to amend.

18. Mandamus 🔑23(1)

Owners of land in district zoned under county ordinance had such special interest or special damage as would entitle them to file petition for writ of mandate requiring county board of supervisors to vacate and set aside their order granting conditional permit, allegedly in violation of the ordinance.

◆

Rutan, Lindsay, Dahl, Smedegaard, Howell & Tucker, Milford W. Dahl, and H. Roger Howell, Santa Ana, for appellants.

Joel E. Ogle, County Counsel (Orange County), and Adrian Kuyper, Asst. County Counsel, Santa Ana, for respondents Board of Supervisors of Orange County and C. W. Donohue, Superintendent of Building and Safety for Orange County.

Blodget, Gilbert & Cochran and Arthur M. Bradley, Santa Ana, for respondent Roman Catholic Archbishop of Los Angeles.

STONE, Justice pro tem.

Facts

The respondent board of supervisors enacted a land use plan for Orange County entitled "The Districting Ordinance." The respondent, The Roman Catholic Archbishop of Los Angeles, petitioned the Orange County Planning Commission for a conditional use permit for the establishment of a church and an elementary parochial school in the 100–E4 Small Estates District. After hearings, the planning commission recommended denial of the application on the grounds that (1) "The site is not large enough to take care of students under customary state standards and also provide adequate parking space"; (2) that "Material detriment or injury to the neighborhood will result from issuance of this permit."

After disapproval by the planning commission, the matter was submitted to the board of supervisors. On May 22, 1957, the board of supervisors held a hearing at which evidence was submitted and the hearing was closed with a motion to reach a decision on the application on Wednesday, May 29, 1957. On May 29, 1957, the board of supervisors met without reopening the hearing, although the applicant proposed to amend the application by changing the location and number of the access roads, the size, type, number and location of the buildings, the size and location of the parking area, the size and location of the playground area, and by the addition of a second parcel of real property. No formal amended application was filed either with the planning commission or the board of supervisors. The matter was continued to June 5, 1957, on which date the board of supervisors, without reopening the hearing, allowed the respondent applicant to file an amended plot plan and verbally amend the original application to conform to the amended plot plan. Neither the amended plot plan nor the amended application was referred to the planning commission. The board of supervisors authorized the issuance of the conditional permit on the basis of the proposed amended application and the amended plot plan.

The petitioners, T. Cecil Ostrander and F. N. Clark, are residents and property owners residing in the county of Orange and in the immediate vicinity of the property to which the conditional permit in controversy applies. Both of said petitioners, T. Cecil Ostrander and F. N. Clark, are members of the board of directors of petitioner, Tustin Heights Association, which is an unincorporated association. Its members are residents and property owners in the area in which the property in question is located, which is within the 100–E4 Small Estates District. Petitioners filed their petition as a representative suit on behalf of the members of the association and individually as property owners within the zoned area. They sought a writ of mandate requiring the board of supervisors, collectively and individually, to vacate and set aside the order of the board of supervisors granting the conditional permit. The petition further requested that a writ of mandate issue against C. W. Donohue, Orange County Building Superintendent of Building and Safety, to refrain from in any manner issuing a construction permit for the construction of the church and school requested by the conditional use application, and if a permit had been issued that it be revoked and rendered null and void.

This is an appeal by the petitioners Cecil Ostrander and F. N. Clark, individually and on behalf of the members of Tustin Heights Association, from the judgment after the demurrer of the respondents to the second amended petition had been sustained without leave to amend.

This action is concerned with four sections of the zoning ordinance pertaining to the area in which the respondent, The Roman Catholic Bishop of Los Angeles, proposed to establish a church and an elementary parochial school. Section 9.2 E4 entitled "Small Estates" District Regulations, provides, insofar as pertinent, as follows:

> "A Uses Permitted: * * *.
>
> "7. The following additional uses, subject to the issuance of Conditional Permits therefor, as prescribed in Section 19: * * *.
>
> "b. Churches, museums and libraries.
>
> "c. Schools and colleges."

Thus conditional permits for the use of churches and schools may be issued pursuant to the ordinance, but only under the conditions provided by section 19. The applicable subsections of section 19 provide:

> "Section 19. Conditional Permits and Variance Permits.
>
> "A. Conditional Permits:
>
> "The Board of Supervisors, after receipt of the report and the recommendation of the Planning Commission as hereinafter in this section provided, shall have the power to authorize the issuance of conditional permits by the Building Inspector for specified types of uses and buildings in the foregoing Districts, as provided in the use regulations of such districts, under conditions which will preserve the integrity and character of the district, the utility and value of adjacent property and the general welfare of the neighborhood. Minimum conditions therefor are specifically as follows, * * *.
>
> "7. Churches, museums and libraries, upon condition that the location and building and plot plans be approved by the Planning Commission.
>
> "8. Schools, colleges, public playgrounds and athletic fields upon the following conditions:
>
> "a. An area adequate in the judgment of the Planning Commission, be provided to reduce possibility of injury to adjoining residential properties.
>
> "b. Building and plot plans be approved by the Planning Commission.
>
> "c. The location of the school site be approved by the Planning Commission."

One of the minimum conditions of 19-A, subdivisions 7 and 8, is the approval of the planning commission as to those particular uses. Respondents contend that section 19-A is not controlling and that section 19-B, relating to variances, also applies to the conditional uses covered by section 19-A. The trial court agreed with this contention and held that subdivision 19-A should not be interpreted independently but must be construed with section 19-B in determining whether the board of supervisors has the authority to grant a conditional permit without the approval of the planning commission and contrary to subdivisions 7 and 8 of section 19-A.

Section 19-B, which the trial court held to be controlling, reads as follows:

> "B. Variance Permits:
>
> "The Board of Supervisors, after receipt of the report and recommendation of the Planning Commission as hereinafter in this section provided, shall have the power to grant variances to the height, yard, area and use regulations of this ordinance and authorize the issuance of Variance Permits therefor by the Building Inspector, in cases where practical difficulty, unnecessary hardships or results inconsistent with the general purpose and intent of this ordinance occur through strict application of such regulations and under such conditions as said Board may deem necessary to assure that the General purpose and intent of this ordinance will be observed, public safety and welfare secured, and substantial justice done."

Subsection B of section 19 clearly vests in the board of supervisors the authority to grant a *variance* when the conditions enumerated by that section are shown to exist. There is nothing in section 19-B requiring a favorable recommendation by the planning commission as a prerequisite to the granting a variance.

Conditional Uses and Variances

[1–8] Respondents contend that section 19-A, Conditional Use Permits, and section 19-B, Variance Permits, must be read together. Inasmuch as section 19-B, relating to variances, authorizes the board of supervisors to grant a variance permit even though the planning commission makes an adverse recommendation, respondents argue that such power coheres to conditional use permits covered by section 19-A. Aside from disregarding the plain wording of the ordinance which treats conditional uses and variances separately, this argument ignores the basic distinctions between conditional use permits and variance permits. Classically, a master zoning ordinance establishes the basic uses permitted within the particular zoned area. Usually such permitted uses are not exclusive and the zoning act also enumerates certain other uses known as exceptions which do not comply with the ordinance but which may nonetheless be permitted upon application and hearing. Although various jurisdictions use different terminology when referring to such exceptions, they fall within three categories and the attributes of each type are essentially the same in all jurisdictions. The first is the "nonconforming use". It is a use of property that was in effect prior to the enactment of the zoning ordinance. Although prohibited, it may be permitted if shown that it is not a menace to the health, welfare and safety of the public. Livingston Rock & Gravel Co. v. County of Los Angeles, 43 Cal.2d 121, 127, 272 P.2d 4; Hopkins v. MacCulloch, 35 Cal.App.2d 442, 445, 95 P.2d 950; 2 Metzenbaum, Law of Zoning, 2d Ed., Chap. IX-m, p. 957; 1 Yokley, Zoning Law and Practice, 2d Ed., sec. 147, p. 362; 8 McQuillan, Municipal Corporations, 3d Rev.Ed., Chap. 25.160. The second type of exception is the "conditional use", which is sometimes referred to by the general term "exception". A conditional use may be permitted if it is shown that its use is essential or desirable to the public convenience or welfare and at the same time that it will not impair the integrity and character of the zoned district. It must also be shown that it is not detrimental to public health, public morals, or public welfare. Hardship is not a prerequisite to the issuance of a conditional use permit and there is no burden on the applicant to show hardship in any nature. Essick v. City of Los Angeles, 34 Cal.2d 614, 623, 213 P.2d 492; Wheeler v. Gregg, 90 Cal.App.2d 348, 363, 203 P.2d 37; 1 Yokley, Zoning Law and Practice, 2d Ed., sec. 133, p. 323; Metzenbaum, Law of Zoning, supra; McQuillan, Municipal Corporations, supra. The third type of use exception permitted under applicable circumstances is known as the "variance". The essential requirement of the variance is a showing that strict enforcement of the zoning limitations would cause unnecessary hardship. The burden of showing hardship is on the applicant. Thus a conditional use and variance are not one and the same and the provisions for each of them are not to be construed together as reciprocal parts of an integrated ordinance unless the particular act in question specifically and unequivocally so provides. Essick v. City of Los Angeles, supra; Wheeler v. Gregg, supra; 2 Metzenbaum, Law of Zoning, supra, p. 362; 8 McQuillan, Municipal Corporations, 3d Rev.Ed., Chap. 25.160.

It is apparent that the framers of the ordinance in question understood that the two types of exception are dissimilar and intended to draw the ordinance in a manner to express the classical distinction between conditional uses and variances. Not only are the two types of uses treated separately in the ordinance, 19-A being entitled Conditional Permits, and 19-B entitled Variance Permits, but each contains a separate statement of conditions.

Section 19-A provides:

> "A. Conditional Permits:
>
> "The Board of Supervisors, after receipt of the report and the recommendation of the Planning Commission as hereinafter in this section provided, shall have the power to authorize the issuance of conditional permits by the Building Inspector for specified types of uses and building in the foregoing Districts, as provided in the use regulations of such districts, under conditions which will preserve the integrity and character of the district, the utility and value of adjacent property and the general welfare of the neighborhood."

It should be noted that no mention is made of hardship as a condition.

Section 19-B provides:

> "B. Variance Permits:
>
> "The Board of Supervisors, after receipt of the report and recommendation of the Planning Commission as hereinafter in this section provided, shall have the power to grant variances to the height, yard, area and use regulations of this ordinance and authorize the issuance of Variance Permits therefor by the Building Inspector, in cases where *practical difficulty, unnecessary hardships or results inconsistent with the general purpose and intent of this ordinance occur through strict application* of such regulations *and under such conditions as said Board may deem necessary* to assure that the general purpose and intent of this ordinance will be observed, public safety and welfare secured, and substantial justice done." (Italics added.)

Clearly, the essence of the variance under 19-B is hardship and the board is to impose the regulations and conditions under which the variance is granted. Despite the clear wording of the two sections, respondents contend that the framers of the ordinance intended 19-A, conditional use permits, and 19-B, variance permits, to be read together because, as a prelude to setting forth some 23 paragraphs of minimum conditions for different types of conditional use permits, section 19-A provides "Minimum conditions therefor are specifically as follows, except as otherwise provided in Subdivision B (Variance Permits) of this section." We do not construe this sentence to mean that the two sections are interchangeable. We conclude that the sentence refers to the common heading of the entire section 19, which is entitled "Section 19. Conditional Permits and Variance Permits". It is an attempt to make it clear that minimum requirements for subdivision 19-A, conditional permits, are not intended to control the issuance of variance permits which follow in subsection 19-B. If respondents' position were correct and the two subdivisions were to be construed together, the result would be that all of the requirements of section 19-B must also apply to 19-A. Under such a construction each applicant for a conditional use permit would be required to show unnecessary hardship, which is required for a variance permit. It must follow that if the veto power of the board in 19-B applies to 19-A, then all other provisions of section 19-B apply equally to 19-A. The record does not reflect that respondent Roman Catholic Archbishop of Los Angeles has met the requirements of section 19-B for a variance and no such contention has been urged on this appeal. We conclude that the board of supervisors violated the provisions of section 19-A of the zoning ordinance by granting a conditional use permit contrary to the recommendation of the planning commission. There is no provision for such overriding action by the board in section 19-A of the ordinance.

Procedure Upon Amending Application for Use Permit

[9] Even though section 19-A, concerning conditional permits, and 19-B, concerning variances, were to be construed together, the demurrer in this case should not have been sustained without leave to amend. The planning commission recommended to the board of supervisors that it deny the permit. Thereafter, on May 22,

1957, the board of supervisors held a public meeting and the matter was taken under submission. On May 29, 1957, respondent church amended the application by changing the locations of roads, adding additional property to the site, changing the number and locations of the buildings and the size and location of the parking area and of the playground area. The matter was continued to June 5, 1957, at which time the board made its minute order approving the granting of the permit in accordance with the amended application. The amended application was not referred to the planning commission after the amendments were made. Section 19-C of the ordinance specifies the procedure to be followed when an application for *either* a conditional permit or a variance is amended and reads as follows:

> "C. Procedure—Conditional Permits and Variance Permits:
>
> "Application for a Conditional Permit or a Variance Permit shall be made to the Planning Commission. The Planning Commission shall prescribe the form, content and manner of preparing and submitting any application provided for in this section. * * *
>
> "9. The Board of Supervisors after receipt of the report and recommendation of the Planning Commission may grant amendment of any Conditional Permit or Variance Permit and authorize the issuance of an Amended Conditional Permit or Amended Variance Permit by the County Building Inspector under the following provisions: * * *
>
> "e. That the application for such amendment shall be subject to the same requirements as to filing of plot plans and related information as was required in filing application for the original permit."

Thus, when an application is amended, whether it be for a conditional permit or a variance, the application as amended must be referred to the planning commission in accordance with 19-C, 9-e. An allegation raising the question of procedure as an issue is properly pleaded in the petition. The question of whether or not the board complied with the procedure specified in the ordinance is an issue regardless of whether or not the board of supervisors has the authority to grant either a conditional permit or a variance contrary to the recommendation of the planning commission. The board of supervisors is bound by the provisions of its own ordinance. Johnston v. Board of Supervisors, 31 Cal.2d 66, 76, 187 P.2d 686.

Is the Zoning of Churches and Private Schools Unconstitutional?

Respondent Roman Catholic Archbishop of Los Angeles contends that the zoning ordinance in its entirety is unconstitutional insofar as it attempts to restrict the use of property for churches or schools within the zoned area. Such zoning, it is argued, is a violation of the First and Fourteenth Amendments to the United States Constitution in that it would deprive respondent of property without due process of law, infringe on the free exercise of religion, and deny equal protection of the law. Although some foreign jurisdictions have so held in cases factually similar, the question is well settled to the contrary in California. The same arguments as respondent church here makes were urged in the case of Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. City of Porterville, 90 Cal.App.2d 656, 203 P.2d 823. That case construed a zoning ordinance which prohibited the building of a church in an area zoned for single family dwellings. The court held, 90 Cal.App.2d at page 660, 203 P.2d at page 825:

> "The petitioner is not a congregation, but holds its property as a corporation sole, the existence of which depends upon the laws of the State. Having such right from the State, the enjoyment of the property is subject to reasonable regulations. The denial of a building permit did not prohibit anyone from religious worship and there is nothing in the record be-

> fore us to indicate that the church building could not be erected if located in the area zoned for that purpose."

A hearing was denied by the California Supreme Court in the Porterville case and the United States Supreme Court dismissed an appeal from the judgment, 338 U.S. 805, 70 S.Ct. 78, 94 L.Ed. 487, and denied a rehearing, 338 U.S. 939, 70 S.Ct. 342, 94 L.Ed. 579. A very recent case, Minney v. City of Azusa, 164 Cal.App.2d 12, 330 P.2d 255, was concerned with the very contentions being made by respondents in this case and the court held the zoning ordinance was not unconstitutional. The California Supreme Court denied a hearing in the Minney v. City of Azusa case, and an appeal to the United States Supreme Court was dismissed, 79 S.Ct. 941. No useful purpose would be served by quoting here the reasoning of the court in the Minney v. City of Azusa opinion or the many authorities cited therein; rather, reference is made to the opinion.

Does the Zoning of Schools Discriminate Against Private Schools?

[10, 11] Respondent church next argues that the zoning ordinance is unconstitutional because it discriminates against private schools, and cites Roman Catholic Welfare Corporation of San Francisco v. City of Piedmont, 45 Cal.2d 325, 289 P.2d 438, which is the leading California case on the subject. However, in that case the ordinance prohibited only private schools and the Supreme Court held such a restriction to be discriminatory. The ordinance before us purports to restrict all schools and, on its face, is not subject to the same criticism. However, as respondent points out, in practical application, the zoning ordinance cannot be enforced against public schools because the courts of this state have held that the State of California has occupied the field of public education. Public schools can not be regulated by city or county ordinances in a field occupied by the state. In Hall v. City of Taft, 47 Cal.2d 177, at page 181 et seq., 302 P.2d 574, at page 577, the court held that:

> "The public school system is of statewide supervision and concern and legislative enactments thereon control over attempted regulation by local government units. (Citations.) * * * When it engages in such sovereign activities as the construction and maintenance of its buildings, as differentiated from enacting laws for the conduct of the public at large, it is not subject to local regulations unless the Constitution says it is or the Legislature has consented to such regulation."

In the Hall case, supra, the particular public school activity involved was the construction and maintenance of public school buildings. In a later case, Town of Atherton v. Superior Court, 159 Cal.App.2d 417, 324 P.2d 328, the court had before it a zoning ordinance which excluded all schools from the zoned area. To that extent the Atherton ordinance is comparable to the Orange county ordinance which we are considering. In the Atherton case the court adopted the principle of the Hall decision and held that the state has occupied the field of school site location. The court said, 159 Cal.App.2d at page 428, 324 P.2d at page 335:

> "If, as the Hall case holds, the construction and maintenance of a school building is a sovereign activity of the state, it is obvious that the location and acquisition of a school site is necessarily and equally such an activity. Obviously, too, neither the Constitution nor the Legislature has consented to a municipal regulation of school sites. * * *
>
> "Under the statutes, the state has in nowise ceded to the municipalities its sovereign right to locate school sites. On the contrary, the state has expressly granted the power of location to its agencies, the school districts."

[12] Hence, it is clear that the Orange county ordinance can not restrict the location of public schools within the zoned areas. Respondent church argues that since the ordinance is ineffective as to public

schools it is an unconstitutional denial of equal protection of the law if applied to private schools. The argument is untenable in that it assumes that due process and equal protection of the law are synonymous with equal treatment of private citizens and the sovereign. Respondent's argument is that since the state may not be regulated in this particular field of activity, neither can the same activity of a private individual or corporation be so regulated. If this theory of equal protection were valid, it would necessarily apply to all activities of the state, not just public schools. Certainly, in the Hall case, 47 Cal.2d at page 182, 302 P.2d at page 578, supra, the Supreme Court said:

> "* * * We are referred to no statute or constitutional provision which, as far as the question here involved is concerned, expressly makes school buildings or their construction any more amenable to regulation by a municipal corporation than *structures which are built and maintained by the state generaly for its use.*" (Italics ours.)

The list of state activities which are not subject to local zoning is long and varied and the law does not prohibit the regulation of the counterpart of each of these activities in private ownership. Equal protection of the law does not require an equating of private rights with those of the sovereign.

There is language in Town of Atherton v. Superior Court, supra, which holds that the zoning of private schools is purely a municipal matter. At page 425, of 159 Cal.App.2d, at page 333 of 324 P.2d, the court said:

> "The word 'education' in section 65462 does not conflict with the power of a school district to locate its schools. It must be construed with statutes dealing with zoning and the rights of the state. *It must be remembered that in all municipalities there are private schools, the location of which is purely a municipal matter.*" (Italics added.)

Must the Standards for Nonconforming Uses, Conditional Uses, and Variances Be Definitive?

[13] Respondents' third and final contention concerning the constitutionality of the ordinance is restricted to subsection 19-A. It is alleged that this section fails to specify definite standards for the granting of a conditional use permit. Respondents argue this leaves the way open for arbitrary and discriminatory action by the planning commission. Before considering the merits of this contention we note that this attack is not directed against the basic zoning ordinance which establishes the character of the area and the uses to which the property therein may be put. It is directed against only the Conditional Uses which are exceptions to the restrictions of the master ordinance. Therefore, if section 19–A were held to be unconstitutional because of a lack of fixed and detailed standards to guide the planning commission, it would leave respondent church's property subject to the basic zoning restrictions without any provision for a conditional use. However, we do not think subsection 19-A unconstitutional. It is true that there are cases holding that an ordinance providing for a conditional use permit is unconstitutional if it does not provide detailed standards to govern the planning commission or the board, which must pass upon the application. On the other hand, there are authorities which take a broader view and hold that by reason of the nature of zoning, exceptions must be defined in general terms and administered at the discretion of the planning commission or board. The basic ordinance which governs the character of the area and circumscribes the uses of the property therein certainly must contain detailed standards and limitations, but we are here concerned with exceptions which are special dispensations for a use barred by the basic zoning ordinance. This distinction is stated in Rubin v. Board of Directors, 16 Cal.2d 119, 124, 104 P.2d 1041, 1043, as follows:

> "Unlike the 'spot zoning' obtained by amendment of the general zoning

> ordinance, a variance or exception sanctions a deviation from the standard under the dispensing power vested in the administrative body. People ex rel. Fordham M. R. Church v. Walsh, 244 N.Y. 280, 155 N.E. 575. This authority is entirely different from a licensing power under which permission may be granted to do an act or conduct a business when the applicant has complied with the requirements of the law under which the license is sought. Ordinarily, under such circumstances, the administrative body must issue a license. On the other hand, the grant of dispensation is a matter of grace, and a refusal is not the denial of a conditional statutory right; it merely leaves in operation the statute adopted by the legislative body. People ex rel. Fordham M. R. Church v. Walsh, supra." See also Lindell Co. v. Board of Permit Appeals, 23 Cal.2d 303, 322, 144 P.2d 4; Wheeler v. Gregg, 90 Cal. App.2d 348, 203 P.2d 37, supra.

[14] There are standards provided by sections 19-A and 19-B but, admittedly, they are broad and permit the exercise of discretion by the planning commission. The primary requirement is that conditional uses and variances must be such that they will preserve the integrity and character of the district, the utility and value of adjacent property and the general welfare of the neighborhood. The ordinance then vests in the discretion and judgment of the planning commission the determination of when the applicant has presented a request for a use which is an exception but which will nonetheless preserve the integrity and character of the district, the utility and value of adjacent property, and the general welfare of the neighborhood. To devise standards to cover all possible situations that could be exceptions, that is, which would warrant the granting of a conditional use permit or a variance permit, would be a formidable task and one that would tax the imagination. If a legislative draftsman blessed with such omniscience were available and he could draft standards to govern the likely as well as the possible contingencies which a conditional use permit or variance is designed to relieve, there would be no need for a conditional use or a variance. Such detailed standards, when incorporated in the ordinance, would remove them from the conditional use and variance category, making them a part of the zoning ordinance proper. There would be no discretion whatever and anyone meeting the detailed and definite standards would be entitled to a permit without question as his proposed use would be authorized by the ordinance just as much as the uses permitted under the basic zoning ordinance. All of which goes to point up our belief that if the purposes of zoning are to be accomplished, the master zoning restrictions or standards must be definite while the provisions pertaining to a conditional use or a variance, designed to relieve against uncertain eventualities, must of necessity be broad and permit an exercise of discretion. The courts of this state have repeatedly upheld zoning ordinances containing provisions governing conditional use permits and variance permits similar to the ordinance before us. In Wheeler v. Gregg, supra, 90 Cal.App.2d at page 360, 203 P.2d at page 45, the ordinance is summarized by the court as follows:

> "Sections 12.24 and 12.32–E of the ordinance authorized the Council to grant a Conditional Use Permit upon a finding that the permitted uses of the property are essential or desirable to the public convenience or welfare, and are in harmony with the various elements or objectives of the Master Plan."

And the court held, 90 Cal.App.2d at page 361, 203 P.2d at page 46:

> "*The determination of what harmonizes with the elements and objectives of the Master Zoning Plan having been committed to the discretion of the local governing bodies,* the burden of proving that the City Council acted without substantial evidence and in excess of

jurisdiction, rested upon appellants." (Italics added.)

We feel that the case of Wheeler v. Gregg, supra, is particularly pertinent as the court in its opinion expressed the basic and fundamental principle of due process as applied to ordinances such as the one before us. At page 362 of 90 Cal.App.2d, at page 46 of 203 P.2d the court said:

> "The essential requirement of due process is met when the administrative body is required to determine the existence or nonexistence of the necessary facts before any decision is made. Such a discretion is not arbitrary or so unguided as to invalidate the statute or ordinance. People v. Walton, 70 Cal.App.2d Supp. 862, 870, 161 P.2d 498." See also Essick v. City of Los Angeles, 34 Cal.2d 614, 617, 213 P.2d 492; Johnston v. Board of Supervisors, 31 Cal.2d 66, 72, 187 P.2d 686; Childs v. City Planning Comm., 79 Cal.App.2d 808, 811, 180 P.2d 433; Rubin v. Board of Directors, 16 Cal.2d 119, 124, 104 P.2d 1041; Otis v. City of Los Angeles, 52 Cal.App.2d 605, 613, 126 P.2d 954.

Up to this point our discussion relating to due process and equal protection of the law has been confined to an interpretation of the ordinance as such. If, as respondents foresee, the ordinance is enforced arbitrarily or there is an abuse of discretion in the administration thereof, the injured party would have recourse to the courts.

Transcript of Proceedings Necessary?

[15–17] Respondents have raised the question of whether it was necessary for petitioners to attach to their petition a record of the proceedings before the planning commission and the board of supervisors. We do not consider the question to be an issue on this appeal as the clerk's transcript reflects that the trial court ordered the record of the planning commission and the record of the board of supervisors to be filed. This order was entered before the amended petition was filed. Even so, this action is not a request for a review of discretionary administrative proceeding. Rather, the gist of the action is a violation of the ordinance and the principal question is the interpretation of the ordinance. It is not necessary in order to state a cause of action that a copy of the transcript of the proceedings be attached to the petition (Livingston Rock & Gravel Co. v. County of Los Angeles, 43 Cal.2d 121, 128–129, 272 P.2d 4). And finally, if the petition were defective because a transcript of the proceedings had not been attached to the petition, such procedural defect would not justify an order sustaining the demurrer without leave to amend. Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358; Witkin, California Procedure, Vol. 2, p. 1496.

Special Damage

[18] Respondents also assert petitioners have not shown any special interest or special damage that would entitle them to file this action. The petitioners are the owners of real property within the zoned area and as such they are restricted in the use of their property by the zoning ordinance. Each of such property owners has an interest in the enforcement of the ordinance which is peculiar to him. If the ordinance is violated, he suffers special damage that is distinguishable from that suffered by the public at large. The special damage cases cited by respondents are primarily actions wherein one individual has attempted to sue another private party for damages, or an action which has been brought to enjoin a nuisance, or a matter in which there has been an effort to secure a writ of mandate to require a public official to exercise his administrative discretion. In our case, petitioners allege that the law has been violated and they seek to have the board of supervisors comply with the ordinance which the county enacted. An owner of property within a zoned district is restricted in the use and occupation of his property by law. If he were to be prevented from going to court to seek redress for an alleged violation of that same statute

by the board of supervisors or any public official, certainly there would be a denial of equal protection of the law. The private citizen would be subject to the burdens and obligations of the statute, yet denied the right to protect the integrity and character of his property by the same ordinance.

Judgment reversed.

MUSSELL, Acting P. J., and SHEPARD, J., concur.

170 Cal.App.2d 780

Kenneth Wayne JOHNS, a minor, by Dovie Johns, his Guardian ad litem, Dovie Johns and Coy Johns, Plaintiffs and Appellants,

v.

Joe WARD and George T. Ward, individually and as co-partners, Defendants,

Raymond Thomas, Inc., a Corporation, Defendant and Respondent.

Civ. 5697.

District Court of Appeal, Fourth District, California.

May 28, 1959.

Rehearing Denied June 22, 1959.

Hearing Denied July 22, 1959.

Action by minor for personal injury sustained when he was struck by automobile driven by field worker on ranch of defendant corporation which paid labor contractor to supply labor, including field worker in question, for work on ranch. The Superior Court of Fresno County, Philip Conley, J., entered judgment for defendant ranch corporation and minor appealed. The District Court of Appeal, Stone, J. pro tem., held that where minor was a few days less than four years of age and apparently had a pre-existing mentally deficient condition, and only eyewitness to accident was a nine-year-old boy who gave sketchy testimony as to how it occurred, failure of trial court to give instruction embodying presumption of due care by minor constituted reversible error.

Reversed.

1. Licenses 🔑11(7)

Where corporation operating ranch paid party 90 cents an hour for labor supplied by party and party paid various wages to the different members of crew and in fact paid the entire 90 cents per hour to worker in question, it could not be said that party was not a "labor contractor" within meaning of licensing statute as to worker in question merely because a fee was not paid on account of such worker. West's Ann.Labor Code, § 1682(b, e).

See publication Words and Phrases, for other judicial constructions and definitions of "Labor Contractor".

2. Licenses 🔑11(7)

Where ranch corporation paid party 90 cents per hour for each worker party furnished to work on ranch, provision of statute that a farm labor contractor was any person who for a fee employed workers to render personal services in connection with production of farm products could not be construed literally or separately as to each individual member of work crew; and whether or not party was a labor contractor must be determined from the overall activity which included persons paid more as well as less than 90 cents per hour by party furnishing them to corporation. West's Ann.Labor Code, § 1682(b, e).

3. Licenses 🔑11(7)

In determining whether a party is a labor contractor under licensing statute, term must be interpreted in the sense used by the statute which does not supplant established rules for determining status of an independent contractor in so far as tort liability is concerned. West's Ann.Labor Code, § 1682(b, e).

4. Automobiles 🔑245(28)

In actions by four-year-old minor and parents to recover damages for personal injuries to minor struck by vehicle being driven by field worker on ranch at which minor's parents as well as field worker in question were hired to work by labor contractor who was in turn paid by ranch corporation so much per hour per worker furnished, where record revealed conflict in evidence concerning degree of control ranch exercised over individual field worker in question as well as other members of field crew, jury question was presented as to whether field worker in question was an employee of ranch corporation.

5. Appeal and Error 🔑1001(1)

Reviewing court may not reverse verdict of jury if record reflects substantial evidence in support of verdict, even though reviewing court might have decided factual question differently in the first instance.

6. Appeal and Error 🔑216(1)

In action against ranch corporation for personal injuries where there was a dispute as to whether or not alleged tort-feasor was employee of labor contractor or of ranch corporation to which labor contractor had furnished field crew, including alleged tort-feasor, plaintiff, who offered no instruction respecting determination of independent contractor relationship other than "fee test" which court properly struck out, could not complain because court did not supply an instruction on the subject on its own motion.

7. Master and Servant 🔑332(4)

In action against corporation for personal injuries where there was a dispute as to whether alleged tort-feasor was an employee of corporation or labor contractor, instruction of court setting forth test of subjection to orders and control as determinative of employer-employee relationship was sufficient.

8. Trial 🔑267(1)

While party has right to have jury instructed on his theory of case in all of the issues presented, he does not have the right to require court to use his phraseology, and court may modify a tendered instruction or give instruction of its own in lieu of the proffered instruction provided court correctly instructs jury as to each issue covered by tendered instruction.

9. Trial 🔑260(8)

In action against ranch corporation and driver of automobile to recover for personal injuries to four-year-old minor, there was no error in refusing requested instruction respecting duty of due care concerning minors, where court's other instructions already covered issue adequately.

10. Appeal and Error 🔑1067
Automobiles 🔑246(60)

In action against ranch corporation and automobile driver for personal injuries to four-year-old minor, who allegedly had a prior mental defective condition, and who was struck by truck driven by field worker, where only eyewitness was a nine-year-old child whose testimony was sketchy at best, court committed reversible error in refusing to give instruction that minor was presumed to be exercising due care for his own safety. West's Ann.Code Civ. Proc. § 1963, subd. 4.

11. Negligence 🔑122(6)

Child who was several days less than four years old and had a pre-existing mentally deficient condition came within class of persons entitled to benefit of presumption of due care.

12. Negligence 🔑122(1)

Benefit of presumption of due care is not lost by presentation of evidence concerning the happening of accident, but by production of evidence which is irreconcilable with the presumption.

◆

Lawrence W. Young, James C. Janjigian, Fresno, for appellants.

Hays & Hays, James N. Hays, Fresno, for respondent.

STONE, Justice pro tem.

This is an appeal by the plaintiffs from a judgment entered upon a jury's verdict for the defendant-respondent Raymond Thomas, Inc., a corporation. The action is one for damages by reason of personal injuries to plaintiff-appellant Kenneth Wayne Johns, who was a child just under four years of age at the time of the happening of the accident which gave rise to this action. His mother, Dovie Johns, represented him as his guardian ad litem and she also appeared as a party plaintiff along with the boy's father, Coy Johns. The plaintiffs by their complaint allege that the accident was caused by the negligence of the defendant Ward and that at the time he was the servant, employee or agent of defendant-respondent Raymond Thomas, Inc. and defendant May. Respondent Raymond Thomas, Inc., answered denying plaintiffs' allegations of negligence and denied that defendant Ward was the servant, agent or employee of the corporation. The company also affirmatively alleged contributory negligence on the part of the minor plaintiff Kenneth Wayne Johns. The defendant May was served in the action and filed an answer. However, prior to the time of trial plaintiffs moved for a dismissal as to him and the motion was granted. The defendant Ward was served but failed to appear and his default was entered. Thus, the only respondent on this appeal is the Raymond Thomas, Inc., company.

The defendant-respondent Raymond Thomas, Inc., is a corporation engaged in extensive farming operations in Fresno County, raising cotton, alfalfa seed and clover. H. O. May was a licensed labor contractor who hired laborers to do field work. He had hired a work crew the members of which were working on the Thomas Ranch at the time of the accident. The ranch corporation hired its own tractor drivers and other permanent employees. From time to time May secured work for his labor crew on other ranches in the vicinity. The parents of the child, Kenneth Wayne Johns, were members of the work crew hired by May, and they were living in a labor camp on the Thomas Ranch. At the time of the accident they were hoeing weeds in a field of clover and their child was sleeping under a pickup truck which belonged to defendant Ward. Ward, who had been hired by May, was not engaged in hoeing weeds but was a hoe filer for the work crew. Ward decided to move his truck forward and before starting the vehicle he told the boy to get out from underneath the truck. There is a conflict in the evidence as to whether the boy heard the remarks or continued to sleep until the motor of the vehicle was started. In any event, as the truck was driven forward by Ward the youngster was struck on the head.

One of the principal issues is the relationship between respondent ranch corporation and Ward, the driver of the truck. The ranch corporation furnished cabins, together with electricity and water, in which the workers hired by May were housed. For each person working on the ranch furnished by May the Thomas Company paid him a straight 90¢ an hour. May in turn paid most of these people 80¢ an hour, retaining 10¢ per hour as his fee. There were "row bosses" whom he paid $1 per hour. The defendant Ward was originally a crew member receiving 80¢ an hour but when May made him a "hoe filer" Ward's wages were increased to 85¢. In addition to filing the hoes used by the crew Ward had the duty of collecting garbage at the worker's camp. Some of the workers rode to the fields in his pickup truck and he hauled some of the drinking water for them. Ward found his duties too arduous for the pay he was receiving and requested a raise to 90¢ an hour, which request May granted. Thus, May paid to Ward the entire 90¢ paid by the respondent ranch corporation. The company also paid May the Social Security which became due by reason of the wages paid the laborers hired by him, and paid a bookkeeper to maintain the Social Security records. May, however, carried Workmen's Compensation Insurance on the workers.

[1–3] Appellants' first contention is, "Unless there was a fee or commission paid, May cannot be a labor contractor as to Ward." Labor Code, Section 1682, subdivision (b) provides:

> "'Farm labor contractor' designates any person who, for a fee, employs workers to render personal services in connection with the production of any farm products to, for, or under the direction of a third person, or who recruits, solicits, supplies, or hires workers on behalf of an employer engaged in the growing or producing of farm products, and who, for a fee, provides in connection therewith one or more of the following services: furnishes board, lodging, or transportation for such workers; supervises, times, checks, counts, weighs, or otherwise directs or measures their work; or disburses wage payments to such persons."

And subsection (e) provides:

> "'Fee' shall mean (1) the difference between the amount received by a labor contractor and the amount paid out by him to persons employed to render personal services to, for or under the direction of a third person; (2) any valuable consideration received or to be received by a farm labor contractor for or in connection with any of the services described above, and shall include the difference between any amount received or to be received by him, and the amount paid out by him, for or in connection with the rendering of such services."

At the time of the accident May had raised Ward's wages to 90¢ an hour, the amount he was receiving from the ranch company. Hence May was not collecting a fee from the wages paid to Ward. The first question is whether the statute must be construed literally as to each individual worker. The ranch corporation paid May 90¢ an hour for all field help supplied by him. It was up to May to complete any job designated for the field workers, which at the time happened to be hoeing out the rows of clover. In order to keep the hoers, whom he paid 80¢ an hour, busy, May had to have a hoe filer. He gave the job to Ward and paid him 85¢ an hour, but later raised his pay to 90¢ because the work was more strenuous than hoeing. A similar situation existed as to row bosses who were acting as "straw bosses" for May. He paid them $1 per hour, at a loss to himself of 10¢ per hour. Yet, these particular positions were part of the make-up of the entire work crew. Without them the work could not have been accomplished and the members of the crew doing the actual hoeing in the field could not have been kept on the job. Other than the difference in pay all members of the crew enjoyed the same relationship toward May as the man actually using the hoe. The provision of the statute regarding a fee need not be construed literally nor construed separately as to each individual member of the work crew. Whether or not May was a labor contractor must be determined from the over-all activity viewed in the light of the statute. Here, May was operating a field labor crew furnishing the necessary services and transportation to keep the people working, and to accomplish the result intended by everyone concerned. As a labor contractor he was collecting his fee and making his profit from the laborers actually doing the hoeing, but he could not keep them working and collect the fee without the services of a hoe filer and row bosses. They were necessary and integral members of the crew. The licensing statute must be liberally construed according to its purpose, which in this case is to protect the farm laborer from labor contractor abuses. In order to regulate farm labor contractors, the state requires them to secure a license and to furnish a bond. The mere fact that the hoe filer received the exact amount that May received from the ranch corporation does not in and of itself take May out of the classification of labor contractor. The term must be interpreted in the sense in which it is used by the statute.

We find nothing to support the assertion that the statute was intended to supplant the well-established rules for determining the status of an independent contractor insofar as tort liability is concerned. Nor has any authority been cited to us which indicates that the licensing statute was so intended or that it should be so construed. Therefore, we find no merit in appellants' contention that the court erred in striking the "fee test" from one of their instructions.

Appellants next contend that if control and not the licensing statute is the test for determining the nature of the relationship between the respondent and Ward, then the evidence discloses that Ward was an employee of Thomas Ranch as a matter of law. Appellants cite several instances wherein respondent ranch corporation, through its foreman or superintendent, determined the field in which the crew was to work, ordered the men and women to work in separate crews, inspected work being done, made changes in the manner in which the work was to be performed, and even ordered two cotton pickers off the premises because they placed dirt and debris in the picking sacks. In the case of McDonald v. Shell Oil Co., 44 Cal.2d 785, 285 P.2d 902, the court commented upon the various ways in which an owner may exercise control over workmen and the work being performed without changing the relationship from independent contractor to that of employer-employee. At page 790 of 44 Cal.2d, at page 904 of 285 P.2d, the court said:

> "However, the owner may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract—including the right to inspect, Callan v. Bull, 113 Cal. 593, 598–599, 45 P. 1017, the right to stop the work, Fay v. German General Ben. Soc., 163 Cal. 118, 122, 124 P. 844, the right to make suggestions or recommendations as to details of the work, S. A. Gerrard Co. v. Industrial Acc. Com., supra, 17 Cal.2d 411, 414, 110 P.2d 377, the right to prescribe alterations or deviations in the work, Green v. Soule, supra, 145 Cal. 96, 99–100, 78 P. 337—without changing the relationship from that of owner and independent contractor or the duties arising from that relationship."

[4, 5] A review of the record reveals a conflict in the evidence concerning the degree of control the ranch exercised over May and Ward, as well as the other members of the field crew. The evidence in this case could be interpreted to support a verdict either way, depending upon the weight given the testimony of different witnesses. Under such a state of the evidence the trial court quite properly submitted the question to the jury. Casselman v. Hartford Accident & Indemnity Co., 36 Cal.App.2d 700, 709, 98 P.2d 539. It follows that a reviewing court may not reverse the verdict of the jury if the record reflects substantial evidence in support of the verdict, even though the reviewing court might have decided the factual question differently in the first instance. Berniker v. Berniker, 30 Cal.2d 439, 444, 182 P.2d 557; Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183.

[6, 7] Appellants next argue that, if the question of the relationship between Ward and the respondent ranch corporation was one of fact to be submitted to the jury, the court erred in not giving the jury instructions on the subject of independent contractor. As respondents point out, the appellants offered no instruction concerning the determination of the independent contractor relationship other than the "fee test", which the court properly struck out. Hence, appellants are in no position to complain because the court did not supply an instruction on the subject on its own motion (Jones v. Bayley, 49 Cal.App.2d 647, 656, 122 P.2d 293; Jaeger v. Chapman, 95 Cal.2d 520, 525, 213 P.2d 404; 24 Cal.Jur., page 802). Even so, the court did give the following instruction:

> "~~You are instructed that~~ a servant or agent is one who is employed to render personal services to his employer, other than in the pursuit of an independent calling, and who in such service remains entirely under the control

> and direction of the employer who is called his principal or master; and in this connection you are instructed that the real test by which to determine whether a person is acting as a servant or agent of another is to ascertain whether at the time when the injury, if any, was inflicted, he was subject to such person's orders and control, expressly or impliedly, and was liable to be discharged for disobedience or misconduct."

This instruction presents the issue conversely, in that it defines the employer-employee relationship rather than defining what constitutes an independent contractor relationship. Yet it does specify subjection to orders and control as the test of the relationship, and in the final analysis this is the test upon which appellants base their contention that Ward was an employee of respondent Ranch Corporation.

Appellants cite as error the striking of a portion of one of their proposed instructions on duty of care concerning minors. Insofar as here pertinent, the instruction, with the stricken portion indicated, is as follows:

> "The care required must be in proportion to the *known* danger to be avoided and the consequences that might reasonably be anticipated. ~~The presence of a child of the age of four years or thereabouts is in itself a warning requiring the exercise of ordinary care for his safety.~~"

The record reflects no indication of the court's reasons for striking the last sentence of the instruction. It is a correct statement of the law set forth in Seperman v. Lyon Fire Proof Storage Co., 97 Cal.App. 654, 657, 275 P. 980, and it is quoted with approval in Hilyar v. Union Ice Co., 45 Cal. 2d 30, 35, 36, 286 P.2d 21. The court elected to give the following instruction:

> "Ordinarily it is necessary to exercise greater caution for the protection and safety of a young child than for an adult person who possesses normal physical and mental faculties. One dealing with children must anticipate the ordinary behavior of children. The fact that they ~~usually~~ *often* cannot and do not exercise the same ~~degree~~ *amount* of prudence for their own safety as adults, that they often are thoughtless and impulsive, imposes a duty to exercise a proportional vigilance and caution on those dealing with children, and from whose conduct injury to a child might result."

[8, 9] The instruction given covers the issue in question, the presence of children, by the sentence "One dealing with children must anticipate the ordinary behavior of children." This phrasing assumes the presence of the child which is what appellants contend was erroneously stricken from their proffered instruction. A party has the right to have the jury instructed on his theory of the case and all of the issues presented. However, he does not have the right to require the court to use his phraseology. The court may modify a tendered instruction, or give an instruction of its own in lieu of a proffered instruction provided the court correctly instructs the jury on each issue covered by the tendered instruction. See Witkins California Procedure, Vol. 2, Sec. 52–b, page 1780, and cases cited therein.

[10–12] Lastly, the appellants urge that the court erred in refusing to instruct the jury that it is presumed that plaintiff Kenneth Wayne Johns was exercising due care for his own safety. The instruction is based upon Code of Civil Procedure, Section 1963, subd. 4, and reads as follows:

> "You are instructed that the presumption is that Kenneth Wayne Johns was at all times exercising due care for his own safety. This presumption is a form of prima facie evidence and will support findings in accordance therewith in the absence of evidence to the contrary. If there is other evidence that conflicts with this presumption it is the jury's duty to weigh that evidence against the presumption, and any evidence that may support the pre-

> sumption, to determine which if either preponderates. Such deliberations, of course, shall be related to and be in accordance with my instructions on the burden of proof."

The question of due care of the boy, even though he was a few days less than four years of age, was an issue as respondents pleaded contributory negligence as a defense and that issue went to the jury as a question of fact. The plaintiff Kenneth Wayne Johns came within the class that the courts have held to be entitled to the benefit of the presumption. This is so not alone by reason of his age but because his mental processes were impaired. The appellants contended at the trial that the boy's mental condition was the result of injuries received in the accident while respondents presented evidence indicating that the child was mentally deficient by reason of a preexisting condition. In any event, because of his age and mental disability the boy clearly came within the class of persons entitled to the benefit of the presumption of due care. Respondent argues that the appellants lost the benefit of the presumption because they produced a witness who testified concerning the manner in which the accident occurred. Respondent misconceives the rule which deprives a party of the benefit of the presumption. The determination does not turn upon the question of whether or not the party has presented evidence concerning the happening of the accident, but whether he has produced evidence which is irreconcilable with the presumption. The rule is summarized in Brandelius v. City & County of S. F., 47 Cal.2d 729, at page 736, 306 P.2d 432, at page 437, as follows:

> "While under some circumstances there is no room for the presumption where the party whose claimed negligence is at issue either himself testifies or introduces evidence in his own behalf as to his acts and conduct immediately preceding and at the time of the accident, Speck v. Sarver, 20 Cal. 2d 585, 587–588, 128 P.2d 16, Zollars v. Barber, 140 Cal.App.2d 502, 506, 295 P.2d 561, the benefit of the presumption is available if such person be deceased and the testimony of plaintiffs' witnesses respecting the deceased's acts and conduct at the time involved is not 'wholly irreconcilable' with such presumption. Gigliotti v. Nunes, 45 Cal.2d 85, 93, 286 P.2d 809."

There was only one witness to the accident, an 11-year-old boy, who was nine years of age when the accident occurred. At the time, he was sitting in an automobile approximately 40 feet from the pickup truck. As might be expected, this young boy's testimony was sketchy, but the important aspect of it, as far as it concerns the point in question, is that his testimony was not irreconcilable with the presumption. Therefore, the instruction embodying the presumption of due care tendered by the appellant-plaintiff should have been given. The issue of contributory negligence or the lack of due care on the part of Kenneth Wayne Johns was factual, and the jurors were entitled to consider as evidence the presumption that the boy was exercising ordinary care. Therefore, the failure to give the requested instruction on the presumption of due care constituted prejudicial error. Douglas v. Hoff, 82 Cal.App.2d 82, 85–87, 185 P.2d 607; Heffington v. Paul, 152 Cal. App.2d 235, 238, 313 P.2d 157; Gigliotti v. Nunes, 45 Cal.2d 85, 93, 286 P.2d 809; Johnson v. Nicholson, 159 Cal.App.2d 395, 409, 324 P.2d 307.

The judgment is reversed.

GRIFFIN, P. J., and MUSSELL, J., concur.

170 Cal.App.2d 637

SAFEWAY STORES, INCORPORATED, a corporation, and Anton Heinrich, Plaintiffs and Appellants,

v.

CITY OF BURLINGAME, an incorporated city, and Parking District No. 1 of the City of Burlingame, Defendants and Respondents.

Georgiana GRAY, Dorothy Gray Gunston, Florence Gray Knapp, and Henry Barrett Gray, individually and as citizens and taxpayers of the City of Burlingame, a municipal corporation, on behalf of all other taxpayers of said municipal corporation, Petitioners, Plaintiffs and Respondents,

v.

CITY OF BURLINGAME, a municipal corporation; Parking District No. 1, a parking district purporting to have been formed under the Parking District Law of 1951 by the City of Burlingame; the City Council of the City of Burlingame; L. B. Morgan, Andrew C. Byrd, Charlotte I. Johnson, Charles W. Rooth and Josephine M. Thayer, as the members of said City Council; Herbert K. White, a City Clerk of the City of Burlingame, and Ida H. Coe, as Treasurer and Tax Collector of the City of Burlingame, Respondents, Defendants and Appellants.

Civ. 18239, 18132.

District Court of Appeal, First District, Division 1, California.

May 26, 1959.

Hearing Denied July 22, 1959.

Consolidated actions involving validity of inclusion of realty in proposed parking district. The Superior Court of San Mateo County, Louis B. Dematteis, J., rendered judgment favorable to some protestants and unfavorable to other protestants, and certain protestants and the city appealed. The District Court of Appeal, Hanson, J. pro tem., held that resolutions and ordinance forming parking district were void for noncompliance with statutes, where city retained engineers to make report and recommendations before petition for formation of district had been filed, pieces of property were excluded or included apparently without regard to benefit or nonbenefit and council added a large parking lot which was not provided for in the district as originally defined in resolution, thus enlarging the district and evading statute requiring owners of 51% in value of taxable property within the district to sign the petition for formation.

Affirmed in part and reversed in part.

1. Municipal Corporations 🔑25

Under statute providing that "at the hearing" legislative body may alter boundaries of proposed district but shall not modify boundaries so as to include territory which will not be benefited, "and no territory shall be excluded from the proposed district which will in the judgment of the legislative body be benefited," the introductory phrase "at the hearing" modifies the first clause and not the quoted clause, and hence proscription against modification to include nonbenefited property applies only to such inclusion at the hearing itself, but proscription against exclusion of benefited property applies under any circumstances, and the statute is mandatory and not merely permissive. West's Ann. Streets & High.Code, § 35268.

2. Municipal Corporations 🔑7

Evidence established detriment and not benefit to owner of store from inclusion of such store and its parking lot in proposed parking district, and hence such inclusion was improper, where store had more than adequate parking lot which it was legally bound to keep open to general public, and city parking lot was immediately adjoining. West's Ann.Streets & High. Code, §§ 35100–35705, 35111.

3. Municipal Corporations 🔑437

Return to property owner by way of benefit is the basic foundation upon which right to levy special assessments rests. West's Ann.Streets & High.Code, §§ 35100–35705, 35111.

4. Municipal Corporations 🔑7, 437

Property must be benefited by proposed parking district or no assessment therefor can be made, and hence the property should not be included in the district.

West's Ann.Streets & High.Code, §§ 35100–35705, 35111.

5. Municipal Corporations 🔑7

Whether or not property would be benefited by inclusion in parking district must be determined by reviewing court solely on basis of record before council in hearings on protest against inclusion.

6. Administrative Law and Procedure 🔑676

Review of action of an administrative agency exercising judicial powers is limited to a consideration of record made before the agency.

7. Municipal Corporations 🔑7

City council was exercising judicial powers in passing on benefits to property owners from inclusion in proposed parking district, and hearing on protests must meet the constitutional standards for quasi-judicial hearings. West's Ann.Streets & High. Code, §§ 35100–35705, 35111.

8. Municipal Corporations 🔑7

A city council resolution rescinding all requirements that public street parking be furnished as a condition to variance permitting commercial use of land classified as residential, which was passed after commencement of action involving validity of inclusion of certain property in parking district, could not be considered as evidence of benefit to property included, though such resolution allegedly merely interpreted intent of council in adopting previous ordinance.

9. Municipal Corporations 🔑7

Where city council received for record written protests against inclusion of certain property in parking district, and heard oral protests, but also viewed the locale and conferred with petitioners seeking establishment of the district or their representatives, without reciting facts allegedly thus gleaned so as to enable protestants to meet or overcome them, protestants did not receive a fair hearing. West's Ann.Streets & High.Code, §§ 35100–35705, 35111.

10. Attorney and Client 🔑32
Municipal Corporations 🔑12(1)

Special attorney for city should have disclosed, at hearings on protests against inclusion of property in parking district, the fact that he had a proprietary interest in realty within the proposed district.

11. Municipal Corporations 🔑3

Resolutions and ordinance forming parking district were void for noncompliance with statutes, where city retained engineers to make report and recommendations before petition for formation of district had been filed, pieces of property were excluded or included apparently without regard to benefit or nonbenefit and council added a large parking lot which was not provided for in the district as originally defined in resolution, thus enlarging the district and evading statute requiring owners of 51% in value of taxable property within the district to sign the petition for formation. West's Ann.Streets & High.Code, §§ 35100–35705, 35111.

12. Municipal Corporations 🔑7

Statutes do not permit exclusions of property from proposed parking district on basis of prior assessments. West's Ann. Streets & High.Code, §§ 35100–35705, 35111.

13. Municipal Corporations 🔑25

In determining boundaries of proposed parking district, borders may not be gerrymandered to exclude those who might oppose the plan, but borders should be fairly even and there must be honest and sincere attempt to include properties among which there is some equality of benefit. West's Ann.Streets & High.Code, §§ 35100–35705, 35111.

◆

George H. Johnston, Willard P. Norberg, Ackerman, Johnston, Johnston & Mathews, San Francisco, for appellants Safeway Stores and Heinrich.

Lloyd S. Ackerman, Philip S. Mathews, Ackerman, Johnston, Johnston & Mathews, San Francisco, for respondent Gray.

Burress Karmel, City Atty., Burlingame, Kirkbride, Wilson, Harzfeld & Wallace, San Mateo, for appellants and respondents City of Burlingame et al.

HANSON, Justice pro tem.

We have here two appeals, one by the plaintiff in the case of Safeway Stores, Inc. v. City of Burlingame and the other by the defendant in Gray v. City of Burlingame. For the purpose of convenience of court and counsel the two cases were consolidated at the trial with a third case from which no appeal has been taken and the appeals are consolidated and being heard on the records as made below. In the first case the main question at issue is whether the property of Safeway should or should not be included in a proposed parking district and in the second case the issue is the validity of the resolution and ordinances creating the district.

The advent of the automobile on the American scene less than 60 years ago followed years later by supermarkets has wrought over the years a tremendous change in shopping practices for the public and the retailers. Today the old-time grocery with its hitching posts on the street in front is gone, and the retailers who were not forehanded enough to anticipate the change have suffered in sales and profits in not having provided parking space for automobiles. To meet the need the Legislature enacted the Parking District Law of 1951. Streets and Highways Code, §§ 35100–35705.

This law enables our municipalities on petition of owners of 51% of the total assessed value of real property in the proposed district to establish a parking district for motor cars as long as it does not include any other parking district or any vehicle parking district (§ 35111).

Pursuant to the foregoing act a petition was filed with the City Council of Burlingame which included within the proposed district the Safeway store and its parking lot. The latter has 119 parking spaces, of which only 71 spaces are required to accommodate the peak load at the parking lot. According to the engineer's report to the Council of Burlingame, the Safeway parking lot alone provides over one-third of all private off-street parking spaces found within the proposed parking district.

When Safeway acquired the lots zoned for apartment buildings upon which it subsequently built its store and adjoining parking lot it sought and obtained from the council a zoning variance but on nine certain conditions mostly as respects its use. Chief among these were the following: (1) that the parking area as proposed by Safeway should be so integrated with the public parking area of the city immediately adjacent so that both areas could be used interchangeably for the benefit not only of the patrons of Safeway but for the citizens of the city; (2) that if the use of the land as contemplated should be abandoned, its status should revert to its then apartment-zone status; (3) that Safeway convey to the city a small triangular piece of its land adjoining the city's parking lot; (4) that the breach of any of the conditions should cause a revocation of the variance granted by the city. It is undisputed that the conditions have long since been and continue to be met by Safeway.

The outer boundaries of the district are approximately 1200 x 1600 feet. The City Hall appears to be in about the center of the district. The city parking lot adjacent to the Safeway parking lot faces Howard Street. The so-called apartment building, which was excluded from the district, is adjacent to the Safeway property on its east side and adjacent to the Gray property, upon which there is also an apartment house, on the west side. The telephone building, which is excluded from the district, is 200 feet westerly of the Gray property (Lot F), which was included within the district to be acquired as parking places, and the Lucky Store with its parking lot, which was likewise excluded, is only 700 feet from the Gray lot.

At the very threshold of this case we are met with the fact that the trial judge in these two cases, consolidated for trial, found in the Gray case that the Gray property was not benefited by its inclusion in the proposed district and that the district was formed contrary to law. In the Safeway case the court found that its property was benefited and properly incorporated within the district, notwithstanding that in the Gray case it had found the district was formed contrary to law. The issue as to invalid formation was not made in the Safeway case but it was made in the Gray case. In view of the disposition we feel we must make of the cases, it is not necessary to discuss the conflict, if such it may be called.

The two most vital questions which have arisen in each of these cases and which call for decision are (1) whether the property of either would be benefited by its inclusion in the district, and (2) whether a fair hearing was accorded by the council.

After reading the briefs and the record it seems crystal clear that the proponents of the district were motivated in setting the boundary lines of said district, not so much by using the yardstick of benefits, but by gerrymandering so as to get signers to the petition, who together owned 51% of the total assessed valuation of the lands within the proposed district. For instance, it is clear that the proponents recognized that if the telephone company lot and building were included, it could and would block the project as the assessed valuation thereof is $1,561,230 while the total assessed valuation of the property within the proposed district is $2,782,640.

The Parking District Law of 1951, in effect at the time here involved, provides that "[a]ny portion of a city may be formed into a parking district * * *" (§ 35107), that "[a]ny territory included within a parking district formed pursuant to this part [the Act] shall not be included within any other parking district or any vehicle parking district" (§ 35111).

When a petition has been filed and checked, as was the case here, the law requires that the legislative body shall either approve the petition or reject it. If it approves the petition, as was done in the instant case, it shall direct the city engineer or other competent person to make and file a report setting forth certain facts. See § 35257. The time and place of the hearing thereon was duly set for December 19, 1955.

Section 35262 of the Streets and Highways Code provides for the filing of protests to the formation or inclusion of property within the district. Pursuant to said section, Safeway, Gray, and others filed protests which were read at the adjourned hearing held on January 3, 1956. Safeway's protest set forth the following allegations:

1. The Safeway property is provided with a total of 119 parking spaces, or 3.2 spaces per 500 square feet of store building space.

2. Parking surveys showed that to accommodate the maximum peak traffic at the Safeway Store only 71 parking spaces were required.

3. Formation of the district would be a detriment to Safeway competitively since its economic advantage over its competitors on Burlingame Avenue would be eliminated and yet Safeway would be required to pay a part of the cost to benefit its competitors and to its own prejudice.

The Gray protest was on the grounds, among others: (1) that the public interest, convenience, and necessity were not being properly served and that the plan was unfair and inequitable in that "the boundaries of the proposed district exclude without apparent reason commercial properties which would apparently benefit as much as those included. * * * As a result, the boundaries are discriminatory as to those properties which are included in the proposed districts * * *"; and consequently the "gerrymandering perimeter of the proposed district is based not on true benefit, but on capricious endeavor to eliminate opponents of the plan"; (2) that the inclusion of the property was beyond the power of the City Council because it could in no way benefit, being residential property; (3) that the property has ample parking facilities of its own for its tenants; (6) that the inclusion of the lot will serve no public use, access to it being by way of an alley of which the public is not aware and that it will provide only a limited convenience for the personal use and enjoyment of owners or operators of commercial properties immediately adjacent to it; (7) that the inclusion of the lot will burden the entire district with a heavy cost but the benefit will accrue only to a small number of commercial properties.

The court found that Mr. Taylor, an official of Pacific Telephone and Telegraph, while a member of the Citizens' Committee, opposed the inclusion of the telephone property in the district and the council believed that if that property had been included the Telephone Company would not have signed the petition for the formation of the district because of the high assessed value of the exchange equipment and that consequently the petition would not have been supported by the names of more than 51% of the owners of the property as required by the statute. It should also be noted at this point that the Telephone Company property forms an enclave (three sides) within the district.

Also excluded from the district, as above mentioned, was the Lucky Store property which is located on the southeast corner of El Camino Real and Chapin Avenue. It was excluded, according to testimony of council members, because within the past few years it had been assessed for the widening of Chapin Avenue.

[1] Section 35268 of the Streets and Highways Code provides as follows: "At the hearing the legislative body may alter the boundaries of the proposed district as it finds to be proper and advisable and shall define and establish the boundaries, but the legislative body shall not modify the boundaries *so as to include any territory which will not in its judgment be benefited by the proposed project,* and *no territory shall be excluded from the proposed district which will in the judgment of the legislative body be benefited by* the proposed project." (Emphasis added.) We believe that there are two things that should be noted about this statute. First of all, we have a compound sentence connected by the coordinating conjunction "and" (in line 8 of the statute above). This would indicate that the introductory prepositional phrase, "At the hearing," which is not set off from the rest of the sentence by a comma, belongs to that clause of which "legislative body" is the subject and not to the second clause of which "territory" is the subject of the passive verb "shall be excluded." Thus interpreted, what the statute means is that although at the hearing the legislative body cannot modify the proposed district to include property not benefited, it cannot, under any circumstance, exclude property which in its judgment will be benefited. The second thing to note is that the proscription against modification to include nonbenefited property applies only to such inclusion being made at the hearing, itself. The act is silent as to the inclusion of nonbenefited property in the original district as proposed. Another thing which might be noticed about the section is that its language is mandatory and not merely permissive.

We come then to the basic question with respect to the Safeway appeal, to wit: May property on which is located a retail food market, but the greater portion of which is legally obligated to be reserved for public parking, be legally assessed to pay part of the cost of providing parking facilities, which, it is argued, are of no benefit to it, for competing retail stores in nearby areas.

[2] At first blush, we cannot help but wonder how it was possible to find that Safeway could in any manner be benefited by being included in the proposed district and how the Lucky Store, with its parking, and the Telephone Company, by reason of its location, could be excluded from the district on the theory that neither was benefited by it and that Safeway was benefited. Safeway has a total of 119 parking spaces, but the maximum number of spaces utilized at any peak load does not exceed 71, which leaves a surplus of 48 spaces, likewise available to both its customers *and* the general public. Even the 71 spaces, at

peak load, was not limited to a count of its customers but of the general public as well. Moreover, not only was Safeway legally bound to keep its lot free and open to the general public, but immediately adjoining was the city parking lot with all its space available. We have searched the record in vain for an answer as to how Safeway was or could be benefited. The three out of five councilmen who voted for the formation of the district do not enlighten us by any *facts*. To be sure they toured the proposed district, and saw the need for more parking spaces in that district quite some distance from the locality of Safeway. But what they heard and observed they did not place on the record. What possible benefit was there to Safeway to have additional parking spaces provided at a distance from its own parking lot? When people shop they want to park nearby and not several blocks away. The city's suggestion that if Safeway should cease to use its property as a grocery it would revert to the status of "apartment" zoning and it might then have need for district parking is of no avail. The short answer is that the ordinances of Burlingame require that new construction must provide on the premises the necessary off-street parking.

[3] What is meant by "benefit" is well stated by our Supreme Court in Spring Street Co. v. City of Los Angeles, 1915, 170 Cal. 24, 30, 148 P. 217, 219, L.R.A.1918E, 197, in these words:

> "That the return to the property owner by way of benefit is, under our system of government, the basic foundation upon which this right [to levy special assessments] rests, becomes apparent from the consideration that, if we are not able to say that the owner for the specific charge imposed is compensated by the increased value of the property, then most manifestly we have a special tax upon a minority of the property owners, which tax is for the benefit of the public and which tax is special, unequal, and ununiform.
>
> "Therefore, the compensating benefit to the property owner is the warrant, and the sole warrant, for the Legislature itself to impose the burdens of these special assessments."

Respondent argues that the above case is authority only for the rule that an assessment is invalid where it is defective on its face; but, it is plain that what made the assessment defective on its face was the failure of the city to assess in proportion to benefits and, consequently, the above statement would appear to be more than mere dictum.

[4] The conclusion to be reached, therefore, is that, even though the Parking District Law of 1951 does not expressly require that property included within the original district as proposed be benefited, that it must nevertheless be benefited by the district or no assessment can be made. And if no assessment can be made, it follows that the property should not be included in the district.

[5, 6] On the theory that there was substantial evidence introduced at the hearings before the council that benefits would or could be expected to accrue to said property by reason of the establishment of said parking district and the improvements to be constructed thereon, the trial court concluded that the Safeway property was legally and validly included within the district. On the other hand, our review of the record does not disclose any benefit at all, but on the contrary, only a detriment. Whether or not the property would be benefited has to be decided solely on the basis of the record before the council. The rule is that set forth in 2 Cal.Jur.2d 386 which is: "The review of the action of an administrative agency exercising judicial powers is limited to a consideration of the record made before the agency."

[7] That the City Council of Burlingame was exercising judicial powers in passing on benefits, see Imperial Water Co. No. 1 v. Board of Supervisors, 1912, 162 Cal. 14, at pages 17 and 18, 120 P. 780, at page 782, where the court said: "* * *

the mere creation of a district of this character [an irrigation district] is a legislative act. [Citations.]' The Legislature may either create such corporations itself by a statute passed without any formal notice or hearing, or it may delegate the power to some local board. [Citations.] It does not follow, however, that where the Legislature delegates such power to a local board, and provides that it can be exercised only upon certain conditions and upon the ascertainment of certain facts by such board, after a notice and hearing to parties interested, that the proceeding thus authorized is not of a judicial character. * * * In Robinson v. Board of Sup'rs, 16 Cal. 208, the court says: 'It is sufficient if they are invested by the Legislature with power to decide on the property or rights of the citizen. In making their decision they act judicially whatever may be their public character.'" Also in the above case, the court pointed out that the board in determining whether property was or was not benefited by the proposed district was deciding property rights.

The contention of the city that there is no evidence to support the Safeway protest is patently inaccurate. Safeway placed the sworn affidavit of one of its duly authorized officers into the record. The facts therein stated were not refuted by the city nor objection made thereto. In Tanzola v. De Rita, 1955, 45 Cal.2d 1, 10, 285 P.2d 897, 901, the following rule was enunciated: "Affidavits are competent evidence where authorized by statute or where they are not objected to on proper grounds by the party against whom they are offered. [Citations.]"

The authorities are clear that this mandatory hearing on the individual protests is quasi-judicial in nature and must meet the constitutional standards for quasi-judicial hearings.

However, although the city urges that there was no duty on its part to introduce evidence of benefit at the hearing, it nevertheless contends that the record does show that the Safeway property would be benefited by the proposed district. In support of that contention it states that Ordinance No. 608, adopted October 17, 1955, provides that property within an assessment district is exempt from providing parking spaces although new commercial property not within such district must provide parking facilities. They then state that Resolution No. 72–56, passed on August 20, 1956, five months after the hearings and enactment of the parking ordinances, and four months after the commencement of this action, "merely interpreted the intent of the council in adopting Ordinance No. 608 that it should apply as well to variances for which commercial use was granted, as to property zoned for that purpose," and that this, then, constitutes a benefit to Safeway. It was this contention, apparently, upon which the trial court based its finding of benefit.

[8] The resolution referred to and which was not requested by Safeway purported to specifically rescind and vacate all existing requirements that the public off-street parking be furnished by the owner of any parcel of land within any parking district as a condition to any variance permitting the commercial use of land classified for residential use. But the resolution, not being in existence at the time the suit was filed, was not received in evidence and therefore could not be considered as any evidence of benefit to Safeway, yet though recognizing this fact the city time and time again refers to it on this appeal. It is for that reason only that we have briefly discussed it.

[9] We come next to the question whether a fair hearing was accorded by the council. True it is that the council received for the record the written protests of the protestants and heard their oral protests, but in addition the members of the council, either individually or collectively, viewed the locale and conferred with the petitioners or their representatives, thereby receiving so-called facts upon which they apparently relied in coming to their judgments. These so-called facts

gleaned by them through observation and hearsay were not recited at all in the record, and consequently were unknown to the protestants and hence could not be met or overcome by them. Under those circumstances, can it be said that a fair hearing was had? We think not! As stated in Miller & Lux v. Board of Supervisors, 1922, 189 Cal. 254, at page 270, 208 P. 304, at page 311, which was a case involving an irrigation assessment district, in which the plaintiff claimed that no evidence was introduced before the board affirmatively showing that its lands would be benefited by the proposed plan of irrigation, the court held that "*[t]he court is limited* in its proceedings to review the order of the board of supervisors *to the record* there made" (emphasis added) *and* that *in the absence of such evidence in the record, the order of the board would be annulled.*

In cases, such as this, the judgment of a councilman must be based on real facts and not on the conclusions of others, such as, for instance, the petitioners. Until such facts resting in the minds of the councilmen are presented in the record, the objectors have no means of knowing on what facts the judgment rests so as to enable them to controvert them. In the instant case the city relies, in the final analysis, not on the real facts showing a benefit to the Safeway property—of which there is none—but rather on the unknown factors which give rise to the judgment which were locked up in the minds of the councilmen and not disclosed in the council record. This does not afford fair play under American standards and is not according to the decisions.

Another contention of the appellant Safeway which probably is not now of importance, in view of the conclusion we have so far reached, is the question of the propriety of Attorney Wilson serving as the advocate of the proponents and the special attorney for the council. On that point the trial court, in its memorandum opinion, not carried into its findings of fact, said: "The contention of the petitioners that they did not receive a fair hearing on their protest because of the conflict of interest of the special counsel employed by the City for the purpose of creating the district is a serious one. It is undisputed that Ernest Wilson, the special attorney for the city in this matter, had a proprietary interest in real property located within the proposed district. It is also quite clear that he did not reveal this interest at any of the public hearings held in connection with these proceedings. Certainly it would have been far better to disclose this fact at an open hearing in order to permit all those concerned to have full knowledge of the facts and to avoid the accusation that is being made here."

[10] We not only concur in that statement, but we regard Mr. Wilson's action as being a flagrant violation of legal ethics.

There remains for consideration the question whether the Safeway lot may be classed as a parking *district* in view of the fact that it is obligated to accord all the privileges of its parking lot to the citizens of Burlingame, as does the City Parking District.

It is interesting to note that the statute (§ 35111) as originally enacted read as follows: "No territory included within a parking district formed under the provisions of this act shall be included within any other *such* parking district or any vehicle parking district *formed under any law of this State.*" St.1951, p. 3932, § 23. (Emphasis added.)

As a result of the codification in 1953 the italicized words and phrases were deleted. With respect thereto counsel for Safeway say: "It is our belief that this change in codification indicates an intent on the part of the legislature to broaden the scope of the term. So construed and interpreted, the prohibition of the section encompasses any attempt to include a parking facility constructed and maintained pursuant to legal mandate and devoted in whole or in part to public use, within a district subsequently formed under the provisions of the Parking District Law of 1951. If this be a correct interpretation, then the Safeway parking area cannot legally be included within the proposed district."

As the holding in the Safeway case must be reversed on the basis that there was no showing of benefit and the holding in the Gray case affirmed, it is unnecessary for us to discuss the point raised.

[11] From what has so far been said concerning the Safeway appeal there is little that calls for discussion in the Gray case. Because the statutes were not complied with, the lower court properly held the resolutions and ordinance of the City Council of Burlingame forming the parking districts were invalid, void, and of no effect.

Illustrative of the council's failures at compliance are the following examples:

In May 1955, the firm of Hahn, Wise & Associates was retained by the city to make a report and recommendations for the formation of the district as required by section 35257 of the Streets and Highways Code. Said section requires the council to direct a report to be made showing the estimate of costs of acquisitions, improvements, incidental expenses, annual revenues from, and operating expenses of, the parking places, revenues from on-street parking meter funds, and the total assessed value of real property within the district. However, the petition for the district as originally proposed was not filed until September 28, 1955, certified by the clerk, and the signatures verified. It was approved on November 4, 1955, and Hahn, Wise & Associates' first report was then filed. The section above cited states: "The legislative body shall either approve the petition or reject it. *If it approves the petition, it shall direct* the city engineer or other competent person to make and file with it a report showing * * *." (Emphasis added.) That is, the action provided by said section is not to be taken until *after* the petition has been approved. Here, the engineers were retained by the city several months before the petition was filed. However, this is merely a technical objection.

[12, 13] More important is the fact that in violation of the statutes various pieces of property were excluded or included apparently without regard to benefit or nonbenefit. As has been seen from the foregoing discussion, the Safeway property was included when there was no evidence of benefit to it at all. The Pacific Telephone & Telegraph Company, surrounded on three sides by the proposed district, was excluded when there was in fact evidence to the effect that it would be benefited by said district. The Lucky Store property was excluded not because there was no finding of nonbenefit to that property but rather because it had been assessed within the last several years for the widening of Chapin Avenue. There is nothing in the code that would permit exclusions from the district on the basis of prior assessments. The district also included one lot on Chapin Avenue, not because in the judgment of the council it was believed it would be benefited, but rather because its owner asked to have the lot included within the district. There was evidence of other commercial properties having been excluded without regard to benefit. Although it is true that the boundary must end somewhere, such statement does not warrant the gerrymandering of borders to exclude those who might oppose the plan. The borders of the district should be fairly even and there must be an honest and sincere attempt to include within the district properties among which there is some equality of benefit.

Section 35108 of the Streets and Highways Code provides that the acquisition of property by eminent domain is authorized. Section 35251(b) provides that a general description of the parking places proposed to be acquired shall be contained in the petition. In 1955, said section was amended to provide: "The parking places must be within the boundaries of the proposed district." It was on the basis of this amendment that the Gray property, or "Lot F" as it is called, was included within the proposed district, as it was to be acquired as a parking place. It is conceded that property is not benefited when it is taken by eminent domain. As we have concluded in the Safeway appeal, to be assessed property must be benefited. But unlike the Safeway property which was to be included within the district for the purpose of assessment, Lot F was designated by the council for acquisition and not for assessment; therefore, it would seem to follow that the council concluded the property to be acquired as a parking lot need not be benefited. But section 35402.3 of the Streets and Highways Code provides as follows: "If at any time, either before or after issuing bonds, the legislative body so determines, *it may* at one time or from time to time *eliminate, change or otherwise modify any of the proposed acquisitions and improvements.* * * *" (Emphasis added.)

The provision gives the authority to eliminate property designated for parking places from the "proposed acquisitions," but it does not provide for the elimination of such property from the proposed district itself. Therefore, unless such property is in fact benefited in the first instance, we may have a situation where nonbenefited property included within the proposed district for the purpose of acquisition is not acquired and yet remains within the district subject to assessment. The city argues that, should the above situation result, the owners of the property might either enforce acquisition of their property or be allowed to withdraw from the district, but it cites us to no authority for this argument and we could find none. Consequently, we must hold that property must either be benefited by its inclusion within the district or it may not be included. The Legislature apparently recognized the position in which the city in such an instance is placed because in 1957 it deleted the 1955 amendment to section 35251 and now property designated for acquisition need not be included within the proposed district.

Section 35268 provides: "*At the hearing* the legislative body may alter the boundaries of the proposed district * * *". (Emphasis added.) However, before any hearing was held on the protests to the original resolution in this case, the council on December 19, 1955, adopted Resolution No. 96–55 of Intention to Make Changes and Modifications.

Finally, it is to be noted that the council adopted Resolution 22–56 to include within the proposed district the South of Howard area, which included several pieces of property zoned for residences. In including this area, the council provided for a large parking lot therein which lot was *not* provided for in the district as originally defined in Resolution 88–55. This area was of such substantial size as to be almost a parking district in itself. That is, it increased the original district in square footage by 28.5%, the cost of acquisitions by 21%, and yet the assessed valuation by only 10% which would result in a substantial increase of the assessments to the owners of the property in the district as originally proposed. The result is that a much larger district has been created than that originally proposed, and the statute requiring that the owners of real property of an assessed value of not less than 51% of the total assessed value of all taxable property within the district sign the petition for formation of the district (§ 35250) has been evaded.

We conclude that the cumulative effect of the above failures to comply with either the letter or spirit of the statutes renders the whole proceeding purportedly taken thereunder void.

For the reasons indicated the judgment in the Gray case is affirmed and the judgment in the Safeway case is reversed.

BRAY, P. J., and FRED B. WOOD, J., concur.

171 Cal.App.2d 32

Allen SANSTAD, Petitioner,
v.
INDUSTRIAL ACCIDENT COMMISSION of the State of California, Johnson & Mape Construction Company and Industrial Indemnity Company, Respondents.
Civ. 9612.

District Court of Appeal, Third District, California.
June 1, 1959.

Workmen's compensation case. The commission denied an application to reopen, and the claimant sought judicial review. The District Court of Appeal, Van Dyke, P. J., held that commission has exclusive jurisdiction to determine compensation even where third-party action is brought before jurisdiction of commission has been invoked; and held that even though insurer, which had voluntarily paid compensation to workman, intervened in workman's action against third-party tort-feasor and stipulated to accept judgment in its favor therein as full repayment, judgment therein was not conclusive on insurer's right of subrogation, and that it was not estopped to claim further recoupment by applying to commission for an adjustment of workman's claim and for allowance of credits upon any award made, measured by recovery workman had made in third party action.

Affirmed.

Workmen's Compensation ⚩2240

Commission has exclusive jurisdiction to determine compensation even where third party action is brought before jurisdiction of commission has been invoked; and even though insurer, which had voluntarily paid compensation to workman, intervened in workman's action against third-party tort-feasor and stipulated to accept judgment in its favor therein as full repayment, judgment therein was not conclusive on insurer's right of subrogation, and it was not estopped to claim further recoupment by applying to commission for an adjustment of workman's claim and for allowance of credits upon any award made, measured by recovery workman had made in third-party action. West's Ann.Const. art. 20, § 21; West's Ann.Labor Code, §§ 3857, 3858, 3861.

◆

Mannino & Lancaster, Sacramento, for appellant.

Everett A. Corten, Emily B. Johnson, San Francisco, for Industrial Accident Comm.

John N. Connell, Sacramento, for other respondents.

VAN DYKE, Presiding Justice.

Petitioner herein brought this proceeding to review an order of the respondent commission denying his application to reopen for good cause. He asks the court to review and annul findings and award made by the commission in a proceeding wherein respondent Industrial Indemnity Company, the insurance carrier for petitioner's employer, had applied for an adjustment of petitioner's claim for industrial injury and for allowance of credits upon any award made, measured by the recovery petitioner had made in a third party action.

Petitioner suffered industrial injuries while working for Johnson & Mape Construction Company. His injuries were the proximate result of the negligence of a third party. Petitioner filed a third party action and respondent insurer intervened. The parties entered into a stipulation for a recovery of $5,000 from the third party. By that stipulation two judgments were entered; one in favor of petitioner for $4,037.45, the other in favor of the insurer for $962.55. At that time the insurer had voluntarily paid compensation to petitioner in the total sum of $1,380.10, but during negotiations for settlement had agreed to accept the stipulated judgment as full repayment thereof. About five months later the insurer filed an application for adjustment of claim before the commission. Amended findings were that petitioner's injuries had caused permanent disability in the accrued sum of $3,870, and that the insurer was entitled to subrogation credit of $3,619.90 against the award. The amount allowed for subrogation credit was arrived at by subtracting the sum of $1,380.10 from the total recovery of $5,000 in the third party action.

Petitioner applied to the commission for reconsideration which was granted and after reconsideration the previous findings and award were affirmed and adopted as the commission's decision after reconsideration. Thereafter petitioner filed with the commission his application to reopen for good cause. The application was denied, as was also a petition for its reconsideration. This proceeding was then begun.

When compensable injury is the result of a third party's tortious conduct our statutes preserve a right of action against the tort feasor. The compensation system was not designed to extend immunity to strangers. To avoid a double recovery by the employee our statutes provide a system with the general effect of reimbursing the employer, or his substituted insurance carrier, for compensation outlay and of giving the employee the excess of the damage recovery over the amount of compensation. (2 Larson's Workmen's Compensation Law, Sec. 71, p. 165 "Theory of Third Party Actions".) Labor Code, Section 3852, declares that the claim of an employee for compensation does not affect his claim or right for damages proximately resulting from injury or death against any person other than the employer and further provides that any employer who pays or becomes obligated to pay compensation may likewise make a claim or bring an action against such third person in the nature of subrogation.

It is the contention of petitioner that the judgment of the superior court was final and conclusive on the insurer's right of subrogation and that having accepted the benefits of that judgment, it was entitled to no further recoupment; that if the foregoing contentions be not sound then respondent insurer was estopped to claim further recoupment.

In support of his primary contention based on the doctrine of res judicata, petitioner cites Bernhard v. Bank of America, 19 Cal.2d 807, 813, 122 P.2d 892, 895 wherein the court said:

> "In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?"

Petitioner argues that the judgment of the superior court rendered in the third party action meets all these tests; and that therefore that judgment finally adjudicated the total amount of recoupment available to the insurer; and that the act of the commission in allowing further recoupment was an act in excess of jurisdiction.

Our Constitution vests in the legislature plenary power to create and enforce a complete system of workmen's compensation by appropriate legislation and declares that in doing so the legislature has full power "to provide for the settlement of any disputes arising under such legislation by arbitration, or by an Industrial Accident Commission, by the courts, or by either, any, or all of these agencies, either separately or in combination. * * *" Calif.Const. Art. XX, Sec. 21. Petitioner argues as follows: The court, in the third party action, had exclusive jurisdiction to try the action against the third party. In addition, the court had at least concurrent jurisdiction, so far as was requisite to a complete determination of the issues presented in the action before it, to determine the amount of compensation which the insurer had paid or had by the industrial injury become obligated to pay; and if that jurisdiction was concurrent it became exclusive when before seeking commission action petitioner and the insurer joined in prosecuting the third party action, citing Greene v. Superior Court, 37 Cal.2d 307, 231 P.2d 821.

Petitioner relies principally upon Jacobsen v. Industrial Accident Commission, 212 Cal. 440, 442–444, 299 P. 66, 69. In that action, in which the facts were practically identical with those here presented, the injured employee brought action against a third party tort feasor and the employer applied for a lien against any judgment that might be obtained. The employer had voluntarily furnished compensation, including medical care and disability payments. The case was settled and all parties concerned stipulated that a judgment for the agreed settlement amount should be entered in favor of the employee and that out of that sum the employer should be reimbursed for compensation theretofore expended. Thereafter the employer filed an application with the commission for adjustment of its employee's claim and requested that there be credited against any award the amount received by the employee in the settlement with the third party, less the amount paid to the employer out of the judgment. On appeal it was contended for the employee that the commission was without power to give any further credit against the award. During the period involved the statutory provisions on subrogation were found in Section 26 of the Workmen's Compensation Act, St.1927, p. 1213, which contained the following provisions: "The court shall, on application, allow as a first lien against any judgment recovered by the employee the amount of the employer's expenditures for compensation." Concerning this provision, the court said:

> "* * * It enables the employer to safeguard his rights in that behalf by providing that 'the court shall, on application, allow as a first lien against any judgment recovered by the employee the amount of the employer's expenditures for compensation.' The statute is not self-executing in the employer's interest, but it affords to him the opportunity to assert his lien for expenditures for compensation on any judgment recovered and provides the forum where the amount of the lien may be ascertained and enforced. The power and duty thus expressly vested in and imposed upon the court in which the judgment was rendered to fix the amount of the lien and allow it as a first lien on the judgment would by necessary implication deny the existence of such power and duty in the respondent Commission, which has no authority in the rendition of the judgment, and does not possess concurrent jurisdiction in that behalf under any statute called to our attention. The commission certainly could not enlarge its powers in that respect by any rule adopted under the provisions of the act which would affect the substantive rights of the parties to the court action.
>
> "We have, then, a statute which confers upon the employer the right to assert his lien for expenditures for compensation, and provides a forum, namely, the court in which the judgment was rendered, for the ascertainment and enforcement of that right. If the employer has the statutory notice of the commencement of the action by his employee, and fails to assert and timely to apply for the allowance of his lien, he must be deemed to have waived his right to the same and should be estopped by reason of such failure from thereafter asserting the right. Obviously the time to assert the right would be before satisfaction of the judgment."

The court further held that the language "amount of the employer's expenditures for compensation" should be construed as including not only expenditures already made, but also the liability of the employer for further expenditures, and said:

> "* * * The respondent corporation has, however, been reimbursed for expenditures already paid, and it may not now be heard to claim reimbursement for amounts it is under obligation to pay for the following reasons: Said corporation received the notice required by the statute of the pendency

> of the action brought by its employee. It presented its application for a lien on the judgment to be rendered in the form of a stipulation for judgment, specifying therein the amount of its past expenditures only. If it desired to assert a lien for future expenditures, then was the time to do it. It failed then to assert its right, and must be deemed thereby to have waived it."

In arguing for the application to this case of the rulings of the Supreme Court in the Jacobsen case, petitioner points to the pleadings in the third party action as indicating the scope of the issues and notes that the prayer of the insurer's complaint in intervention included a claim for past and future expenditures made or to be made by the insurer. Petitioner says: "This prayer followed the rule laid down in Jacobsen v. Industrial Accident Commission, 212 Cal. 440, 299 P. 66, that the term 'expenditures for compensation' includes expenditures for past and future compensation. Therefore it follows that intervener * * * presented the identical issue to both the Superior Court and to respondent Commission."

The decision in the Jacobsen case was commented on by the Supreme Court in Heaton v. Kerlan, 27 Cal.2d 716, 722, 166 P.2d 857, 860, as follows:

> "When the Industrial Accident Commission has made an award fixing the compensation to which the employee is entitled, the award will govern any later determination as to what was payable as compensation under the award. An award, however, may relate only to part of the compensation, such as disability benefits, leaving uncovered such expenditures as those for medical and hospital treatment. Frequently compensation is paid by the employer without proceedings in the Industrial Accident Commission. In such cases the court in ascertaining the amount of the lien, must determine what amount was or will be properly expended in fulfillment of the employer's duty to compensate the employee. Moreno v. Los Angeles Transfer Co., 44 Cal.App. 551, 554, 186 P. 800; see Jacobsen v. Industrial Acc. Comm., supra, 212 Cal. 440, 448, 299 P. 66."

Respondent commission and respondent insurer argue that by reason of subsequent statutory changes the holdings of the Supreme Court in the Jacobsen case are no longer controlling. We think respondents are correct and that whatever must have been the disposition of this matter under the statutes in force when the Jacobsen opinion was rendered the respondent commission has made the proper disposition of the cause under existing statutes. In discussing these statutory changes we bear in mind the provisions of the Constitution hereinbefore noted empowering the legislature to vest jurisdiction over the settlement of controversies arising under the workmen's compensation laws in the commission or in the courts or concurrently in both. The Jacobsen decision was rendered on April 30, 1931. Effective August 14, 1931 (Stats.1931, p. 2370) provisions were incorporated by amendment into Section 26 of the Workmen's Compensation Act which, for all purposes here, were practically identical with existing provisions in the Labor Code. Labor Code Section 3861 provides that:

> "The commission is empowered to and shall allow, as a credit to the employer to be applied against his liability for compensation, such amount of any recovery by the employee for his injury, either by settlement or after judgment, as has not theretofore been applied to reimburse the employer * * *."

Section 3858 of the Labor Code provides:

> "After payment of the employer's lien, the employer shall be relieved from the obligation to pay further compensation to or on behalf of the employee under this division up to the entire amount of the balance of the judgment, if satisfied, without any deduction. No satisfaction of such judgment in whole or in part, shall be

> valid without giving the employer notice and a reasonable opportunity to perfect and satisfy his lien."

These provisions were not contained in the old Workmen's Compensation Act at the time the Jacobsen case was decided. They are harmonious with the basic reasons for subrogation which allow the injured employee to proceed against the third party who caused the injury, unfettered by the provisions of the workmen's compensation laws and yet provides against double recovery by allowing recoupment to the employer for compensation paid or to be paid. We think the effect of these later provisions is to vest in the commission and to continue in the commission, exclusive jurisdiction to determine compensation, even though the third party action is brought before the jurisdiction of the commission has been invoked. Of course if the action is begun after the jurisdiction of the commission has been invoked the decisions of the commission bind the court and the court may give relief to the employer, based on the commission's award in so far as the commission has determined compensation. If, after the judgment, and while it remains unsatisfied, the commission awards further compensation, the court may give further relief based upon that award under the provisions of Section 3857 of the Labor Code, which provides:

> "The court shall, upon further application at any time before the judgment is satisfied, allow as a further lien the amount of any expenditures of the employer for compensation subsequent to the original order."

After satisfaction of the judgment the commission, under the code sections heretofore cited, may perfect the right of the employer to recoupment not theretofore accorded to him.

We think there is nothing inconsistent herein with what was said by the Supreme Court in the Heaton case as to the holdings in the Jacobsen case. The court in the Heaton case made no mention of the statutory changes that had intervened, and those changes were not material to the case then before the court.

What we have said disposes of petitioner's further contentions based on estoppel. It does not appear that there was any representation or promise made in the third party action that the respondent insurer's claims based on the subrogation provisions of the Labor Code were waived or would not be enforced through further proceedings before the commission.

For the reasons given the award of the Industrial Accident Commission is affirmed.

SCHOTTKY, J., and WARNE, J. pro tem., concur.

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170 Cal.App.2d 719

**MAYWOOD GLASS CO., a Corporation,
Petitioner and Appellant,
v.
H. W. STEWART, Director of Employment,
Defendant and Respondent.
Civ. 23621.**

**District Court of Appeal, Second Appellate
District, Division 2, California.
May 27, 1959.**

Proceeding on claim by employee for unemployment insurance benefits following her discharge for misconduct in packing defective glassware after allegedly having been warned. From adverse judgment of the Superior Court, Los Angeles County, Bayard Rhone, J., the employer appealed. The District Court of Appeal, Herndon, J., held that evidence was insufficient to sustain employer's claim that employee had been warned that she must cease packing defective glassware.

Affirmed.

1. Mandamus 🔑172, 187(9)

In mandamus proceeding to review a decision of an administrative agency having statewide jurisdiction, trial court is authorized to exercise its independent judgment on the evidence, but upon an appeal from judgment of trial court in such a proceeding, province of reviewing court, with respect to sufficiency of evidence, is whether there is any substantial evidence which will support the judgment.

2. Social Security and Public Welfare 🔑584

In proceeding on claim filed by employee for unemployment insurance benefits following her discharge for misconduct in packing defective glassware after allegedly having been warned, evidence was insufficient to sustain employer's claim that employee had been warned that she must cease packing defective glassware. West's Ann.Unempl.Ins.Code, § 1256.

3. Social Security and Public Welfare 🔑269

Purpose and object of unemployment insurance statute is to cushion the effect of unemployment. West's Ann.Unempl.Ins. Code, § 1256.

4. Social Security and Public Welfare 🔑389

Under statute providing that an individual is disqualified for unemployment compensation benefits if he has been discharged for misconduct connected with his most recent work, conduct of selector and packer of glass products in packing defective merchandise did not necessarily constitute "misconduct" depriving her of unemployment benefits. West's Ann.Unempl.Ins.Code, § 1256.

See publication Words and Phrases, for other judicial constructions and definitions of "Misconduct".

5. Social Security and Public Welfare 🔑651

In proceeding on claim by employee for unemployment insurance benefits following her discharge for misconduct in packing defective glassware after allegedly having been warned, wherein question of whether employee had been previously warned was fully developed during referee's hearing, Unemployment Insurance Appeals Board did not abuse its discretion in refusing to consider affidavits which employer submitted to show that employee had been previously warned not to pack faulty ware. West's Ann.Unempl.Ins.Code, §§ 1256, 1336.

6. Social Security and Public Welfare 🔑566

In proceeding on claim by employee for unemployment insurance benefits following her discharge for misconduct in packing defective glassware after allegedly having been warned, employer had burden of establishing "misconduct" to protect its reserve fund against claim of discharged employee. West's Ann.Unempl. Ins.Code, § 1256.

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Edwin C. Boehler, Francis R. Dwyer, A. T. Fulsom, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., William L. Shaw, Deputy Atty. Gen., for respondent.

HERNDON, Justice.

By a decision rendered March 7, 1958, the Unemployment Insurance Appeals Board allowed claimant, Gladys M. Witt, certain unemployment insurance benefits, rejecting the contentions of her erstwhile employer, Maywood Glass Co., that she was ineligible for such benefits because she had been discharged for misconduct. Maywood thereupon filed a petition in the Superior Court for a writ of mandate to compel the Appeals Board to set aside its order allowing benefits and charging Maywood's reserve account with the amount paid. The entire cause was submitted to the lower court on a certified administrative record of the Appeals Board. The trial court found that the weight of the evidence supported the decision of the Appeals Board and that Maywood was not deprived of any substantial rights in the antecedent administrative proceedings. Judgment was entered for the respondent Director of Employment. Maywood appeals contending (1) that the evidence is insufficient to support the judgment and (2) that the Appeals Board was guilty of an abuse of discretion in failing to consider certain affidavits submitted by Maywood.

Under provisions of the Unemployment Insurance Code, the Director of Employment maintains separate reserve accounts for each employer, crediting his account with contributions made and charging it with benefits paid. Unemployment Insurance Code, § 1025 et seq. However, the employer's reserve account is not charged if the claimant was discharged "* * * by reason of misconduct connected with his work". Unemployment Insurance Code, § 1032. Section 1256 of the Unemployment Insurance Code provides: "An individual is disqualified for unemployment compensation benefits if the director finds that he left his most recent work voluntarily without good cause or that he has been discharged for misconduct connected with his most recent work.

"An individual is presumed to have been discharged for reasons other than misconduct in connection with his work and not to have voluntarily left his work without good cause unless his employer has given written notice to the contrary to the director within five days after the termination of service, setting forth facts sufficient to overcome the presumption. If the employer files such notice, the question shall immediately be determined in the same manner as benefit claims."

The facts of the instant case are not complex. Claimant Witt had been employed by Maywood Glass Company as a selector and packer of glass products for approximately five years. On November 20, 1957, Maywood gave her notice of discharge as the result of her packing of certain defective merchandise. Mrs. Witt's employment terminated on November 26, 1957, and she filed a claim for unemployment benefits on December 1, 1957.

Maywood was notified of the claim and on December 5, 1957, reported to the Department of Employment that Mrs. Witt "was discharged for consistently refusing to follow instructions * * *" and that "* * * she willfully persisted in packing imperfect bottles into the cartons. After being warned about this on several occasions * * * she was discharged. We believe that the claimant was guilty of misconduct in that she willfully disregarded her instructions * * *"

On December 26, 1957, in an interview before the Department of Employment Mrs. Witt stated, "I was fired because I packed some bad glassware. I knew better as I have been packing and selecting for the past 5 years and more. The reason I packed bad glassware was because of the rapidity in which we were working. I had a headache. I had been warned about this refusing to follow instructions * *"

On December 26, 1957, the Department of Employment issued a ruling that claimant was discharged for misconduct connected with her work and was therefore disqualified from receiving benefits. She filed an appeal from the ruling, and on January 27, 1958, a hearing was held before a referee of the Department of Employment at which were present the claimant, a representative of Maywood, and a representative of the Department of Employment. Testimony was taken under oath and various exhibits accepted.

Robert D. Harper, an auditor for Maywood, represented the company and testified in its behalf. He admitted that he had no personal knowledge of the circumstances of Mrs. Witt's discharge. However, he testified that he had verified the allegations of Maywood's report of December 6, by contacting Joseph Shasha, Maywood's Packing Superintendent. Harper testified that Shasha informed him that he [Shasha] had warned claimant on several occasions preceding her discharge about packing defective glassware.

Mrs. Witt testified that her foreman at Maywood Glass Company was Dick Swanson; that he never had occasion to warn her about defective packing; that Shasha was her supervisor next in line; that Shasha had notified her of her discharge on November 20, but that she had never had any conversations with either supervisor regarding defective merchandise she had packed. During the course of the hearing the referee asked the claimant whether she had ever been warned by her supervisors that she would be discharged if her work did not improve and claimant gave a negative reply. Mr. Harper made no request for a continuance, and the following day the referee issued a decision allowing claimant benefits and holding that she was not disqualified because of misconduct under section 1256 of the Code. Maywood appealed from the decision of the referee to the Unemployment Insurance Appeals Board. Attached to the notice of appeal were three affidavits by Shasha and two other Maywood packing shift foremen to the effect that they had warned Mrs. Witt not to pack faulty ware prior to her notification of discharge. The Appeals Board declined to accept or consider these supplementary affidavits and returned them to Maywood. Thereafter, the Board issued a decision affirming the determination of the referee, and on May 1, 1958, Maywood filed its petition for writ of mandate.

[1] As stated in Ashdown v. State of California, 135 Cal.App.2d 291, 299, 287 P.2d 176, 181: "In a mandamus proceeding in a trial court, wherein a decision of an administrative agency having statewide jurisdiction is reviewed, the trial court is authorized to exercise its independent judgment on the evidence, Moran v. State Board of Medical Examiners, 32 Cal.2d 301, 308, 196 P.2d 20; but upon an appeal from the judgment of the trial court in such a proceeding the province of the appellate court, with respect to the sufficiency of the evidence, is whether there is any substantial evidence which will support the judgment."

[2] Appellant argues that "the overwhelming evidence before the referee was to the effect that claimant had been warned that she must cease from packing faulty glassware" and the referee's finding that claimant "had not been warned that she would be dismissed if the quality of her work did not improve" was unsupported by the evidence.

However, viewing the evidence and the reasonable inferences to be drawn therefrom according to the familiar rule (Sultan Turkish Bath, Inc. v. Board of Police Com'rs, 169 Cal.App.2d 188, 337 P.2d 203; cf. Fromberg v. Dept. of Alcoholic Beverage Control, 169 Cal.App.2d 230, 337 P.2d 123) the record simply does not support appellant's contention. Mrs. Witt testified under oath that her supervisor never threatened her with discharge if her work did not improve. Despite her statements in a prior interview and the assertions of Maywood to the contrary, there is simply a conflict in the evidence which was resolved adversely to appellant by an administrative body. Ashdown v. State of California, supra, 135 Cal.App.2d 291, 299, 287 P.2d 176.

[3, 4] Moreover, even if the claimant *had* been warned, the evidence does not compel a finding that she was guilty of "misconduct" within the meaning of the statute. Although Mrs. Witt admitted packing defective bottles, she denied that she had intentionally done so. Mrs. Witt worked the "graveyard shift" from midnight to 8 o'clock in the morning. She testified that on the night in question she was suffering from a headache and that there was a high percentage of defective glassware coming down the line. In these circumstances the trier of fact could reasonably conclude that her conduct did not constitute "misconduct" within the meaning of the statute. In Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636, 639, 640, the Supreme Court of Wisconsin construed the unemployment compensation act of that state, which declared an employee ineligible for benefits if "[h]e has been discharged * * * for misconduct connected with his employment." Observing that the purpose and object of the statute was to "cushion the effect of unemployment", the court affirmed an allowance of benefits to an employee. The court said "* * * the intended meaning of the term 'misconduct', as used in sec. 108.04(4) (a), Stats., is limited to conduct evincing such wilful or wanton disregard

of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed 'misconduct' within the meaning of the statute." (See, generally, 1 CCH Unemployment Insurance Reporter, 2326.) While Mrs. Witt's conduct may have justified her employer's decision to terminate the employment relationship (see 32 Cal.Jur.2d 471, § 59) it did not necessarily constitute "misconduct" within the meaning of the statute. Cf. State ex rel. Employment Security Commission v. Smith, 235 N.C. 104, 69 S.E.2d 32, 33.

[5, 6] Appellant's second assignment of error is equally unavailing. Section 1336 of the Unemployment Insurance Code authorizes the Appeals Board on its own motion to affirm, modify, or set aside any decision of a referee on the basis of the evidence previously submitted in the case, or to direct the taking of additional evidence. It is appellant's theory that the Board abused its discretion when it rejected and refused to consider the affidavits which appellant submitted after they received notice of the referee's ruling. However, the question whether the claimant had been warned prior to November 20, 1957, was fully developed during the referee's hearing at which appellant was represented. At that time, Maywood made no request for a continuance in order to present additional evidence along the lines of the three affidavits which they later submitted. It would have been unfair for the Board to have considered Maywood's affidavits without giving the claimant an opportunity to controvert them. The employer has the burden of establishing "misconduct" to protect its reserve fund. Boynton Cab Co. v. Giese, 237 Wis. 237, 296 N.W. 630, 633; cf. Boynton Cab Co. v. Neubeck, supra, 237 Wis. 249, 296 N.W. 636. In these circumstances the Board did not abuse its discretion in declining to reopen the case for the taking of additional evidence.

Affirmed.

FOX, P. J., and ASHBURN, J., concur.

171 Cal.App.2d 120

PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Fred Lee EATON, Defendant and Appellant.
Cr. 6530.

District Court of Appeal, Second District,
Division 1, California.
June 4, 1959.

Prosecution for forcible rape and burglary. From adverse judgment of the Superior Court, Los Angeles County, Gordon L. Howden, J., and from an order denying a motion for a new trial, the defendant appealed. The District Court of Appeal, Lillie, J., held that court did not abuse its discretion in permitting a government witness, who held a bachelor's degree in science, with a major in criminology, and who had taken several courses in fingerprinting and was employed as a laboratory technician with police department and who had worked in office of county district attorney, to testify as an expert as to fingerprints he had obtained of defendant at victim's house.

Judgment and order affirmed.

1. Burglary ⚷41(1)
Rape ⚷51(4)

Evidence was sufficient to sustain conviction for forcible rape and first degree burglary.

2. Criminal Law ⚷1159(2)

It is not function of reviewing court to weigh the evidence.

3. Criminal Law ⚷1159(2)

In prosecution for forcible rape and burglary, even justifiable suspicion or unusual circumstances do not categorize evidence as inherently impossible and unworthy of belief.

4. Criminal Law ⚷1159(4)

It is exclusive province of trial judge or jury to determine credibility of witness and truth or falsity of facts upon which a determination depends.

5. Criminal Law ⚷386, 741(2)

In criminal prosecution, testimony relating to identity of a voice is generally considered competent, with its probative value being a question of fact.

6. Criminal Law ⚷481, 1153(2)

Qualification of an expert to testify is committed to sound discretion of trial court, and exercise of its discretion will not be disturbed unless an abuse thereof has been made manifest.

7. Criminal Law ⚷478(1)

In prosecution for forcible rape and burglary, court did not abuse its discretion in permitting a government witness, who held a bachelor's degree in science, with a major in criminology, and who had taken several courses in fingerprinting and was employed as a laboratory technician with police department and who had worked in office of county district attorney, to testify as an expert as to fingerprints he had obtained of defendant at victim's house.

8. Criminal Law ⚷486

In prosecution for forcible rape and burglary, reasons given by fingerprint expert, who testified for prosecution, for his conclusions that fingerprints taken from victim's home were those of defendant were for a proper evaluation by trier of fact.

9. Criminal Law ⚷656(3)

In prosecution for forcible rape and burglary wherein prosecuting witness was asked about assailant's size as compared to her own and defendant's counsel stated that witness had already stated that she did not observe, statement by court that prosecuting witness apparently was willing to state that person involved was taller than she, did not unduly assist witness by supplying proper adjective as to size.

10. Criminal Law ⚷656(1)

A trial judge, within reasonable limits, not only has the right but the duty clearly to bring out facts.

11. Criminal Law ⚷655(1)

In prosecution for forcible rape and burglary, statement by court in reply to suggestion of defendant for leave to approach bench that "you can tell me from there", did not tend to discredit cause of the defense and did not constitute misconduct.

12. Criminal Law ⚷1044, 1129(1)

In prosecution for forcible rape and burglary, absence of an assignment of misconduct on part of court or of any action on part of defendant to strike a statement of the court from the record precluded reversal of judgment on ground of misconduct by the court.

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William L. White, Long Beach, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Marvin L. Part, Deputy Atty. Gen., for respondent.

LILLIE, Justice.

[1] Defendant was charged by information with forcible rape and burglary. Upon trial by the court sitting without a jury he was adjudged guilty of both offenses, the burglary being fixed in the first degree due to the accompanying assault. Three prior felony convictions were admitted and he was sentenced to the state's prison. He appeals from the judgment of

conviction and the order denying a motion for new trial.

Pursuant to recognized rules, the following narration of the evidence is in the aspect most favorable to the respondent. At or about five o'clock on the morning of June 16, 1958, the husband of the victim, Mrs. Smith, left the family home in Long Beach for his place of business. Approximately thirty minutes later Mrs. Smith arose to go to the bathroom. She was seized in the hallway by a large man who put his thumbs inside of her mouth, forced her back into the bedroom and onto the bed. After pulling a bed sheet over his victim's head, he accomplished the act complained of, in the course of which the assailant touched her arm with some sharp article, saying: "You know what that is. * * * It is a knife." Although unable to see her attacker, Mrs. Smith recognized his voice as that of the accused who, she stated, had patronized a cafe operated by her and her husband.

The victim's testimony was corroborated in certain particulars by a physician who examined her later that morning. He found fresh bruises and cuts around her throat and mouth, as well as sperm in the vaginal canal. Further corroboration consisted of fingerprints lifted by experts from the Smith residence and later identified as belonging to the defendant. In this connection, when first questioned by police officers, defendant denied he had ever been to Mrs. Smith's house. Later however he admitted he had lied in order to protect the reputation of a woman friend whom he had once driven, while she was intoxicated, to Mrs. Smith's home. The woman in question denied the occurrence of any such episode.

Appellant challenges the sufficiency of the evidence to support his conviction. He asserts that a key prosecution witness was incompetent to testify as an expert, and claims that the trial judge was guilty of prejudicial misconduct. We are of the opinion that there is no merit in any of these contentions.

[2–4] As to the asserted insufficiency of the evidence, appellant claims that the prosecutrix was motivated by hatred and revenge. She admittedly disliked appellant and her testimony, he urges, was inherently improbable and hence incredible. He points out that she was not blindfolded, that there were four windows in the bedroom and that the sun rose that morning, according to official records, at 5:41, all of which circumstances negative the victim's claim that she did not see her assailant. He also urges there were no bruises about the pelvic area, no hysteria following the assault, and no disarray either of the victim's clothing or the bedroom generally. But it is not our function to weigh the evidence (People v. Soto, 155 Cal.App.2d 344, 345, 317 P.2d 1005) and even justifiable suspicion or unusual circumstances do not categorize evidence in prosecutions of this character as inherently impossible and unworthy of unbelief (People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758). As stated in the last cited case, "it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends" (21 Cal.2d at page 693, 134 P.2d at page 759).

[5] There is also the suggestion that the victim's identification of appellant, solely by his voice, was insufficient as a matter of law. However, testimony relating to the identity of a voice is generally considered competent, its probative value being a question of fact (Connell v. Clark, 88 Cal.App.2d 941, 947, 200 P.2d 26; People v. Loar, 165 Cal.App.2d 765, 333 P.2d 49). This adverse determination, coupled with the corroborative evidence previously mentioned and appellant's two prior convictions of burglary which served to aid in the impeachment of his testimony fully support the finding of guilt. People v. Loar, supra.

[6–8] It is next contended that Robert W. Parkin, who obtained a thumb and three fingerprints of the appellant at the victim's home, was incompetent to testify as an expert in that field. The record reveals that Parkin held a bachelor's degree in science, having majored in criminology; that he had taken several courses in fingerprinting; that he was employed as a laboratory technician with the Long Beach Police Department and previously had worked in the office of the Orange County District Attorney. Appellant relies on People v. Horowitz, 70 Cal.App.2d 675, at page 689, 161 P.2d 833; but the general rule is there restated that the qualification of an expert to testify is committed to the sound discretion of the trial court and the exercise of its discretion will not be disturbed unless an abuse thereof has been made manifest. No such abuse has here been shown; furthermore, we are of the view that the witness demonstrated a sufficient background of study and experience to enable him to give the expert testimony elicited. The reasons for the conclusions reached by the witness were for a proper evaluation by the trier of fact.

[9] Appellant's final assignment of error concerns two instances of asserted misconduct by the trial court, both without merit. First, during the direct examination of the prosecuting witness, she was asked about her assailant's size as compared to her own, to which she replied that he was "larger." The following thereupon ensued:

> "Mr. White (appellant's counsel): I think she has already stated that she did not observe.
>
> "The Court: She said she couldn't identify the person as being a specific person or even the race of the person, but she is apparently willing to state that the person involved was taller than she."

[10] Appellant's claim that the court unduly assisted the witness by supplying the proper adjective is without merit. A trial judge within reasonable limits not only has the right but the duty clearly to bring out the facts (Gantner v. Gantner, 39 Cal.2d 272, 278, 246 P.2d 923).

[11, 12] The second instance of alleged misconduct relates to the statement of the court in reply to the suggestion of appellant's counsel for leave to approach the bench: "You can tell me from there." Of course, the cold record wholly fails to sustain the claim that "the words spoken and the tone used by the Court * * * tended to discredit the cause of the defense." Additionally, there was no assignment of misconduct or any action on the part of defendant to strike the language from the record. (People v. Harris, 87 Cal.App.2d 818, 827, 198 P.2d 60), which precludes reversal on the ground asserted (People v. Galuppo, 81 Cal.App.2d 843, 849, 185 P.2d 335).

The judgment and order appealed from are affirmed.

WHITE, P. J., and FOURT, J., concur.

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171 Cal.App.2d 171

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Glenn ROSE, Defendant and Appellant.

Cr. 3587.

District Court of Appeal, First District, Division 2, California.

June 8, 1959.

Hearing Denied Aug. 5, 1959.

Prosecution for kidnapping and assault by means of force likely to produce great bodily injury, wherein defendant entered a plea of guilty. From adverse judgment of the Superior Court, Alameda County, Cecil Mosbacher, J., the defendant appealed. The District Court of Appeal, Draper, J., held that the judgment entered on plea of guilty was not appealable on the merits when defendant failed to make any motion either to withdraw the plea or to vacate the judgment.

Judgment affirmed.

1. Criminal Law 🔑1026

Judgment on a plea of guilty is not appealable on the merits.

2. Criminal Law 🔑1023(12)

If a motion is made in trial court to vacate judgment and withdraw plea of guilty, such motion may be treated as an application for writ of error coram nobis, denial of which can be reviewed on appeal.

3. Criminal Law 🔑1026

In prosecution for kidnapping and assault by means of force likely to produce great bodily injury, wherein defendant pleaded guilty, defendant could not appeal on the merits from an adverse judgment when he failed to make any motion in the trial court either to withdraw the plea or to vacate the judgment. West's Ann.Pen. Code, §§ 207, 245.

4. Criminal Law 🔑273

In criminal prosecution in which defendant entered a plea of guilty, assurances of defendant's own attorney that he would be given probation if he pleaded guilty were not sufficient to vitiate the plea of guilty.

5. Criminal Law 🔑274

Representations by a defendant's attorney that he will be given probation if he enters a plea of guilty can avail a defendant only when there is an apparent corroboration of them by the acts or statements of a responsible state officer.

◆

Glenn Rose, San Quentin, in pro. per.

Gartner S. Thomas, Albany, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

DRAPER, Justice.

Defendant pleaded guilty to charges of kidnapping (Pen.Code, § 207) and assault by means of force likely to produce great bodily injury (Pen.Code, § 245). A third count charging violation of Penal Code Section 288a was dismissed, request for probation was denied, and defendant was sentenced to prison. He appeals.

[1–3] Judgment on a plea of guilty is not appealable on the merits. Stephens v. Toomey, 51 Cal.2d 864, 338 P.2d 182. If a motion is made in the trial court to vacate the judgment and withdraw the plea of guilty, such motion may be treated as an application for writ of error coram nobis, denial of which can be reviewed on appeal. People v. Grgurevich, 153 Cal.App.2d 806, 810, 315 P.2d 391; People v. Adams, 100 Cal.App.2d 841, 842, 224 P.2d 873. But defendant, although represented by counsel of his own choice throughout the proceedings in the trial court, failed to make any motion either to withdraw the plea or to vacate the judgment.

[4, 5] Defendant filed his notice of appeal and his briefs in this court in propria persona. Thus, even though the attorney who represented him in the trial court appeared at oral argument and filed a brief supplemental to those prepared by appellant himself, we extend this opinion briefly to point out that, on the merits, the appeal is groundless. Appellant's contention is based wholly on the claim that he pleaded guilty only on the assurance of his attorney that he "would positively be given probation." But assurances of a defendant's own attorney are not sufficient to vitiate a plea of guilty. In re Atchley, 48 Cal.2d 408, 418, 310 P.2d 15; People v. Butler, 70 Cal.App.2d 553, 562, 161 P.2d 401. Such representations can avail a defendant only when there is an apparent corroboration of them by the acts or statements of a responsible state officer. People v. Gilbert, 25 Cal.2d 422, 443, 154 P.2d 657. Even if this proceeding be deemed an original application in the nature of coram nobis, and the briefs be considered as affidavits, they fail to show the essential element of such corroboration.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

170 Cal.App.2d 772

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Ronald Wayne LUSHENKO and Robert LaVerne Gillette, Defendants and Appellants.

Cr. 2942.

District Court of Appeal, Third District, California.

May 28, 1959.

Prosecution for assault with a deadly weapon with intent to commit murder. The Superior Court, Placer County, Leland J. Propp, J., entered judgment of conviction for assault with a deadly weapon, and two of the defendants appealed. The District Court of Appeal, Schottky, J., held that where record did not disclose that either defendant asked for a separate trial, and since a separate trial is not a matter of right, and since defendants were jointly charged, court would not be deemed to have erred in failing to order that defendants be tried separately.

Judgment affirmed.

1. Assault and Battery ⚷56

The gist of the offense of an assault with a deadly weapon is an assault with a weapon likely to produce death or great bodily harm.

2. Homicide ⚷268

In a prosecution for assault with intent to commit murder, jury could determine under proper instruction that a length of hose with lead or metal inserted in the center known as a "sap", was a deadly weapon.

See publication Words and Phrases, for other judicial constructions and definitions of "Sap".

3. Criminal Law ⚷1144(13), 1159(2)

In considering the sufficiency of the evidence to sustain a conviction, court must assume in support of the judgment the existence of every fact which the jury could reasonably deduce from evidence, and if circumstances reasonably justify verdict, opinion of reviewing court that these circumstances might also be reconciled with the innocence of defendant will not warrant a reversal.

4. Assault and Battery ⚷71

Where a defendant charged with assault with intent to commit murder accompanied two other defendants to the vicinity of victim's cabin for the purpose of robbing him, and it was contemplated that force or fear would be used, and the defendants who entered the victim's cabin were armed, and there was evidence that defendant constructed the "sap" found in the cabin, defendant could be found guilty of the crime of assault with a deadly weapon, even though he did not participate in the assault but only accompanied the other defendants to the vicinity of the cabin.

5. Assault and Battery ⚷92

Evidence sustained conviction for assault with a deadly weapon.

6. Criminal Law ⚷622(2)

In criminal prosecution, trial court did not err in not ordering defendants tried separately since a separate trial is not a matter of right, and since defendants were jointly charged. West's Ann.Pen.Code, § 1098.

7. Criminal Law ⚷641(5)

Where record, in prosecution for assault with intent to commit murder, did not disclose any diversity of interest which would have prejudiced either defendant by having one counsel represent each of them, court would not be deemed to have erred in not appointing counsel other than public defender for one of the defendants merely because the public defender was representing the other defendant.

8. Criminal Law ⚷658

Generally, the arrest of a witness for perjury in a criminal prosecution is not prejudicial to the accused where it takes place outside of the presence of the jury.

9. Criminal Law ⚷1137(8)

In criminal prosecution, arrest of a witness for the defendant outside the presence of the jury would not be deemed prejudicial misconduct on the part of the district attorney, where it was defense counsel who brought the arrest to the attention of the jury.

George I. Lewis, Sacramento, for appellant.

The Attorney General by Doris H. Maier and Lloyd Hinkelman, Deputy Attys. Gen., for respondent.

SCHOTTKY, Justice.

Ronald Wayne Lushenko and Robert LaVerne Gillette were charged with having assaulted Vincent Santelli with a deadly weapon with intent to commit murder. A jury found them guilty of the lesser offense of assault with a deadly weapon, and they have appealed from the judgment pronounced against them.

Appellants make the following contentions as grounds for reversal of the judgment: (1) Insufficiency of the evidence to support the judgment; (2) Appellant Gillette was entitled to a separate trial; (3) The court erred in not appointing counsel other than the public defender as counsel for Gillette; (4) Misconduct on the part of the district attorney.

Disregarding all conflicts in the evidence and assuming in support of the judgment the existence of every fact which the jury could reasonably deduce from the evidence, we shall briefly summarize the evidence as shown by the record.

On the evening of July 4, 1958, a large man appeared at the door of the residence of Victor Santelli. After receiving a glass of water from Mr. Santelli, the visitor entered Santelli's cabin and commenced to hit Santelli with a weapon which the victim described as a tool. Santelli fought with the man. He tried to catch the tool but was unable to and was severely beaten by his assailant. While the struggle was going on, another man entered and advised Santelli not to resist because he might be forced to use a gun. Santelli was unable to identify his assailant or the second man.

About 11 p. m. a neighbor heard noises coming from Santelli's cabin. He went over toward the cabin and heard moaning and crying. He then went to another neighbor's home, a Charles Muskavitch, and told him about the sounds he heard. The two then returned to the vicinity of the cabin where they heard a man moaning and crying. Muskavitch then returned to his home where he telephoned the sheriff's office. Edwards, the other neighbor, remained at the front gate, as did Muskavitch after the telephone call was completed, until the sheriff's officers arrived. During this period, which was between 20 minutes and one-half hour, they did not see anyone leave the cabin.

Deputy Sheriff Wightman, upon his arrival, heard moaning sounds coming from the cabin. As he opened the door he met Lushenko. Lushenko had what appeared to be blood on his clothes. He was perspiring and generally disheveled. There was no blood on his hands or face. In response to a question, Lushenko said to help the old man; that there was a fight; and that some men were beating the man. Lushenko was then taken outside, and Wightman saw a second man in the cabin who was also taken outside. Wightman entered the cabin and saw Santelli lying on the floor moaning and crying. His hands were tied behind his back. His face was bloody and messed up. Wightman found a piece of rubber hose with a metal rod inserted in it near Santelli. He also found a pistol in a box some three feet from Santelli. A pair of wet cotton gloves covered with what appeared to be blood were also found. Silk stockings were also found on the floor of the cabin.

During the course of the trial, Santelli could not make a positive identification of Lushenko. The gun which was found near Santelli's body was identified as the property of either Lushenko or Gillette.

Appellants Gillette and Lushenko testified that on the night of July 4, 1958, they and Eddie Sessa were on their way to Reno, Nevada, when they stopped near the Santelli residence. They were looking for Sessa's girl friend, Eleanor, who resided somewhere in the area. Upon reaching the Santelli residence, they observed a pickup truck parked in front of the premises. Sessa got out of their vehicle and proceeded to the pickup to inquire of the occupant if he knew where Eleanor resided. Sessa returned to their car and informed Lushenko that he heard noises coming from the Santelli cabin. Lushenko got out of the vehicle and proceeded to the cabin with Sessa following him. Lushenko pushed his way into the cabin where he encountered two men. He engaged one in a fight and was knocked to the floor, which was covered with Santelli's blood. The two men ran out of the cabin and got into the pickup and drove off. Lushenko returned to their vehicle and informed Gillette of the situation in the cabin. Gillette grabbed his gun and followed Lushenko back to the cabin. Lushenko requested Gillette to go for an ambulance, whereup Gillette handed his gun to Eddie Sessa and Gillette left the premises in his vehicle and proceeded with the intent of obtaining an ambulance. Lushenko and Sessa re-entered the cabin, where Lushenko untied the ropes which bound Santelli's legs and removed the adhesive tape from his mouth. Before Lushenko could untie Santelli's hands, the police arrived and placed him under arrest. Lushenko was searched and he claimed his wallet, which contained $225, was removed from his person and he has not seen it since.

Gillette testified further that in his attempt to procure help he became lost and after driving in a circle finally straightened himself out and as he was proceeding toward Auburn the sheriff's car passed him; he observed Lushenko in the vehicle. Gillette, not wanting to get involved in any trouble, returned to Sacramento.

Carol Schaeffer testified that appellant Gillette met her in the Tropical Cellar at 7th and J Streets, Sacramento. Carol asked Gillette if he knew what had happened to Eddie Sessa and Gillette stated that he thought Eddie had been arrested. Gillette further stated that he had taken Lushenko and Eddie Sessa to the Auburn area where they were going to get some money from a hermit whom they had been watching; that they were going to do whatever they had to do to get his money. He stated that Lushenko and Sessa had gone to the cabin and assaulted the hermit and that he had waited in the car for them and when they failed to return to their meeting place he thought he might have been mistaken as to their place of rendezvous so he left; and when he did, he observed a police car coming and took it for granted that Lushenko and Sessa had been arrested.

A few days thereafter, Gillette had another conversation with Carol Schaeffer and a girl named Jean Hagg. During this conversation, Gillette stated that he had made a weapon out of a length of hose, wherein he had inserted lead or metal in the center.

On another occasion Jean Hagg observed Eddie Sessa's wallet in the glove compartment of Gillette's automobile. Jean asked Gillette why he had Eddie's wallet in his possession, whereupon Gillette stated that Lushenko and Sessa had taken their wallets out and left them in the car in case they were caught by the police they would have no identification on them.

In another conversation Gillette stated that they had taken the cotton gloves and nylon stockings to put over their faces. The reason they took work gloves was because if they had to be discarded they could not be identified with any certain person.

[1-3] There is no merit in appellants' contention that the evidence is insufficient to sustain the judgment of conviction as to both appellants. The gist of the offense of an assault with a deadly weapon is an assault with a weapon likely to produce death or great bodily harm. The jury could determine under proper instructions that the sap was a deadly weapon. The well-settled rule as to the function of an appellate court in considering the sufficiency of the evidence is as stated in People v. Ogg, 159 Cal.App.2d 38, at page 48, 323 P.2d 117, at page 123.

> "Before the verdict of a jury which has been approved by the trial court can be set aside on the ground of the insufficiency of the evidence it must be made clearly to appear that upon no

> hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. We must assume in support of the judgment the existence of every fact which the jury could reasonably deduce from the evidence. If the circumstances reasonably justify the verdict, the opinion of the reviewing court that those circumstances might also be reconciled with the innocence of the defendant will not warrant a reversal. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. People v. Frankfort, 114 Cal.App. 2d 680, 689, 251 P.2d 401."

See also People v. Osslo, 50 Cal.2d 75, 84, 85, 323 P.2d 397.

[4] Insofar as the defendant Gillette is concerned, the fact that he had gone with the other defendants to Santelli's cabin only for the purpose of robbing him, even if he had not participated in the assault, would not prevent his being found guilty of the crime of assault with a deadly weapon. While he may not have participated in the particular acts constituting the crime, he would still be subject to criminal prosecution for it. "All those who assemble themselves together with an intent to commit a wrongful act, the execution whereof makes probable in the nature of things a crime not specifically designated, but incidental to that which was the object of the confederacy, are responsible for such incidental crime. * * * Hence it is not necessary that the crime should be part of the original design; it is enough if it be one of the incidental probable consequences of the execution of that design, and should appear at the moment to one of the participants to be expedient for the common purpose." (Wharton Criminal Law, 12th ed., sec. 258.) Gillette accompanied Lushenko and Sessa to the site of the cabin for the purpose of robbing Santelli. Robbery is the felonious taking of personal property in the possession of another person from his immediate presence and against his will, accomplished by means of force or fear. It was contemplated that force or fear would be used. The defendants who entered Santelli's cabin were armed. Hence, one of the probable consequences of the execution of the design was that the weapons would be used on Santelli. There was evidence that Gillette constructed the "sap" found in the cabin. According to the cited rule Gillette could be found guilty of the crime of assault with a deadly weapon. Accord, People v. Bostic, 167 Cal. 754, 141 P. 380; People v. Vasquez, 49 Cal. 560.

Insofar as Lushenko is concerned, the condition in which he was found would permit the jury to infer that he was the man who committed the assault. They were not compelled to accept his version of the facts, particularly since the two neighbors stood at the front gate of Santelli's cabin for about one-half hour waiting for the sheriff to arrive and in that period of time they did not see anyone leave the cabin.

[5] We are satisfied that there is substantial evidence in the record to support the judgment of conviction as to both Lushenko and Gillette.

[6] Appellants' second contention is that each should have been granted a separate trial. However, the record shows that when the case was called for trial Sessa, who was jointly charged with appellants, was ill and in order that the trial might proceed the public defender, who was representing appellants, stated: "I now make a formal motion to separate the cases of Ronald Wayne Lushenko, Eddie Steve Sessa, and Robert LaVerne Gillette to be tried separately insofar as Eddie Steve Sessa is concerned. In other words, the motion would allow us to—if granted by the Court, that we may proceed in the case of Ronald Wayne Lushenko and Robert LaVerne Gillette." The motion was granted and the trial proceeded against appellants. Section 1098 of the Penal Code provides that persons jointly charged must be jointly tried unless the court orders separate trials. The record discloses that a separate trial was sought by Sessa because he was ill. The record does not disclose that either Lushenko or Gillette asked for a separate trial. Since a separate trial is not a matter of right, and since

the appellants were jointly charged, there is no merit in appellants' contention that the court erred in not ordering them tried separately.

[7] Appellants next contend that the court erred in not appointing counsel other than the public defender for Gillette, because the public defender was representing Lushenko. The record discloses that at the time of the arraignment each appellant stated that he was without funds to hire counsel and each appellant requested that the public defender be appointed to represent him. The record does not disclose any diversity of interest which would prejudice either by having one counsel representing each of them. Under such circumstances this contention of appellant Gillette is without merit.

The final contention of appellants is that the district attorney was guilty of prejudicial misconduct. During the course of the trial the defense called a Jesse Bonilla who testified on behalf of Gillette. After he was excused, and as he was leaving the courthouse, outside of the presence of the jury, he was arrested for perjury. Defense counsel called this to the court's attention. He asked permission to recall Bonilla so he could explain to the jury why he was arrested. Bonilla was recalled, and he testified that he had been arrested upon leaving the court and that his testimony previously given was the truth. The arrest of Bonilla took place outside of the presence of the jury, and it was defense counsel who brought it to the attention of the jury.

[8] The general rule is that the arrest of a witness is not prejudicial to the accused where it takes place outside of the presence of the jury. People v. Myers, 122 Cal.App. 675, 10 P.2d 498; 23 C.J.S., Criminal Law § 996, p. 358. In Young v. United States, 5 Cir., 107 F.2d 490, the court said witnesses were arrested outside of the presence of the jury on a charge of perjury; that the incident was not error where the arrest was not known to the jury except as the accused may have brought it to its attention.

[9] It is therefore clear that appellants' contention of prejudicial misconduct on the part of the district attorney cannot be sustained.

The judgment is affirmed.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.

171 Cal.App.2d 116

Norman W. GILBERT and Nelda B. Gilbert, husband and wife, Plaintiffs and Respondents,

v.

Clayton W. CORLETT, Defendant and Appellant.

Civ. 18455.

District Court of Appeal, First District, Division 2, California.

June 4, 1959.

Action by purchasers for fraud in the sale of residential premises. Judgment for the purchasers for $6,500 in the Superior Court, County of Alameda, S. Victor Wagler, J., and the vendor appeals. The District Court of Appeal, O'Donnell, J. pro tem., held that recovery was authorized where the vendor failed to make known to the purchasers the contents of an engineering report indicating that the property had little value due to subsidence that the evidence justified the award of damages and that an expert witness was qualified to testify as to the life expectancy of the house sold.

Judgment affirmed.

1. Fraud 🔑17

In purchasers' action for fraud in the sale of residential premises, where the vendor had had an engineer inspect the premises and make a report which indicated that the property was of little value, the vendor was bound to make known to the purchaser the contents of such report.

2. Fraud 🔑23

In purchasers' action for fraud in the sale of residential premises on the ground that the purchasers were misled by concealment by the vendor of an engineering report indicating that the property had little value, purchasers were entitled to recover for such concealment though they made their own inspection of the property before contracting to purchase it where the purchaser was not familiar with either the real estate business or the construction business.

3. Fraud 🔑62

In purchasers' action for fraud in the sale of residential premises, evidence justified judgment in favor of the purchasers of $6,500.

4. Evidence 🔑543(3)

A witness who had been a real estate broker and appraiser for almost 20 years and was familiar with the neighborhood and had inspected the subject property sold by the defendant and had investigated sales of other property similarly situated in slide areas was entitled to express his opinion of the life expectancy of the house sold the purchasers.

5. Appeal and Error 🔑203(3)

Where defendant did not at trial question expert witness' qualifications or object to his giving his opinion on the subject of life expectancy of house sold, the defendant could not question his competency on appeal.

◆

Marquam C. George, Oakland, for appellant.

Robert J. Cooney, Robert J. Duggan, El Cerrito, for respondents.

O'DONNELL, Justice pro tem.

This is an action for damages for fraud perpetrated by defendant on plaintiffs in the sale of certain residence premises in the City of Berkeley. The jury returned a verdict for plaintiffs in the sum of $6,500 on which judgment was entered. Defendant appeals from the judgment.

On November 28, 1953, plaintiffs, who were in the market for a residence, looked at defendant's premises. The premises consisted of a two-story house located on a steep hillside lot in the Berkeley hills. Plaintiffs spent several hours inspecting the house. There was considerable unevenness in the floors throughout the house extending down to the foundation. Mr. Gilbert, in discussing this condition with defendant, said that he was not particularly concerned with the existing condition but that he wanted to make sure that the condition would not worsen, and that he would therefore like to have an engineer inspect the property. Defendant replied that, anticipating that such a question might be raised, he had had an engineer, Mr. Piatt, make an inspection and report. Defendant thereupon showed plaintiffs that report. The report dated November 6, 1953, stated that the house is in excellent condition, that the ground structure is good and "such movement as there may be is minor in amount and does not threaten the structural safety of the building." The report further states that "* * * when the time comes when the accumulated distortion would make repairs imperative, the cost of such repairs will be a minimum. So far as I can see this will not be required for another twenty years * * *." The following day, November 29, 1953, plaintiffs signed a contract of sale and in January 1954, they moved into the house. About two weeks later, during a rainstorm, a crack appeared in the fireplace which gradually widened to about 2 inches. Later the house pulled away from the steps. Both chimneys in the house developed cracks. Cracks also developed in the dining room and basement.

[1] In September of 1956, plaintiffs learned that prior to the Piatt report defendant had had another engineer's inspection and report made by one Paul A. Swafford. When asked by plaintiffs about this report defendant said he could remember no one by the name of Swafford. Later he admitted knowledge of the report. The

Swafford report was based on an inspection made in April 1953. In his report, Mr. Swafford says that, "Eventually, the house will become uninhabitable and valuless [sic]." And further that, "With the present and continuing settlement the lot is of no value." Defendant was duty bound to make known to plaintiffs the contents of the Swafford report.

Pashley v. Pacific Elec. Ry. Co., 25 Cal.2d 226, 235, 153 P.2d 325, 330 quotes with approval the following statement from 12 R.C.L. § 71, p. 310: "Even though one is under no obligation to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells but also not to suppress or conceal any facts within his knowledge which will materially qualify those stated. If he speaks at all he must make a full and fair disclosure."

At the trial Mr. Gilbert testified that he would not have bought the property had he then known of the Swafford report. He also testified that he was not familiar with either the real estate business or the construction business.

Defendant contends that one of the essential elements of actionable fraud, to wit, a misrepresentation or concealment of a material fact, is absent in this case. He asserts that the Swafford report is merely the expression of an opinion regarding the subject property and not a representation of fact. The contention is clearly without merit. While Mr. Swafford did, of course, express an opinion regarding the property, yet, it is a matter of fact and not opinion that he inspected the property and that he made a report of his inspection, and it is also a matter of fact that he gave an opinion on the condition of the property. This contention of defendant is best answered in the language of the Supreme Court in French v. Freeman, 191 Cal. 579, 217 P. 515, a fraud case in which the facts were essentially similar to those of the instant case. The court there said in 191 Cal. at page 586, 217 P. at page 517, "Furthermore, the misrepresentations of the defendant relative to the character of this land were based upon the further statement that the soil had been analyzed, and that such analysis showed the land to be of the character represented, and fitted for the production of pears. And it is well established that a statement of what might otherwise be an opinion, if based on alleged facts, is a statement of fact and not a statement of an opinion."

[2] The French case also disposes of defendant's further contention that plaintiffs did not rely on the Piatt report and were not misled by the concealment of the Swafford report because they made their own inspection of the property before contracting to purchase it. In the French case the court said in 191 Cal. at page 587, 217 P. at page 518, "It is apparent that a vendee who actually knew the character of the soil on the land which he inspected would not be heard to say that he relied upon the statements of the vendor; but, where it is shown that the vendee was unacquainted with soils, the fact that he visited the land does not preclude him from saying that he relied upon the vendor's statements." As we have seen above, Mr. Gilbert was not familiar with either the real estate business or the construction business. He was sales manager for a concern that manufactured conveyor belts. Moreover, that he was unfamiliar with the qualities of soil, and that he was not relying upon his own inspection, is demonstrated by the fact that he, prior to the purchase, told defendant that he wanted an engineer's report.

[3–5] Finally, defendant argues that there was no proof of damages. The purchase price of the property was $17,500. Lester G. Brown, a real estate appraiser who testified on behalf of plaintiffs and who was the only witness who testified to value, stated that in his opinion the property had reasonable market value of $8,750 as of the date of purchase. (The jury returned a verdict of $6,500 damages.) Mr. Brown, in arriving at his valuation figure, placed a life expectancy of ten years on the house. Defendant contends that Mr. Brown was not qualified to testify as an expert on the life expectancy of houses and that therefore his opinion of the market value of the subject property must be entirely disregarded. This contention is wholly devoid of merit. Mr. Brown had been a real estate broker and appraiser for almost 20 years. He was familiar with the neighborhood. He had inspected the subject property. He had investigated sales of other property similarly situated in the slide areas of the Berkeley hills. He examined the condition of other properties similarly situated. It was upon these competent factors that he predicated his opinion of the life expectancy of the house. Moreover, defendant did not, at the trial, question Mr. Brown's qualifications or object to his giving his opinion on the subject of life expectancy. Having failed to so object, defendant cannot now question his competency. 19 Cal.Jur.2d, p. 22.

The judgment is affirmed.

DOOLING, Acting P. J., and DRAPER, J., concur.

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171 Cal.App.2d 41

Virginia H. COOROUGH, Plaintiff and Appellant,

v.

Alice DE LAY and Vince Dundee, Jr. Defendants and Respondents.

Civ. 23187.

District Court of Appeal, Second District, Division 1, California.

June 2, 1959.

Action for personal injuries suffered by plaintiff in course of being ejected by defendant cocktail waitress from barroom owned and operated by other defendant. Defendants pleaded provocation and use of reasonable force. The Superior Court of Los Angeles County, Philbrick McCoy, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Lillie, J., held that evidence sustained jury's implied finding that only reasonable force had been used to accomplish plaintiff's expulsion from premises.

Affirmed.

1. Appeal and Error ⚷930(4)

Implicit in general verdict is presumption that all material facts in issue as to which substantial evidence was received were determined in a manner consistent and in conformance with verdict.

2. Assault and Battery ⚷44

In action for personal injuries suffered by plaintiff in course of being ejected by defendant cocktail waitress from barroom owned and operated by other defendant, wherein defendants pleaded provocation and use of reasonable force, jury impliedly found, by verdict for defendants general in form, that no unreasonable force had been used.

3. Assault and Battery ⚷42

Trier of facts must determine from circumstances of each case whether more than reasonable force was used to protect personal property.

4. Appeal and Error ⚷989

Where evidence is in conflict, it is not province of reviewing court to analyze or resolve those conflicts.

5. Assault and Battery ⚷35

In action for personal injuries suffered by plaintiff in course of being ejected by defendant cocktail waitress from barroom owned and operated by other defendant, wherein defendants pleaded provocation and use of reasonable force, evidence sustained jury's implied finding that only reasonable force had been used to accomplish plaintiff's expulsion from premises.

6. Intoxicating Liquors ⚷116

Proper operation of place of public accommodation requires maintenance of peace and good order upon premises, and this principle is particularly applicable to barrooms or places where intoxicants are served; and proprietors of such places owe a legal duty to protect business invitees from acts of third persons.

7. Appeal and Error ⟹1001(1)

In action for personal injuries suffered by plaintiff in course of being ejected by defendant cocktail waitress from barroom owned and operated by other defendant, wherein defendants pleaded provocation and use of reasonable force, reviewing court, finding sufficient support in evidence for implied finding that only reasonable force had been used to accomplish plaintiff's expulsion from premises, could not reverse judgment entered on verdict general in character even if there was evidence establishing that waitress had been acting within scope of her employment.

8. Appeal and Error ⟹882(14)

Having herself submitted instruction propounding interrogatory calling for determination by jury as to whether alleged assault and battery upon plaintiff had been within scope of employment of defendant's servant, plaintiff could not successfully urge on appeal that court should have instructed as a matter of law that servant's conduct was to be deemed to have been that of her employer.

9. Master and Servant ⟹331

Unless employer personally participated in wrongful acts, or previously authorized them, or subsequently ratified employee's acts with full knowledge of facts, he is not liable in exemplary damages.

10. Appeal and Error ⟹1068(4)

Where jury returns verdict in favor of defendant on main issue, errors in instructions bearing solely on amount of damages present no ground for reversal.

11. Appeal and Error ⟹928(1)

Reviewing court would have to assume that damages instruction could not have influenced a verdict for defendants which was rendered less than an hour after jury commenced its deliberations.

Joseph H. Bradley, Burbank, Wm. H. Neblett, Los Angeles, for appellant.

Veatch, Thomas & Carlson, Henry F. Walker, Los Angeles, for respondents.

LILLIE, Justice.

On June 3, 1956, plaintiff suffered personal injuries in the course of being ejected by defendant, Alice DeLay, a cocktail waitress, from a barroom owned and operated by defendant Vince Dundee, Jr. in the city of Glendale. Compensatory and punitive damages were sought for the alleged assault and battery, and the jury returned a general verdict in favor of both defendants. Plaintiff's motion for a new trial was denied. On this appeal from the judgment entered on the jury verdict, plaintiff challenges the sufficiency of the evidence as a matter of law to sustain the jury's implied finding that reasonable force was used to accomplish her expulsion from the premises; and claims reversible error in the giving and refusal of certain instructions.

As is our duty, we recount the evidence in the light most favorable to the respondents and indulge all intendments and reasonable inferences which favor the sustaining of the trier of fact (Berniker v. Berniker, 30 Cal.2d 439, 444, 182 P.2d 557). Such evidence discloses that between 10:15 and 10:30 on the evening of June 2, 1956, appellant, unescorted, entered Vince Dundee's Cafe and took a seat at the bar. Immediately prior to her appearance there, she had spent more than an hour at a nearby drinking establishment where, with certain friends, she admitted consuming three whiskey highballs. At Dundee's, according to her testimony, appellant had two more drinks (the last only partly consumed); whether influenced by the environment or the liquid refreshments, or both, she proceeded during the course of the evening to do several impromptu solo dances near the piano and tables occupied by other patrons. Her attire at this time requires comment: she wore tight-fitting pants, variously described by witnesses as "toreadors," "capri slacks," and "pedal pushers," and a black short-sleeved blouse. Also requiring comment is the description given these solo dances by several witnesses: "obscene," "pretty filthy," "lewd," and "a cheap imitation of a low-down carnival hoochie-coochie."

The attention of respondent DeLay to appellant's activities was first directed by a woman patron seated at a table, who objected to appellant "doing this obscene dance in front of her husband." DeLay then asked appellant to return to her seat at the bar and stop dancing, but appellant refused.

One witness stated that appellant did some "swinging" at DeLay, but he could not recall if the latter was struck. A short time later appellant approached the table occupied by this witness and his wife. She stopped, turned her back to the couple and proceeded to "gyrate again" about six inches from the man's face. As respondent DeLay was approaching with a tray of drinks appellant attempted to strike her, whereupon a male patron led her back to her seat at the bar. On the way she stopped him and exclaimed: "Let me at that bitch." He and his wife then left the premises.

A few minutes later, appellant repeated her impromptu performance at the table of the first woman patron who then demanded that appellant "get away" or she would "throw her out." She made this same demand to respondent DeLay, telling her that if she "didn't do something about it, she would."

At this juncture, as often happens, the evidence is in sharp conflict. Appellant states that DeLay applied a hammer lock, forced her to the landing platform at the entrance, slashed her right arm with some metal instrument and then knocked her down the three or four steps leading to the sidewalk. Denying that she twisted appellant's arm, DeLay testified that she escorted appellant to the door, where appellant slapped her and again refused to leave; that thereupon she "let her right out the door and pulled the door shut and went about my (her) business," adding that as she returned to her work she saw appellant through the glass door and the latter was standing up—swearing and screaming. More disinterested witnesses testified to some hair pulling and scuffling within the room; none however could corroborate appellant's claims concerning the incident on the landing platform.

About twenty minutes later, DeLay next saw appellant seated at a table in the alcove of the barroom. She had returned, she testified, to ascertain the reason for her removal from the premises. Neither had spoken to the other when the cafe closed at 2:00 a. m.

Respondent Dundee, DeLay's employer, was not present at any time on the evening in question. His liability for compensatory damages was sought on the basis of respondeat superior; and the claim against him for punitive damages stemmed from his retention of DeLay in his service as a cocktail waitress, assertedly being a ratification of her acts.

Although conceding it to be "Hornbook law that a person may use reasonable and necessary force to protect his person and property," appellant nevertheless argues that the force here used was such that a reasonable person would not have exercised under the circumstances. She urges that DeLay had only to call the manager or bartender to accomplish this mission or should have resorted to peaceable persuasion coupled with the patience expected of people in the business of dispensing refreshments which cause some of their invitees to lose their inhibitions. Attention is also directed to the fact that appellant was bruised and battered, whereas DeLay escaped unscathed; this in itself, appellant contends, would indicate that an unnecessary amount of force was used. She cites such cases as Griswold v. Hollywood Turf Club, 106 Cal.App.2d 578, 235 P.2d 656; Haworth v. Elliott, 67 Cal.App.2d 77, 153 P.2d 804 and Tomblinson v. Nobile, 103 Cal.App.2d 266, 229 P.2d 97, all of which hold that actions of this type are secure from appellate interference where there is substantial evidence that unreasonable force was used on the invitee. The cases cited, however, are factually dissimilar, either because the conflict in testimony related to immaterial details (Griswold v. Hollywood Turf Club) or because there was no room for argument about the use of such force.

[1-4] As heretofore noted, the jury's verdict was general in character. Implicit in such verdicts is the presumption that "all material facts in issue as to which substantial evidence was received were determined in a manner consistent and in conformance with the verdict" (Elliott v. Rodeo Land & Water Co., 141 Cal.App.2d 404, 411, 297 P.2d 129, 133). Since both respondents affirmatively pleaded provocation by appellant and the use of reasonable force to remove her from the cafe, we must assume that the jury impliedly upheld their claims on those issues. Furthermore, it is well settled that the trier of fact must determine from the circumstances of each case whether more than reasonable force was used (Landegren v. Quilici, 52 Cal.App.2d 213, 216, 126 P.2d 141; Haeussler v. De Loretto, 109 Cal.App.2d 363, 364, 240 P.2d 654; See v. Grandview Gardens, 136 Cal. App.2d 618, 619, 289 P.2d 48). Where the evidence is in conflict, it is not the province of a reviewing court to analyze or resolve those conflicts (See v. Grandview Gardens, supra, 136 Cal.App.2d 619, 289 P.2d 49).

[5, 6] In the light of the foregoing rules, we are not persuaded that the jury's determination is without substantial support. The proper operation of places of public accommodation requires the maintenance of peace and good order upon the premises—this principle, we need hardly add, is particularly applicable to barrooms or places where intoxicants are served. Too, a legal duty is owed by their proprietors to protect business invitees from the acts of third persons, and this duty includes the "taking (of) appropriate measures to restrain conduct by (such) third persons which he should be aware of and which he should realize is dangerous" (Edwards v. Hollywood Canteen, 27 Cal.2d 802, 810, 167 P.2d 729, 733).

The power of control would be completely anemic without the power of expulsion lawfully accomplished; furthermore, no valid distinction can logically be made between acts which may cause physical harm and those which affront the proprieties. It has been declared that the proprietor of a public tavern may not eject a member of the public of lawful age as long as he is acting "properly" or "except for good cause" (Stoumen v. Reilly, 37 Cal.2d 713, 716, 234 P.2d 969, 971). One or more of the women patrons present testified that appellant's behavior was "personally offensive"; without narration of further details, no other reaction would seem possible, since it is not suggested that the cafe in question was one frequented by persons of questionable morals and tastes.

[7, 8] In view of our conclusion that there is no lack of evidentiary support for the jury's implied finding, we give but brief attention to appellant's additional claim that DeLay must have been acting within the scope of her employment and that her acts were imputable to her employer. She relies on Hiroshima v. Pacific Gas & Electric Co., 18 Cal.App.2d 24, 63 P.2d 340; Perry v. Washington National Ins. Co., 14 Cal.App.2d 609, 58 P.2d 701, 59 P.2d 158; Andrews v. Seidner, 49 Cal.App.2d 427, 121 P.2d 863, and cases from other jurisdictions for the general proposition that a master is liable for the wilful and malicious acts of his servant when the latter makes an assault upon a third person as a result of a quarrel which immediately grew out of the performance of his duties. But the insurmountable difficulty with appellant's argument lies in the fact that in the matter here under consideration the jury impliedly found that no assault was committed, thus rendering academic any discussion of the refinements which are said to control.

It is next urged that the trial court committed errors of law prejudicial to appellant in the giving and refusal to give certain instructions. In that regard, it is first asserted that the court erred in declining to instruct that as a matter of law the conduct of DeLay was to be deemed to have been the conduct of Dundee, her employer. We must again point out that the jury's verdict being general in form or character, it impliedly found that no unreasonable force was used by DeLay; accordingly, there was nothing in such conduct which, if imputed to Dundee, could have rendered him liable therefor. In De La Torre v. Johnson, 203 Cal. 374, 264 P. 485, the trial court directed a verdict in favor of Johnson, the defendant employer, and the jury, of its own accord, found in favor of defendant Smith, the employee. The Supreme Court concluded that the verdict as to Smith had substantial support and declared in the closing paragraph of its opinion (203 Cal. at page 379, 264 P. at page 487): "These views render it unnecessary to pass upon the * * * propriety of directing a verdict in favor of the deceased defendant W. P. Johnson, for his alleged liability is predicated solely upon the doctrine of respondeat superior." Similar reasoning was applied in Stickel v. San Diego Electric Ry. Co., 32 Cal.2d 157, 167, 195 P.2d 416. Furthermore, appellant is in no position to complain because she herself submitted an instruction (Plaintiff's Instruction No. 8), refused as covered by other instructions given, which propounded interrogatories calling for a determination by the jury as to whether (1) an assault and battery were committed on appellant's person by DeLay and (2) whether such assault and battery were within the scope of her employment by Dundee. Since the trial court gave B. A. J. I. No. 54 (contested issue as to agency) with certain modifications, the situation is akin to that in Redfoot v. J. T. Jenkins Co., 138 Cal.App.2d 108, 291 P.2d 134, where plaintiff-appellant requested two conflicting instructions on one subject. Both were refused, but the trial court read an instruction offered by the respondent which agreed in principle with one of the two requested by appellant. Quoting from Jansen v. Southern Pacific Co., 112 Cal.App.2d 833, 247 P.2d 581, the court said (138 Cal.App.2d at page 114, 291 P.2d at page 136): "It is well established that 'A party cannot complain of an instruction given at his own request or of an error in an instruction given at the instance of his adversary, when he requests a substantially similar one'". We agree with respondents that the doctrine of invited error is here applicable.

[9–11] Finally, appellant contends that the trial court erred to her prejudice in instructing the jury that punitive damages could not be assessed against Dundee regardless of the right to such an award from DeLay. Unless an employer personally participates in the wrongful acts, or previously authorized them, or subsequently ratifies the employee's acts with full knowledge of the facts, he is not liable in exemplary damages (Deevy v. Tassi, 21 Cal.2d 109, 125, 130 P.2d 389). Here the sole question related to Dundee's ratification of his codefendant's conduct. Respondents rely on Edmunds v. Atchison, T. & S. F. Ry. Co., 174 Cal. 246, 250, 162 P. 1038, to the effect that a prospective plaintiff should do more than merely notify the principal of his claim—he should also acquaint him with the facts and thus give the employer an opportunity to redress the wrong. The Edmunds case is cited in McChristian v. Popkin, 75 Cal.App.2d 249, 256, 171 P.2d 85, although this court there affirmed an award of punitive damages and held that appellant-employers had ample opportunity to learn of their employee's conduct and continued him in their service without making an investigation or attempting to redress the wrong. However, as in the previous point raised by appellant, extended discussion of the present problem would be purely academic. It has been settled law for many years that where a jury returns a verdict in favor of the defendant on the main issue, errors in instructions bearing solely on the amount of damages present no ground for reversal. Wilhelm v. Donegan, 143 Cal. 50, 53–54, 76 P. 713; Cook v. Los Angeles Ry. Corp., 169 Cal. 113, 115, 145 P. 1013; Church v. Payne, 36 Cal.App.2d 382, 401, 97 P.2d 819; De La Torre v. Johnson, supra, 203 Cal. 378, 264 P. 487. In the present state of the record, we must assume that the instruction complained of, though possibly subject to criticism, could not have influenced a verdict which was rendered, as in this case, less than an hour after the jury commenced its deliberations.

No reversible error being manifest, the judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

170 Cal.App.2d Supp. 817

PEOPLE of the State of California, Plaintiff and Respondent,
v.
Domenic CONTERNO, Defendant and Appellant.
Cr. A. 3981.

Appellate Department, Superior Court, Los Angeles County, California.
April 30, 1959.

As Corrected June 15, 1959.

Defendant was convicted in the Municipal Court of the Los Angeles Judicial District, Elisabeth Eberhard Zeigler, J., for driving while under the influence of intoxicating liquor and for driving without having in possession and displaying upon demand a valid license, and he appealed. The Appellate Department, David, J., held that defendant had no constitutional right to refuse to take intoximeter test at time of his arrest.

Affirmed.

1. Criminal Law 🔑1114(3)

Sufficiency of evidence to support verdict and judgment was not an issue, where appellant failed to bring evidence before reviewing court, either by settled statement or reporter's transcript.

2. Constitutional Law 🔑268

Comment upon, and consideration of, defendant's failure to explain or deny evidence in case against him in state court does not violate Fifth or Fourteenth Amendments to Federal Constitution. West's Ann.Const. art. 1, §§ 13, 19; U.S.C.A.Const. Amends. 5, 14.

3. Criminal Law 🔑304(1)

Court took judicial notice that intoximeter or breath analysis test for alcoholic intoxication was frequently called by laymen a "balloon test", due to use of small rubber balloon to collect breath sample.

See publication Words and Phrases, for other judicial constructions and definitions of "Balloon Test".

4. Criminal Law 🔑304(1)

The methods and characteristics of test to determine quantity of blood alcohol are matters of judicial notice.

5. Criminal Law 🔑388

Intoxication is not proportional to amount of alcohol consumed, but to rate and amount of its absorption into blood, and percentage of such absorption fixes degree of loss of physical control which characterizes intoxication; but test to determine quantity of blood alcohol does not declare guilt or innocence, or even fact of intoxication, which still is to be determined from testimony of experts interpreting test. West's Ann.Vehicle Code, § 502.

6. Automobiles 🔑353, 355(6)

Results of blood alcohol test are to be weighed and considered with all other evidence by jury; and even where state has adopted certain alcoholic blood content figures as basis for presumptions as to intoxication, such presumptions are not conclusive. West's Ann.Vehicle Code, § 502.

7. Criminal Law 🔑393(1)

Only testimonial compulsion is within purview of privilege against self-incrimination under California constitution, and California constitution does not provide privilege not to take tests at request of arresting officers. West's Ann.Const. art. 1, § 13.

8. Criminal Law 🔑393(1)

Evidence produced as result of physical examination of prisoner to determine his condition, made without his consent, does not violate California constitutional provision against self-incrimination. West's Ann.Const. art. 1, § 13.

9. Criminal Law 🔑393(1), 486

Expert testimony, based upon analysis of bodily fluids or breath made from samples taken without consent of defendant, is admissible in evidence, and constitutional privilege afforded by California constitution, supplemented by Penal Code section, is not violated. West's Ann.Const. art. 1, § 13; West's Ann.Pen.Code, §§ 688, 1323, 1323.5.

10. Criminal Law 🔑393(1)

Defendant under lawful arrest does not have right, under California constitution, to decline to take blood alcohol test, properly administered, and no federal constitutional right is violated. West's Ann. Const. art. 1, §§ 13, 19.

11. Searches and Seizures 🔑7(1)

Taking of a sample of blood or breath for blood alcohol test, incident to lawful arrest, does not constitute an unlawful search or seizure, under California constitution. West's Ann.Const. art. 1, §§ 13, 19.

12. Automobiles 🔑357
Criminal Law 🔑1172(1)

In prosecution for driving while under influence of intoxicating liquor, it was error to instruct that defendant did not have to take sobriety tests; but such error was not prejudicial to defendant.

13. Criminal Law 🔑388

Officer administering blood alcohol test to arrested person need not inform him that results may be used against him.

14. Constitutional Law 🔑266
Searches and Seizures 🔑7(1)

The making of blood alcohol tests without consent of person under arrest does not violate either Fourth or Fifth Amendments to the Federal Constitution. U.S.C. A.Const. Amends. 4, 5.

15. Constitutional Law 🔑266

The Fifth Amendment to the Federal Constitution does not extend to use of defendant's body as real or physical evidence. U.S.C.A.Const. Amend. 5.

16. Constitutional Law 🔑266

Even if compulsion is used, admission in evidence of results of test does not deny due process of law unless physical means used were violent and brutal, shocking and revolting to civilized conscience, or unless defendant was so terrorized that to admit evidence would make mockery and pretense of fair trial. U.S.C.A.Const. Amend. 5.

17. Arrest 🔑70

As incident to otherwise lawful arrest, person may be required to take intoximeter test.

18. Criminal Law 🔑388

It is no bar to reception in evidence of results of intoximeter test, administered to defendant at time of his arrest, that he took test only because he was afraid that if he refused to do so he would be made to take it.

19. Criminal Law 🔑393(1)

In prosecution for driving while under the influence of intoxicating liquor, court properly denied motion to bar receipt of evidence of defendant's refusal to take blood alcohol test upon his arrest.

20. Criminal Law 🔑317, 721½(1)

Under constitution provision permitting comment upon, and consideration of, defendant's failure to explain or deny any evidence or facts in case against him, question of probative value is to be resolved in first instance by trial judge, upon all of circumstances of case. West's Ann.Const. art. 1, § 13.

21. Criminal Law 🔑393(1)

There must be some proof of commission of crime, prima facie, established by other evidence, before any evidence as to refusal to take intoximeter test becomes admissible.

22. Criminal Law 🔑361(3)

In prosecution for driving while under influence of intoxicating liquor, defendant was entitled to explain why he declined to take intoximeter test, and jury was entitled to weigh his credibility as to explanation.

23. Criminal Law 🔑1173(2)

By refusing intoximeter test, defendant, in effect, refused to produce evidence which would bear materially on condition for which he was arrested, and in absence of showing that defendant had, at time request to take test was made, declared that he was not guilty of driving while under influence of intoxicating liquor, it was not prejudicial error to refuse categorical instruction that no inference of guilt attached to defendant by reason of his refusal to take test.

24. Criminal Law 🔑317

Constitutional provision, for consideration of defendant's failure to explain or deny any evidence or facts in case against him makes applicable to criminal cases established rule that failure to produce evidence in power of party to produce, material to facts in issue, permits inference that such evidence would be adverse. West's Ann.Const. art. 1, § 13.

25. Criminal Law 🔑317

Where there is prima facie evidence of defendant's intoxication, evidence of his refusal to take intoximeter test may, in absence of explanation legally sufficient or satisfactory to jury, be considered as tending to indicate truth of other evidence in case upon subject of defendant's intoxication, and as indicating, among inferences that may be reasonably drawn therefrom, that those unfavorable to defendant are the more probable. West's Ann.Const. art. 1, § 13.

26. Criminal Law 🔑317

Failure to deny or explain incriminating testimony does not constitute admission of its truth, but is merely circumstance to be considered by jury as tending to indicate truth of culpatory evidence not denied or explained. West's Ann.Const. art. 1, § 13.

27. Criminal Law 🔑317

Any inference arising from refusal of defendant to submit to intoximeter test may not be used to supply a lacuna in prosecution's proof, in drunk driving case. West's Ann.Const. art. 1, § 13.

28. Witnesses 🔑277(1)

Defendant who voluntarily took stand was competent witness, and he thereby opened door for questions. West's Ann. Pen.Code, § 1323.

29. Witnesses 🔑277(1)

When a defendant takes stand and makes general denial of crime charged, permissible scope of cross-examination is very wide. West's Ann.Pen.Code, § 1323.

30. Criminal Law 🔑317

Whether or not inference arises from testimonial silence, induced by arrest, fear, pain, physical suffering, advice of counsel, admonition as to silence, warning against self-incrimination, a belief that silence will best serve his interests, or other physical or mental pressure, involves consideration of all the circumstances. West's Ann.Pen. Code, § 1323.5; West's Ann.Const. art. 1, § 13.

31. Criminal Law 🔑721½(1)

Having taken stand, defendant cannot omit to explain any incriminating circumstances without inviting comment and consideration of those circumstances. West's Ann.Pen.Code, §§ 688, 1323, 1323.5; West's Ann.Const. art. 1, § 13.

32. Criminal Law 🔑673(1)

Admission of evidence of defendant's refusal to take intoximeter test at time of his arrest calls for careful instructions to jurors as to use that they may make of such evidence. West's Ann.Pen.Code, §§ 688, 1323, 1323.5; West's Ann.Const. art. 1, § 13.

33. Criminal Law 🔑1172(1)

In prosecution for driving while under influence of intoxicating liquor, no right of defendant was prejudiced when court instructed that jurors should not speculate as to what might have been result of sobriety test, if one had been taken.

34. Criminal Law 🔑1186(4)

Even if rulings of court, as to effect of refusal to take intoximeter test, were erroneous, conviction for driving while under unfluence of intoxicating liquor would have to be affirmed, in absence of showing that evidence had been so conflicting or uncertain as to create a doubt of guilt of defendant, exclusive of evidence relative to his refusal to take test. West's Ann.Const. art. 6, § 4½.

35. Criminal Law 🔑1163(1)

The burden of showing unfairness and miscarriage of justice rests upon appellant, and it must be sustained not as a matter of speculation but as a demonstrable reality. West's Ann.Const. art. 6, § 4½.

Morris Lavine, Los Angeles, for appellant.

Roger Arnebergh, City Atty., Philip E. Grey, Asst. City Atty., William E. Doran, Deputy City Atty., Los Angeles, for respondent.

DAVID, Judge.

The jury's verdict declared defendant Conterno guilty of violation of California Vehicle Code, sec. 502: "It is unlawful for any person who is under the influence of intoxicating liquor to drive a vehicle upon any highway * * *"; and upon a second count of the complaint, found that he was guilty of operating a vehicle upon a public highway without having in his possession and displaying upon demand a valid license, etc., in contravention of Vehicle Code, sec. 274, subd. (b).

The judgment of the court was that the defendant on the first count should pay a fine in the sum of $250, suspended on condition that $125 of the fine be paid or that 25 days be served, and on condition that defendant should not drive without a valid license; with the usual alternatives of imprisonment if the fine should not be paid; and upon the second count, that he should pay a fine in the sum of $10, payment suspended. The defendant appeals from this judgment.

[1] Although the insufficiency of the evidence to support the judgment is urged, particularly in reference to the second count of the complaint, the appellant has not brought the evidence before us, either by settled statement or reporter's transcript. The sufficiency of the evidence to support the verdict and the judgment is therefore not in issue, and we must affirm the judgment in relation to the second count. We therefore turn our attention to the first count.

When arrested, the defendant was requested by the arresting officer to give a breath sample for the intoximeter test, and refused. The settled statement on appeal states: "The defendant testified that he refused an intoximeter test on the ground that the giving of the test was a violation of his constitutional rights. The defendant objected on constitutional grounds to testifying to any facts regarding the giving of or refusal to take the intoximeter test. The objection was overruled."

Appellant claims in the statement on appeal that: "The court erred in admitting evidence that the defendant stood on his constitutional rights in refusing to take a balloon test and in using the fact of refusal to incriminate himself as a basis for conviction."

Upon this appeal, defendant Conterno asserts that the trial court also committed prejudicial error in its refusal to instruct the jury that:

> "(No. 1) You are instructed that no inference of guilt attaches to the defendant by reason of his refusal to take any so-called sobriety tests.
>
> "(No. 3) You are instructed that a person has a constitutional right to refuse to take any tests at the request of officers arresting him and no inference of wrongdoing may be had by you from such refusal, if one occurred."

The court did instruct:

> "(No. 4) You are instructed you may not speculate as to what might have been the result of a sobriety test, if one had been taken."
>
> "(No. 8) You are instructed that the defendant did not have to take any sobriety tests."

No other instructions bearing upon the subject matter were offered or given.

Which constitutional rights he had in mind when he refused the test or made his objection at time of trial are not specified. We will assume that these are California Constitution, Art. I, secs. 13 and 19 as urged in the briefs. California Constitution, Art. I, sec. 13, provides in part: "No person shall be * * * compelled, in any criminal case, to be a witness against himself; * * * but in any criminal case, whether the defendant testifies or not, his failure to explain or deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury."

[2] Such right of comment upon, and consideration of, a defendant's failure to explain or deny evidence in the case against him does not violate the Fifth or Fourteenth Amendments. Adamson v. People of State of California, 1947, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903, 171 A.L.R. 1223; affirming People v. Adamson, 1946, 27 Cal.2d 478, 165 P.2d 3.

California Constitution, Art. I, sec. 19, provides in part: "The right of the people to be secure in their persons * * * against unreasonable seizures and searches, shall not be violated; * * *".

[3] We take judicial notice that the intoximeter or breath analysis test for alcoholic intoxication is frequently called by laymen "a balloon test", due to the use of a small rubber balloon to collect the breath sample.

[4, 5] To determine the quantity of blood alcohol, samples of the bodily fluids such as blood, urine, saliva, or the human breath are analyzed. See People v. Kovacik, 1954, 205 Misc. 275, 128 N.Y.S.2d 492, 500 et seq. describing such tests.[1]

The scientific validity of such tests, when properly administered, is generally conceded. People v. Duroncelay, 1957, 48 Cal.2d 766, 772, 312 P.2d 690; cf. Lawrence v. City of Los Angeles, 1942, 53 Cal.App.2d 6, 8, 127 P.2d 931. Until the quantitative analysis is made and the results have been interpreted by an expert, it cannot be known whether the person from whom the breath or other sample was taken was or was not under the influence of intoxicating liquor, within the terms of Vehicle Code, sec. 502. "Nor should it be ignored that a test of this kind may serve to exonerate, as well as to convict." People v. Duroncelay, supra, 1957, 48 Cal.2d 766, 772, 312 P.2d 690, 694. Such testing may determine that an apparent impairment of a person's physical faculties is not due to alcohol, and that other medical aid is needed urgently; as in case of insulin shock, concussion of the brain from trauma, and the like. (Cf. State v. Shiren, 1951, 15 N.J. Super. 440, 83 A.2d 620, electro-encephalogram, to prove that "blackout" was not due to intoxication.) Both for the protection of the citizen who needs medical attention and the protection of the police officer against claims of false arrest, physical examinations to determine the cause of a citizen's apparent lack of physical coordination and control are important. Cf. circumstances of Wood v. Cox, 1935, 10 Cal.App. 2d 652, 52 P.2d 565.[2]

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[1] The methods and characteristics of such tests are matters of judicial notice. McKay v. State, 1951, 155 Tex.Cr.R. 416, 235 S.W.2d 173, 174; cf. Cortese v. Cortese, 1950, 10 N.J.Super. 152, 76 A.2d 717, blood test. It has become established that intoxication is not proportional to the amount of alcohol consumed, but to the rate and amount of its absorption into the blood. McKay v. State, supra, 235 S.W.2d 173, 174–175. The percentage of such absorption fixes the degree of loss of physical control which characterizes intoxication. Lawrence v. City of Los Angeles, 1942, 53 Cal.App.2d 6, 127 P.2d 931.

Consult also: State v. Koenig, 1949, 240 Iowa 592, 36 N.W.2d 765, 767; People v. Coppock, 1954, 206 Misc. 89, 133 N.Y.S.2d 174, 177, discussing the test and the adoption of the New York statute establishing the evidentiary effect of such tests, and providing for revocation of operator's licenses for refusal to take the test; People v. Kovacik, supra, 1954, 205 Misc. 275, 128 N.Y.S.2d 492, 500 et seq. describing the tests and setting out the New York statute; State v. Warren, 1953, 75 Ariz. 123, 252 P.2d 781, 782–783, describing the Harger test; Toms v. State, 1952, 95 Okl.Cr. 60, 239 P.2d 812; Natwick v. Moyer, 1945, 177 Or. 486, 163 P.2d 936, 939, holding the test is scientifically established; accord, State v. McQuilkin, 1948, 113 Utah 268, 193 P.2d 433, 436; State v. Moore, 1956, 245 N.C. 158, 95 S.E.2d 548, 550–551; State v. Libby, 1957, 153 Me. 1, 133 A.2d 877, 881; Stacy v. State, Ark.1957, 306 S.W.2d 852, 855, holding such test generally approved judicially. cf. Smith v. Mott, Fla.1958, 100 So.2d 173, 176, results of test as official or business records; also, Nichols v. McCoy, 1951, 38 Cal.2d 447, 448–449, 240 P.2d 569, test results covered by business record statute.

The test itself does not declare guilt nor innocence, nor the fact of intoxication, which still is to be determined by the testimony of experts interpreting the test. People v. Tucker, 1948, 88 Cal.App.2d 333, 339, 198 P.2d 941; People on Complaint of Meehan v. Spears, 1952, 201 Misc. 666, 114 N.Y.S.2d 869, 870. The test and the evidence founded upon it may protect the innocent (Toms v. State, supra, 95 Okl.Cr. 60, 239 P.2d 812, 817), and the reports reflect occasions where it has done so. As in State v. Ayres, 1949, 70 Idaho 18, 211 P.2d 142; cf. Macon Busses, Inc. v. Dashiell, 1945, 73 Ga.App. 108, 35 S.E.2d 666, 670.

[6] Where the test is given the results are to be weighed and considered with all other evidence by the jury (People v. Tucker, supra, 88 Cal.App.2d 333, 339, 198 P.2d 941), and even where a state has adopted certain alcoholic blood content figures as the basis for presumptions as to intoxication, such presumptions are not conclusive. Trimble v. City of New York, 1949, 275 App.Div. 169, 88 N.Y.S.2d 324.

I.

[7] The trial court properly refused to give defendant's proposed instruction No. 3, which declared in part: "You are instructed that a person has a constitutional right to refuse to take any tests at the request of officers arresting him * * *."

A. There is no constitutional privilege under California Constitution, Art. I, sec. 13.

It has long been the law in this state that only testimonial compulsion is within the purview of the privilege against self-incrimination under California Constitution, Art. I, sec. 13. People v. Trujillo, 1948, 32 Cal.2d 105, 112–113, 194 P.2d 681, certiorari denied Woodmansee v. People of State of California, 335 U.S. 887, 69 S.Ct. 236, 93 L.Ed. 426; People v. Robarge, 1953, 41 Cal.2d 628, 632–633, 262 P.2d 14; People v. Chapman, 1957, 151 Cal.App.2d 59, 63, 311 P.2d 190. Handwriting exemplars: People v. Harper, 1953, 115 Cal.App.2d 776,

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[2] By adoption of the Uniform Vehicle Code provisions, some 23 or more states have officially adopted the results of such tests as prima facie evidence in traffic cases, and the adoption of such legislation is now before the California legislature.

People v. Kovacik, supra, 205 Misc. 275, 128 N.Y.S.2d 492, 500, under the uniform statute as adopted in New York, discussing the tests; Mattingly v. Eisenberg, 1955, 79 Ariz. 135, 285 P.2d 174, citing Lawrence v. City of Los Angeles, 1942, 53 Cal.App.2d 6, 127 P.2d 931; Alexander v. State, Okl.Cr.1956, 305 P. 2d 572, 585–588.

Applying the uniform statute as adopted in other states: cf. State v. Bock, Idaho 1958, 328 P.2d 1065; Schacht v. State, 1951, 154 Neb. 858, 50 N.W.2d 78; State v. Chabot, 1957, 152 Me. 348, 129 A.2d 559; consult footnote 3, Breithaupt v. Abram, 1957, 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed.2d 448.

If a motorist suspected of intoxication refuses the blood test for alcohol, his license may be revoked, under the New York statute, Vehicle and Traffic Law, § 71–a. Combes v. Kelly, 1956, 2 Misc.2d 491, 152 N.Y.S.2d 934.

779, 252 P.2d 950; People v. Smith, 1952, 113 Cal.App.2d 416, 419, 248 P.2d 444; but cf. People v. Wignall, 1932, 125 Cal.App. 465, 13 P.2d 995. Consult Wigmore, Evidence (3rd Ed. 1940) sec. 2250, 2251, 2265; note, 171 A.L.R. 1144.

[8] Evidence produced as a result of a physical examination of a prisoner to determine his condition, made without his consent, does not violate constitutional provisions against self-incrimination. People v. One 1941 Mercury Sedan, 1946, 74 Cal. App.2d 199, 168 P.2d 443; Territory of Hawaii v. Chung Nung, 1912, 21 Haw. 214, 219; Skidmore v. State, 1939, 59 Nev. 320, 92 P.2d 979, 982; O'Brien v. State, 1890, 125 Ind. 38, 25 N.E. 137, 139, 9 L.R.A. 323.

[9] Expert testimony, based upon the analysis of bodily fluids or breath made from samples taken without the consent of the defendant, is admissible in evidence. The constitutional privilege afforded by California Constitution, Art. I, sec. 13, supplemented by Penal Code, secs. 688, 1323 and 1323.5, is not violated. People v. Duroncelay, supra, 1957, 48 Cal.2d 766, 312 P. 2d 690; People v. Haeussler, 1953, 41 Cal. 2d 252, 260 P.2d 8, certiorari denied Haeussler v. People, 347 U.S. 931, 74 S.Ct. 533, 98 L.Ed. 1082; People v. Tucker, 1948, 88 Cal.App.2d 333, 343–344, 198 P.2d 941; People v. Lewis, 1957, 152 Cal.App.2d 824, 830, 313 P.2d 972; cf. People v. One 1941 Mercury Sedan, supra, 1946, 74 Cal.App.2d 199, 202–214, 168 P.2d 443; accord, State v. Bock, supra, Idaho 1958, 328 P.2d 1065, 1067–1068, reviewing many authorities; Breithaupt v. Abram, 1957, 352 U.S. 432, 435, 77 S.Ct. 408, 1 L.Ed.2d 448, 450, affirming 58 N.M. 385, 271 P.2d 827; State v. Berg, 1953, 76 Ariz. 96, 259 P.2d 261; State v. Cram, 1945, 176 Or. 577, 160 P.2d 283, 164 A.L.R. 952; State v. Kroening, 1957, 274 Wis. 266, 79 N.W.2d 810, 80 N.W. 2d 816.

In Breithaupt v. Abram, supra, 1957, 352 U.S. 432, 435, 77 S.Ct. 408, 1 L.Ed.2d 448, affirming, Id., 58 N.M. 385, 271 P.2d 827, it was held there was no violation of due process under the Fourteenth Amendment in receiving in evidence an analysis of defendant's blood, taken from his veins while unconscious.

Statutes, such as Penal Code, secs. 688 and 1323, defining who is a competent witness, and excluding testimony of defendants not testifying with their own consent, have no relevancy here. The physical state of the defendant, and not his testimonial utterances, is concerned. Cf. State v. Bock, supra, Idaho 1958, 328 P.2d 1065, 1071.

[10] We now conclude that a defendant under lawful arrest does not have any constitutional right under California Constitution, Art. I, sec. 13, to decline such a test, properly administered; and that no federal constitutional right is violated (People v. Haeussler, supra, 1953, 41 Cal.2d 252, 260 P.2d 8, certiorari denied 347 U.S. 931, 74 S.Ct. 533, 98 L.Ed. 1082; accord, Breithaupt v. Abram, supra, 1956, 352 U.S. 432, 435, 77 S.Ct. 408, 1 L.Ed.2d 448, affirming Id., 58 N.M. 385, 271 P.2d 827, holding that there is no violation of the Fourteenth Amendment in receiving evidence of a test made with a blood sample taken from defendant while unconscious).

We think there is no substantial difference between obtaining a specimen of blood or breath from an accused under ordinary circumstances, and obtaining fingerprints or personal property, the possession of which is a pertinent issue in the charge against him (cf. Alexander v. State, supra, Okl. Cr.1956, 305 P.2d 572, 584), or requiring handwriting exemplars to be given, where the requirement for writing approaches even more closely the characteristic of the protected oral or written testimonial disclosures (cf. People v. Harper, supra, 1953, 115 Cal.App.2d 776, 779, 252 P.2d 950, and other cases cited, supra, on this point).

[11] B. The taking of a sample of blood or breath for such a test, incident to a lawful arrest, does not constitute an unlawful search or seizure, under California Constitution, Art. I, sec. 19. Chief Justice Gibson, speaking for the court in People v. Duroncelay, supra, 1957, 48 Cal.2d 766, at

page 772, 312 P.2d 690, 694, states in respect to the more stringent taking of blood for such tests: "The extraction of blood for testing purposes is, of course, an experience which, every day, many undergo without hardship or ill effects. When this fact, together with the scientific reliability of blood alcohol tests in establishing guilt or innocence, is considered in the light of the imperative public interest involved, the taking of a sample for such a test without consent cannot be regarded as an unreasonable search and seizure where, as here, the extraction is made in a medically approved manner and is incident to the lawful arrest of one who is reasonably believed to have violated section 501 of the Vehicle Code"; and also, at page 771 of 48 Cal.2d, at page 693 of 312 P.2d, "Where there are reasonable grounds for an arrest, a reasonable search of a person and the area under his control to obtain evidence against him is justified as an incident to arrest, and the search is not unlawful merely because it precedes, rather than follows, the arrest." So it is, when the violation is of Vehicle Code, sec. 502 (or 501) and the search is the gathering of breath in the balloon of an intoximeter in a reasonable manner. Cf. State v. Smith, 1952, 8 Terry 334, 47 Del. 334, 91 A.2d 188, 193, as to intoximeter; cf. People v. Morgan, 1956, 146 Cal.App.2d 722, 304 P.2d 138. Accord: State v. Berg, supra, 1953, 76 Ariz. 96, 259 P.2d 261, 263; State v. Bock, supra, Idaho 1958, 328 P.2d 1065; Alexander v. State, supra, Okl.Cr.1956, 305 P.2d 572.

In People v. One 1941 Mercury Sedan, supra, 1946, 74 Cal.App.2d 199, 203–214, 168 P.2d 443, it was held that material evidence secured by use of a stomach pump, where any apparent acquiescence was forced by the circumstances, was not barred by the California constitutional provisions. A finger probe of the rectum of a prisoner by a doctor, resulting in the forcible ejection of a rubber container holding narcotics, has been held not to be in violation of the prisoner's constitutional rights under California Constitution Art. I, sec. 13 (People v. Woods, 1956, 139 Cal.App.2d 515, 516–525, 293 P.2d 901).

In State v. Berg, 1953, 76 Ariz. 96, 259 P.2d 261, it appears that force was used to obtain a breath sample. At page 263 of 259 P.2d the court stated that the results of the test nevertheless were admissible, where the breath sample was forcibly taken over defendant's objection, if the force is used in capturing the exhaled breath after it passes the lips and nose of the defendant. In State v. Willard, 1954, 241 N.C. 259, 84 S.E.2d 899, 902, it was held that the fact that the blood sample was taken by a police chemist whom defendant thought to be a doctor was immaterial, since physical facts concerning one under arrest discovered by compulsion are admissible in evidence.

[12] We conclude that it was error to instruct that the defendant did not have to take any sobriety tests, but this was obviously not prejudicial to him.

[13] Since the privilege against self-incrimination is not involved, the officer administering the test need not inform the defendant that the result may be used against him. Heath v. State, 1952, 156 Tex.Cr.R. 563, 244 S.W.2d 815, 816.

[14, 15] C. The making of such tests without defendant's consent does not violate either the Fourth or Fifth Amendment to the United States Constitution. Adamson v. People of State of California, supra, 1947, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903, 171 A.L.R. 1223; Breithaupt v. Abram, supra, 1957, 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed.2d 448; State v. Berg, supra, 1953, 76 Ariz. 96, 259 P.2d 261, 266. The Fifth Amendment does not extend to the use of defendant's body as real or physical evidence (United States v. Nesmith, D.C.D.C. 1954, 121 F.Supp. 758, 762, urine supplied for use in blood alcohol test at direction of police officer; State v. Smith, 1956, 230 S.C. 164, 94 S.E.2d 886).

[16, 17] D. In making physical tests, it is elementary to due process that any compulsion used does not shock the civilized conscience by its excess. Rochin v. People

of California, 1951, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, 25 A.L.R.2d 1396; reversing People v. Rochin, 1950, 101 Cal. App.2d 140, 225 P.2d 1, 913.

Compulsory testing, as such as an incident to lawful arrest, is not in conflict with Rochin v. People of California, supra, 1951, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, deciding that brutal compulsion may be a denial of due process. In Breithaupt v. Abram, supra, 1957, 352 U.S. 432, 77 S.Ct. 408, 1 L.Ed.2d 448, wherein the taking of blood without consent for the purpose of such a test was concerned, the Rochin case is distinguished and explained. Even if compulsion is used, admission in evidence of the results of the test does not deny due process of law, unless the physical means used are violent and brutal, shocking and revolting to the civilized conscience; or unless the defendant is so terrorized that to admit the evidence would make mockery and pretense of fair trial. This is the interpretation of the Rochin case by the California courts. People v. Kiss, 1954, 125 Cal.App.2d 138, 142, 269 P.2d 924, citing People v. Kendall, 1952, 111 Cal.App.2d 204, 215, 244 P.2d 418; People v. Speaks, 1957, 156 Cal.App.2d 25, 41, 319 P.2d 709; People v. Hardin, 1955, 138 Cal.App.2d 169, 291 P. 2d 193; People v. Martinez, 1954, 130 Cal. App.2d 54, 278 P.2d 26. Accord: State v. Berg, supra, 1953, 76 Ariz. 96, 259 P.2d 261, 266; Alexander v. State, supra, Okla. Cr.1956, 305 P.2d 572, 582, 585; State v. Smith, supra, 1952, 8 Terry 334, 47 Del. 334, 91 A.2d 188; City of Barron v. Covey, 1955, 271 Wis. 10, 72 N.W.2d 387, 389. That some of the California cases were decided before the California Supreme Court adopted the rule against admission of evidence illegally obtained does not detract from their evaluation of Rochin v. People of California. As indicated by the authorities considered in this opinion, the requirement that a defendant take the intoximeter test is not illegal, where incident to an otherwise lawful arrest.

[18] Thus, though a defendant testifies that he took the test because he was afraid that if he refused he would be made to take it, this is no bar to reception of the results in evidence. State v. Warren, 1953, 75 Ariz. 123, 252 P.2d 781.

[19] We conclude the motion to bar receipt of evidence on the subject of Conterno's refusal to take the test was properly denied. In other similar cases, a motion to suppress the evidence at the outset of the trial has been denied, since there is no denial of any constitutional right. Cf. United States v. Nesmith, supra, D.C.D.C. 1954, 121 F.Supp. 758; Alexander v. State, supra, Okl.Cr.1956, 305 P.2d 572; People on Complaint of Meehan v. Spears, supra, 1952, 201 Misc. 666, 114 N.Y.S.2d 869; stating that the test does not declare guilt nor innocence, which still is to be determined on the entire testimony.

II.

It cannot be said that the refusal to give defendant's proposed instructions 1 and 3 was prejudicial error.

No claim has been made or supported that the evidence received upon the trial was not sufficient to support the judgment, apart from consideration of the inferences to be drawn, if any, from defendant's refusal to take the intoximeter test.

In Grunewald v. United States, 1957, 353 U.S. 391, 424, 77 S.Ct. 963, 984, 1 L.Ed. 931, 954, 62 A.L.R.2d 1344, 1368, the court held "*under the circumstances of this case* (italics supplied) it was prejudicial error for the trial judge to permit cross examination of petitioner on his plea of the Fifth Amendment privilege before the grand jury," because the probative value of the issue of the witness' credibility was so negligible as to be far outweighed by its possible impermissible impact on the jury.

[20, 21] Under California Constitution, Art. I, sec. 13, such impact is not "impermissible" by the express terms of the section; and the question of probative value, as indicated by People v. Simmons, supra, 1946, 28 Cal.2d 699, 713, 172 P.2d 18, is to be resolved in the first instance by the trial judge, upon all the circumstances of the case. We cannot say, in the absence of an

evidentiary transcript or statement of the evidence below, that any *inference* of guilt was permitted to rise, as contrasted to the permissible inferences of *fact*. Whatever words or conduct the witness uses to invoke the privilege (see Quinn v. United States, 1955, 349 U.S. 155, 164, 75 S.Ct. 668, 99 L.Ed. 964, 51 A.L.R.2d 1157), the witness has thereby admitted some *fact* is true. That fact, by definition, is one which *tends* to incriminate him. In this case, it is not the defendant's privileged *testimony* given at some former proceeding which is being used against him, but his unprivileged *conduct*, which is a fact. Such inferences as may arise as an admission, standing alone, are insufficient for conviction. There must be some proof of the commission of the crime, prima facie, established by other evidence, before any evidence as to refusal to take the intoximeter test becomes admissible. People v. Cobb, 1955, 45 Cal.2d 158, 161, 287 P.2d 752.

We have held previously that the fact of refusal to take the test is admissible in evidence, without violation of any constitutional right of a defendant, and that there may be comment upon the refusal. People v. McGinnis, 1953, 123 Cal.App.2d Supp. 945, 946, 267 P.2d 458. Accord: State v. Bock, supra, Idaho 1958, 328 P.2d 1065, 1071, listing authorities in accord. State v. Smith, supra, 1956, 230 S.C. 164, 94 S.E. 2d 886; Gardner v. Commonwealth, 1954, 195 Va. 945, 81 S.E.2d 614, 618; State v. Benson, 1941, 230 Iowa 1168, 300 N.W. 275, 277.

[22] In any case the defendant is entitled to explain why he declined to take the intoximeter test. People v. Harrington, 1955, 138 Cal.App.2d Supp. 902, 906, 291 P.2d 584. He did. The jury was entitled to weigh his credibility as to the explanation, as in the case of any other evidence.

[23] Subject to these comments, it is clear no prejudicial error was shown to be committed in refusing a categorical instruction, "that no inference of guilt attaches to the defendant [Conterno] by reason of his refusal to take any so-called sobriety tests." The instruction would be proper if there was no other prima facie evidence of intoxication in the case except such a refusal. We cannot say from the record that there was not such other evidence.

Nor does the record disclose that defendant at the time he was requested to take the test declared that he was not guilty of driving while under the influence of intoxicating liquor, within the rule restricting inferences where there is such an unequivocal declaration. People v. Wignall, supra, 1932, 125 Cal.App. 465, 13 P.2d 995. By refusing the test, he in effect is refusing to produce evidence which would bear materially on the condition for which he was arrested.

[24–26] Under California Constitution, Art. I, sec. 13, whether or not a defendant takes the stand, the court and jury have the right to consider a defendant's failure to explain or deny any evidence or facts in the case against him. The constitutional provision thus makes applicable to criminal cases the established rule that failure to produce evidence in the power of a party to produce, material to the facts in issue, permits the inference that this evidence would be adverse. Thus, in the face of other prima facie evidence of his intoxication, his refusal to take the test, in the absence of an explanation legally sufficient or satisfactory to the jury, may be considered by the jury as tending to indicate the truth of the other evidence in the case upon the subject of his intoxication, and as indicating among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable. People v. Adamson, supra, 1946, 27 Cal.2d 478, 488, 489, 165 P.2d 3. It is not the law that the failure to deny or explain incriminating testimony is an admission of its truth. It is merely a circumstance to be considered by the jury tending to indicate the truth of the culpatory evidence not denied or explained. People v. Cuevas, 1957, 148 Cal.App.2d 331, 335, 306 P.2d 510.

[27] Thus, it is clear that any inference arising from the refusal of a defendant to submit to such a test may not be used to "supply a lacuna in the prosecution's proof." People v. Peters, 1957, 149 Cal.App.2d 94, 99, 308 P.2d 42, 45.

In People v. Ashley, 1954, 42 Cal.2d 246, 268–269, 267 P.2d 271, certiorari denied 348 U.S. 900, 75 S.Ct. 222, 99 L.Ed. 707, the failure of defendant to testify was properly urged as corroborative of the prima facie case made by the prosecution, though a failure to testify would not supply a lacuna in the prosecution's proof.

[28] In this case, the defendant voluntarily took the stand. He therefore was a competent witness. Pen.Code, sec. 1323. Thus, he opened the door for questions. The record does not indicate who asked the question in response to which "The defendant testified that he refused an intoximeter test on the ground that the giving of the test was a violation of his constitutional rights," and "objected on constitutional grounds to testifying to any facts regarding the giving of or refusal to take the intoximeter test." While it is established that the defendant is not called upon to "explain or deny by his testimony any evidence in the facts against him" until those facts have been established *prima facie* in the trial itself, since until then, there is no right of comment (People v. Talle, 1952, 111 Cal.App.2d 650, 664, 245 P.2d 633), no such ground of objection has been raised, and it must be assumed there was such a prima facie case. It likewise is established that on cross-examination, he can only be examined upon those matters to which he testified in chief. Pen.Code, sec. 1323. No such ground of objection has been raised, so far as the record shows, and therefore it cannot be considered. People v. Wignall, supra, 1932, 125 Cal.App. 465, 470–471, 13 P.2d 995.

We have carefully studied People v. Snyder, 1958, 50 Cal.2d 190, 324 P.2d 1, and People v. Calhoun, 1958, 50 Cal.2d 137, 323 P.2d 427, and find their ultimate interpretation in the provisions of Pen.Code, sec. 1323.5, and People v. Keelin, 1955, 136 Cal.App.2d 860, 881, 289 P.2d 520, 56 A.L.R.2d 355, respecting the incompetency of testimony given before a grand jury under the compulsion of a subpoena. In People v. Calhoun, supra, 50 Cal.2d at page 148, 323 P.2d 427, the court pointed out that the privilege of comment under the terms of California Constitution Art. I, sec. 13, was not involved.

[29] Since there is no constitutional privilege relieving a defendant from the requirement that such a test be taken, the matters here presented resolve themselves into a matter of the competency of evidence that he refused to take it. It is not the refusal to take the test that raises an inference, per se. It is, that the "facts in the case against him" such as a prima facie case of intoxication call for denials or explanations and that the failure to deny them or explain them may be commented upon and considered by the court and jury. Cal. Const. Art. I, sec. 13. When a defendant takes the stand and makes a general denial of the crime charged, the permissible scope of cross-examination is very wide. People v. Watson, 1956, 46 Cal.2d 818, 832, 299 P.2d 243. There is nothing in the record to show that this was exceeded, in asking concerning the intoximeter test.

[30] In People v. Simmons, supra, 1946, 28 Cal.2d 699, at page 715, 172 P.2d 18, it is indicated that an accusation of crime does call for a reply, even from a person under arrest. Whether or not an inference arises from testimonial silence, induced by arrest, fear, pain, physical suffering, advice of counsel, admonition as to silence, warning against self-incrimination, a belief that silence will serve his best interests, or other physical or mental pressure, involves consideration of all the circumstances. It is indicated in discussion (28 Cal.2d at page 716, 172 P.2d 18) that a policy of silence induced by the testimonial privilege against self-incrimination is not inconsistent with innocence; a view which is formalized by People v. Calhoun, supra, 1958, 50 Cal.2d 137, 147, 323 P.2d 427, 434, which states

"no implication of guilt can be drawn from a defendant's relying on the constitutional guarantee" of the state or federal constitution, or the provisions of Penal Code, secs. 688, 1323, and 1323.5.

Since, in this case, such constitutional guaranties and code sections relating to the defendant's testimonial declarations were inapplicable, the question still remains as to the effect to be given defendant's assigned reason for refusal to take the intoximeter test.

[31] This falls, we believe, within the more general considerations set forth in People v. Simmons, supra, 1946, 28 Cal.2d 699, 172 P.2d 18. Under California Constitution, Art. I, sec. 13, the defendant has undertaken to explain some of the facts in the case against him, by stating his reason (however legally unfounded) for not taking the test. Having taken the stand, he cannot omit to explain any incriminating circumstances without inviting comment and consideration of that circumstance. Caminetti v. United States, 1917, 242 U.S. 470, 37 S. Ct. 192, 61 L.Ed. 442.

[32] Without any further testimony before us, we cannot say that the trial court "indulged in too broad a discretion in allowing admission of such evidence in the first instance." We are satisfied that when evidence of such a refusal has been admitted, it calls for careful instructions to the jury as to the use that they may make of it. People v. Adamson, supra, 1946, 27 Cal.2d 478, 165 P.2d 3.

In People v. Starrett, 1959, Cr.A. 3953 (unreported), this court approved an instruction based upon People v. McGinnis, supra, 123 Cal.App.2d Supp. 945, 267 P.2d 458, to the effect: "You are instructed that in a case where a defendant is accused of violating section 502 of the Vehicle Code it is permissible to prove that the defendant was offered a balloon [intoximeter] test after he or she has been made aware of the nature of the test and its effect. The fact that such test is refused under such circumstances is not sufficient standing alone and by itself to establish the guilt of the defendant but is a fact which, if proven, may be considered by you in the light of all other proven facts in deciding the question of guilt or innocence. Whether or not such conduct shows a consciousness of guilt and the significance to be attached to such a circumstance are matters for your determination." This terminology might be improved, but the essence of the instruction we believe correctly states the law.

In the instant cases, from the objection made to taking the test, it is reasonable to infer that the defendant knew the nature of the test, and what it was designed to show.

[33] No right of the defendant was prejudiced when the court gave instruction No. 4 as modified: "You are instructed you may not speculate as to what might have been the result of a sobriety test, if one had been taken." There is a wide difference between naked speculation, and rationally supported inferences.

If there was no competent evidence in the case to support the element of being under the influence of intoxicating liquor, other than such a refusal, the evidence of such refusal should not be received. We cannot say from the judgment roll and statement on appeal that this was the case here, nor after the verdict can we presume it.

[34, 35] Even if the rulings of the court as to the effect of refusal to take the intoximeter test were erroneous, the mandatory provisions of California Constitution, Art. VI, sec. 4½, would require affirmance of the judgment. There is no showing that the evidence was so conflicting or uncertain as to create a doubt of the guilt of the defendant, exclusive of the testimony in question, so that such admission resulted in a miscarriage of justice. People v. Simmons, supra, 1946, 28 Cal.2d 699, 721, 172 P.2d 18. The burden of showing unfairness and a miscarriage of justice rests upon the appellant, and it must be sustained not as a matter of speculation but as a demonstrable reality. People v. Crooker, 1956, 47 Cal.2d 348, 353, 303 P.2d 753. This, defendant has not done.

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The decision of this cause would have been easier, and possibly would have been more adequate from standpoint of the defendant, had default not been made in the steps to bring a proper record before this court.

The judgment is affirmed.

SWAIN, J., concurs.

BISHOP, Presiding Judge.

I concur, both in the judgment and in the opinion which supports it, for it satisfactorily establishes these propositions:

(1) If it was error to permit inquiry about defendant's refusal to take an intoximeter test, from the incomplete and sketchy record of oral proceedings before us we cannot say either that the error was not invited by the defendant or that it was prejudicial.

(2) It is not error to prove that a defendant, arrested, refused to permit the taking of an intoximeter test, for (a) such refusal, if not satisfactorily explained, may be taken by the jury as a circumstance to be considered, as it weighs the other evidence in the case; (b) the constitutional question involved is not based upon the federal, but upon the state constitution; and (c) our constitutional prohibition against compelling a person to be a witness against himself, prevents "testimonial compulsion", but is not a constitutional right to refuse to have evidence taken as to one's breath, blood, fingerprints, condition of eyes, and like bodily characteristics.

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52 Cal.2d 238

Thomas W. MARTIN, Director of the Department of Alcoholic Beverage Control, State of California, Petitioner and Respondent,

v.

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD of the State of California, Defendant;

Helen M. Richards, Appellant.

Sac. 7040.

Supreme Court of California,
In Bank.
May 26, 1959.

Proceeding on application for an on-sale beer license. The Department of Alcoholic Beverage Control denied the application and applicant appealed to the Alcoholic Beverage Control Appeals Board. The Appeals Board entered an order of reversal and the Department sought judicial review of such order. The Superior Court, Sacramento County, Gordon A. Fleury, J., entered a judgment in effect reversing the Appeals Board, and applicant appealed. The Supreme Court, Spence, J., held that showing in record on hearing before Department that there was some commercial development near applicant's place of business, but that there were nine residences in the immediate vicinity and that there were children of school age living in some of the residences, and that a traffic hazard would result from a lack of parking facilities, constituted substantial evidence of good cause for the Department's determination that the granting of a license would be contrary to public welfare, and therefore such finding was unassailable on appeal to the Appeals Board.

Judgment affirmed.

Opinion, 329 P.2d 758, vacated.

1. Intoxicating Liquors 🔑75(2)

Where Alcoholic Beverage Control Appeals Board reversed an order of the Department of Alcoholic Beverage Control denying an applicant's application for an on-sale beer license, the Appeals Board, as well as the applicant, could have appealed from the judgment of the trial court directing it to affirm the Department's order.

2. Intoxicating Liquors 🔑75(7)

Where the Director of the Department of Alcoholic Beverage Control instituted judicial proceedings directed against the decision of the Alcoholic Beverage Control Appeals Board, reversing an order of the Department denying an application for an on-sale beer license, judicial review would be of the decision of the Appeals Board and not the decision of the Department. West's Ann.Const. art. 20, § 22.

3. Intoxicating Liquors 🔑75(7)

In light of provisions of constitutional amendment vesting in the Department of Alcoholic Beverage Control exclusive power to issue, deny, suspend, or revoke licenses in its discretion, and further provisions thereof denying to the Alcoholic Beverage Control Appeals Board any power to limit or control in any way the discretion vested in the Department, Appeals Board could not be deemed authorized to exercise full discretion or its independent judgment on conflicting evidence, but powers granted to the Board under such amendment are strictly limited and are no greater than those previously exercised by the courts on judicial review of decisions of the State Board of Equalization. West's Ann.Const. art. 20, § 22.

4. Intoxicating Liquors ⚷75(7)

Power of the Alcoholic Beverage Control Appeals Board, under provision of constitutional amendment providing that Appeals Board shall determine whether findings of the Department are supported by substantial evidence in the light of the whole record, is to determine whether findings of the Board were supported by substantial evidence as distinguished from a mere scintilla of evidence. West's Ann. Const. art. 20, § 22.

5. Intoxicating Liquors ⚷75(7)

Finding of Department of Alcoholic Beverage Control on an application for an on-sale beer license that the granting of the license would be contrary to public welfare was unassailable on appeal to the Alcoholic Beverage Control Appeals Board if there was substantial evidence in the record to show that the Department's determination was made for good cause. West's Ann. Const. art. 20, § 22.

6. Intoxicating Liquors ⚷75(7)

Showing in record on hearing before Department of Alcoholic Beverage Control on an application for an on-sale beer license that there were some commercial developments near applicant's place of business, but that there were nine residences in the immediate vicinity and that there were children of school age living in some of the residences, and that a traffic hazard would result from a lack of parking facilities, constituted substantial evidence of good cause for the Department's determination that the granting of a license would be contrary to public welfare, and therefore such finding was unassailable on appeal to the Alcoholic Beverage Control Appeals Board. West's Ann.Const. art. 20, § 22.

7. Intoxicating Liquors ⚷75(7)

Constitutional amendment dealing with powers of the Department of Alcoholic Beverage Control and the Alcoholic Beverage Control Appeals Board gave the Appeals Board no greater powers of review of Department decisions in regard to licenses than powers previously exercised by the court, and such rule was also applicable to review of the Department's decisions by the Appeals Board. West's Ann.Const. art. 20, § 22.

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Richard tum Suden, San Francisco, for appellant.

Charles P. Just, Chief Counsel, Alcoholic Beverage Control Appeals Board, Sacramento, as amicus curiae on behalf of appellant.

Edmund G. Brown and Stanley Mosk, Attys. Gen., E. G. Funke, Asst. Atty. Gen., and William T. Chidlaw, Deputy Atty. Gen., for petitioner and respondent.

SPENCE, Justice.

[1] This is an appeal by Helen M. Richards (hereinafter called the applicant) from a judgment of the trial court ordering the issuance of a writ of mandate directing the Alcoholic Beverage Control Appeals Board (hereinafter called the Appeals Board) to issue its decision affirming the order of the Department of Alcoholic Beverage Control (hereinafter called the Department) denying the applicant's application for an on-sale beer license. As the Appeals Board had reversed the order of the Department, the Appeals Board could have appealed from the judgment of the trial court directing it to affirm the Department's order. Koehn v. State Board of Equalization, 50 Cal.2d 432, 326 P.2d 502. It did not do so but nevertheless, it has filed an amicus curiae brief in support of the applicant's appeal.

Before turning to the factual background of this litigation, we will direct our attention to the several procedural questions which have been raised by the parties.

These procedural questions arise out of the amendment in 1954 of article XX, section 22, of the Constitution. That amendment created two new constitutional agencies—the Department of Alcoholic Beverage Control and the Alcoholic Beverage Control Appeals Board—and prescribed the powers of each.

With respect to the powers of the Department, the 1954 amendment provided: "The Department of Alcoholic Beverage Control shall have the exclusive power, except as herein provided and in accordance with laws enacted by the Legislature, to license the manufacture, importation and sale of alcoholic beverages in this State, and to collect license fees or occupation taxes on account thereof. The department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverage license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude. * * *"

Concerning the powers of the Appeals Board, the 1954 amendment provided: "When any person aggrieved thereby appeals from a decision of the department ordering any penalty assessment, issuing, denying, transferring, suspending or revoking any license for the manufacture, importation, or sale of alcoholic beverages, the board shall review the decision subject to such limitations as may be imposed by the Legislature. In such cases, the board shall not receive evidence in addition to that considered by the department. Review by the board of a decision of the department shall be limited to the questions whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record. In appeals where the board finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department it may enter an order remanding the matter to the department for reconsideration in the light of such evidence. In all other appeals the board shall enter an order either affirming or reversing the decision of the department. When the order reverses the decision of the department, the board may direct the reconsideration of the matter in the light of its order and may direct the department to take such further action as is specially enjoined upon it by law, but the order shall not limit or control in any way the discretion vested by law in the department. Orders of the board shall be subject to judicial review upon petition of the director or any party aggrieved by such order."

The portion of the 1954 amendment defining the powers of the Department was cast in language similar to that previously used in defining the constitutional powers of the State Board of Equalization with respect to liquor control. Const., art. XX, § 22, as amended Nov. 6, 1934. In Covert v. State Board of Equalization, 29 Cal.2d 125, 173 P.2d 545, we compared the constitutional powers of the Board of Equalization to "those of a local administrative tribunal" having quasi-judicial functions rather than those of a state-wide administrative agency created by statute; and we outlined the limited nature of the judicial review of decisions of the State Board of Equalization. 29 Cal.2d at pages 131–132, 173 P.2d at page 548. The portion of the 1954 amendment defining the "limited" powers of the Appeals Board was cast in language quite similar in part to that used in section 1094.5 of the Code of Civil Procedure with respect to the limitations on judicial review of the decisions of those administrative agencies where the court was not authorized to "exercise its independent judgment on the evidence."

In emphasizing the nature of the relative powers and functions of the Department and the Appeals Board, the language of the 1954 amendment makes it abundantly clear that the Department has "the exclusive power, * * * to license * * * [and] in its discretion, to deny, suspend or revoke" any license. Then after defining the "limited" powers of the Appeals Board, it further provides that no order of the Appeals Board shall "limit or control in any way the discretion vested by law in the department." In expressly limiting the powers of the Appeals Board, it was provided that "the board shall not receive evidence in addition to that considered by the department," and that "Review by the board of a decision of the department shall be limited" to questions such as excess of jurisdiction by the Department and the sufficiency of the evidence and findings to support the decision of the Department. Ordinarily, the Appeals Board may enter only "an order either affirming or reversing the decision of the department," depending upon its determination of the above-mentioned questions. One further power is given the Appeals Board, however, for "In appeals where the board finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department it may enter an order remanding the matter to the department for reconsideration in the light of such evidence." This additional power is not involved here, as there was no claim of newly discovered evidence or of improperly excluded evidence, and the Appeals Board made an order of reversal rather than of remand to the Department. Nor is any question presented here of the impact of any legislative enactments upon the powers of the Appeals Board, as section 23084 of the Business and Professions Code merely enacts in statutory form the same provisions for "limited" review by the Appeals Board as are found in the 1954 amendment.

None of the parties seriously questions the propriety of mandamus as the judicial remedy to be pursued under the constitutional provision that "Orders of the board shall be subject to judicial review upon petition of the director or any party aggrieved by such order." The parties are, however, widely at variance in their contentions with respect to the question of the nature of that review, the question of whether it is the decision of the Department or of the Appeals Board which is to be judicially reviewed, and the question of the correctness of the decisions made here by the Department and the Appeals Board in the light of their respective powers and functions.

The applicant contends that it is the decision of the Appeals Board which is subject to judicial review; that the Appeals Board is "empowered to exercise full discretion in passing upon the matter submitted for its decision"; that the Appeals Board "was invested with complete power to review the entire record and was free to draw its own conclusions from the conflicting evidence in the record and, in the exercise of its independent judgment in the matter, affirm or reverse the decision of the Beverage Department, or remand the matter for the taking of additional evidence." The applicant therefore takes the position that "the trial court should have reviewed the entire record and ascertained if there was substantial evidence in support of the decision of the Appeals Board rather than in support of the decision of the Beverage Department—that it is the decision of the Appeals Board that is subject to judicial review and not the decision of the Beverage Department."

The Department, on the other hand, contends that "it is the decision of the Department that is reviewed"; that the Department, rather than the Appeals Board, is vested with discretion in licensing matters and has the power to make final determinations of fact, which are subject to review only if such findings are not supported by substantial evidence; and that "the Appeals Board may not exercise its independent judgment on the evidence."

The contentions of the Appeals Board differ somewhat from those of either the applicant or the Department. It takes the position "that it is the decision of the Appeals Board that is subject to judicial review and not the decision of the Department"; and while the Appeals Board does not appear to contend that it may exercise a wholly independent judgment on the evidence or that it may make findings of fact on conflicting evidence contrary to those made by the Department, it stresses its power to determine whether the Department's findings "are supported by substantial evidence in the light of the whole record" and suggests that this language gives to the Appeals Board somewhat greater power than that vested in an appellate court in reviewing the findings of a trial court under the so-called "substantial evidence" rule. It is mainly upon this basis that the Appeals Board seeks to sustain its decision in the present case and to support the applicant's appeal from the judgment of the trial court.

[2] Considering first the question of whether it is the decision of the Appeals Board or the decision of the Department which is subject to review by mandamus, we are of the opinion that in cases such as the present one in which the Appeals Board has reversed the Department, the judicial review is necessarily directed at the decision of the Appeals Board. This is made clear by the 1954 amendment, which provides that "Orders of the board shall be subject to judicial review upon petition of the director or any party aggrieved by such order." It was the director who instituted the judicial proceeding here, which was properly directed against the decision of the Appeals Board. It is true that section 24301 of the Business and Professions Code provides for judicial review of orders of the Department in the following terms: "Subject to the provisions of Section 22 of Article XX of the Constitution, any ruling, order, or decision of the department is subject to review as provided by law in any court of competent jurisdiction in the county in which the person affected resides." It is further true that mandamus proceedings have been directed in many cases against the Department, with or without the joinder of the Appeals Board. Schaub's Inc. v. Department of Alcoholic Beverage Control, 153 Cal.App.2d 858, 315 P.2d 459; Brice v. Dept. of Alcoholic Bev. Control, 153 Cal.App.2d 315, 314 P.2d 807; Molina v. Munro, 145 Cal.App.2d 601, 302 P.2d 818; Wright v. Munro, 144 Cal.App.2d 843, 301 P.2d 997; Griswold v. Dept. of Alcoholic Bev. Control, 141 Cal.App.2d 807, 297 P.2d 762. But in all the cited cases, the Appeals Board had affirmed the Department. Thus in those mandamus proceedings, it was the adverse decision of the Department, as affirmed by the Appeals Board, which was being challenged by the aggrieved applicant or licensee. In this mandamus proceeding, it was the adverse decision of the Appeals Board reversing the Department which was being challenged by the Department. Nothing in said section 24301 could possibly affect the constitutional right of "the director or any party aggrieved" by the reversal of the Department by the Appeals Board from seeking judicial review of such reversal. We therefore conclude that the judicial review here was properly directed at the decision of the Appeals Board reversing the decision of the Department. In this connection, however, is would appear obvious that any judicial determination of whether the Appeals Board had exceeded its "limited" powers would incidentally require a review of the decision of the Department and of the record upon which the Department's decision had been based.

[3] The other procedural questions arise out of the conflicting contentions of the parties concerning the respective powers and functions of the Department and the Appeals Board. In the light of the provisions of the 1954 amendment vesting in the Department "exclusive power" to issue, deny, suspend or revoke licenses "in its discretion" and the further provisions thereof denying to the Appeals Board any power to "limit or control in any way the discretion vested by law in the department," we find wholly untenable the applicant's claim that the Appeals Board was thereby "empowered to exercise full discretion"

and to exercise "its independent judgment" on conflicting evidence. The powers granted to the Appeals Board were strictly "limited" and were certainly no greater than those previously exercised by the courts on judicial review of the decisions of the State Board of Equalization. See Covert v. State Board of Equalization, supra, 29 Cal.2d 125, 173 P.2d 545. The question remains as to the precise nature of the powers of the Appeals Board in view of the provision that it shall determine "whether the findings (of the Department) are supported by substantial evidence in the light of the whole record."

[4] The phrase "substantial evidence in the light of the whole record" is not new in the law of this state. It has been embodied in section 1094.5 of the Code of Civil Procedure at all times since the enactment of that section in 1945. Stats.1945, ch. 868, p. 1636. The quoted language, as used in section 1094.5, had been considered by this court prior to the adoption of the constitutional amendment in 1954 (Thompson v. City of Long Beach, 41 Cal.2d 235, 244, 259 P.2d 649), and more recently, the meaning of a similar phrase—"based upon the entire record"—was considered by this court. Argonaut Insurance Exchange v. Industrial Accident Commission, 49 Cal.2d 706, 708, 321 P.2d 460, 461. The cited cases and others show that such phrases have been consistently construed as signifying no more than the adoption by the Legislature, for particular purposes, of the "substantial evidence" rule as generally applied in judicial proceedings in this state rather than the "scintilla" rule, which has been applied in judicial proceedings in some other jurisdictions. See Walters v. Bank of America Nat. Trust & Savings Ass'n, 9 Cal.2d 46, 49, 69 P.2d 839, 110 A.L.R. 1259; 88 C.J.S. Trial § 208, p. 422. The Appeals Board's present reliance on Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456, does not support a contrary conclusion, for the court there recognized that perhaps a majority of the courts have "always applied the attitude reflected in this legislation." 340 U.S. 490, 71 S.Ct. 466. **Furthermore**, from its own decisions appended as exhibits to its brief, it appears that the Appeals Board, or at least a majority thereof, has consistently declared that the Appeals Board's power of review of the Department's decisions is governed by the "substantial evidence" rule or, as otherwise stated in one of its opinions, by the "orthodox substantial evidence rule as applied in civil adversary litigation." Matter of the Accusation against Howard W. Hill and Nancy J. Hill, A.B. 726.

Turning to the background of this appeal, the facts may be briefly stated. The applicant applied for an on-sale beer license for a small restaurant which was located on the highway about six-tenths of a mile outside of the city limits of Grass Valley. Residents of the vicinity filed protests, and a hearing was had. It was stipulated that the hearing officer might view the premises and the neighboring vicinity, and he did so. Thereafter he made findings that the premises were in a residential area; that they did not afford adequate off-the-highway parking facilities; and that the issuance of the license would be contrary to the public welfare and morals. He therefore recommended that the application be denied. His findings and recommendation were adopted by the Department, and the license was denied. Upon the applicant's appeal to the Appeals Board, that board reversed the Department's decision upon the ground that the latter's findings were not supported by substantial evidence in the light of the whole record. The Director of the Department then petitioned the superior court for a writ of mandate to compel the Appeals Board to affirm the decision of the Department. The applicant appeared and answered. The trial court made findings of fact and conclusions of law, including the following: That the act of the Appeals Board in reversing the decision of the Department on the ground that the findings were not supported by substantial evidence in the light of the whole record "was erroneous as a matter of law and constituted action by said Appeals Board in excess of its jurisdiction." It therefore entered judgment directing the Appeals Board to issue its decision affirming the order of the Department denying the license, and the applicant appealed.

In view of our above-stated conclusions regarding the procedural questions, the sole remaining question on this appeal is whether the trial court properly determined upon the record before it that the Appeals Board had erred and exceeded its jurisdiction by its determination that the Department's findings were not supported by substantial evidence in the light of the whole record. In our opinion, the trial court properly so determined and the judgment must be affirmed.

[5] As the Department was vested with "power, in its discretion, to deny" the license upon its determination "for good cause that the granting * * * would be contrary to public welfare, * * *" the broad range of its power and discretion is at once apparent. The Department made a finding here of the ultimate fact that the granting "would be contrary to public welfare," and such finding was unassailable on appeal to the Appeals Board if there was substantial evidence in the record to show that such determination was made "for good cause." In our opinion, the record contains ample evidence for that purpose.

[6] While the record before the Department shows that there is some commercial development near the applicant's place of business, it also shows that there are nine residences in the immediate vicinity and that there are children of school age living in some of those residences. The applicant's restaurant seats 43 persons. She claimed that "12 to 15 cars" could be parked on her premises between the road and the restaurant. The hearing officer, who had viewed the area by stipulation, found that "it would not be practicable to park that many cars" there, and that "the parking of cars along the road would create a traffic hazard." Upon this evidence, the Department found that the premises were in a residential area, and further found that there were inadequate parking facilities off the highway. It thus appears that there was substantial evidence to show "good cause" for the Department's determination that the granting of the license would be "contrary to public welfare." Even if it be conceded that reasonable minds might differ as to whether granting would or would not be contrary to public welfare, such concession merely shows that the determination of the question falls within the broad area of discretion which the Department was empowered to exercise.

[7] When administrative agencies, such as the Department, are vested with broad discretionary powers, it had been declared, prior to the 1954 amendment, that the courts should permit them to "work out their problems with as little judicial interference as possible," and that an abuse of discretion "must appear very clearly before the courts will interfere." Maxwell v. Civil Service Com., 169 Cal. 336, 339, 146 P. 869, 871; see also Hansen v. State Board of Equalization, 43 Cal.App.2d 176, 179–180, 110 P.2d 453. In view of our conclusion that the 1954 amendment gave the Appeals Board no greater powers than those previously exercised by the courts, it follows that the same rule is applicable to the review of the Department's decision by the Appeals Board. Nothing in the record justifies the conclusion of the Appeals Board that the Department's findings were not supported by substantial evidence in the light of the whole record, and nothing in the record could justify a conclusion that the Department had abused its discretion. We therefore are of the opinion that the Appeals Board erred and exceeded its jurisdiction in reversing the decision of the Department.

Before concluding, reference should be made to the applicant's claim that the construction which we have placed on the 1954 amendment will make "the process of appealing to the Alcoholic Beverage Appeals Board * * * a useless and meaningless step that must be pursued in the process of exhaustion of administrative remedies." This argument is similar to that made against the adoption of the 1954 amendment in the official pamphlet distributed to the voters prior to the 1954 election. It was there argued that because of the broad discretionary powers vested in the Department and the "limited" powers vested in the Appeals Board on appeals from the Department's decisions, such appeals would be "useless." It is not our function, however, to determine, whether, as a matter of policy, the Appeals Board should have been given, or should now be given, powers greater than the "limited" powers mentioned in the 1954 amendment. Our only function is to determine the nature of the powers actually conferred by that amendment. This we have done. Nevertheless, we cannot agree that an appeal to the Appeals Board thereby becomes a useless or meaningless step. The unchallenged figures submitted in the brief of the Appeals Board show that during the period from January 1, 1955, through February 28, 1959, there had been 1,152 appeals filed with the Appeals Board, 1,006 decisions rendered thereon, and that "judicial review had been sought in approximately 232 cases." Thus it appears that applicants have freely availed themselves of the relatively expeditious and inexpensive remedy of appeal to the Appeals Board, and that the vast majority of the applicants, as well as the Department, have ordinarily been willing to accept the decisions of the Appeals Board without resort to the courts. We therefore believe that the Appeals Board can perform, and has performed, a very useful function under the powers presently conferred upon it.

For the reasons stated, we conclude that no ground has been shown for the reversal of the judgment of the trial court.

The judgment is affirmed.

GIBSON, C. J., SHENK, TRAYNOR, SCHAUER and McCOMB, JJ., and WHITE, J. pro tem., concur.

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52 Cal.2d 283

PEOPLE of the State of California, Respondent,

v.

Harvey Murray GLATMAN, Appellant.

Cr. 6420.

Supreme Court of California,
In Bank.
June 5, 1959.

Prosecution for murder. The Superior Court, San Diego County, John A. Hewicker, J., entered judgment of conviction and defendant appealed. The Supreme Court, Gibson, C. J., held that evidence regarding circumstances surrounding killing of a woman other than the two women defendant was charged with killing, and of defendant's arrest during an unsuccessful attempt to force a fourth woman to submit to sexual intercourse, due to arrival of a police officer, was admissible with respect to both the degree of the crimes and the penalty, and was admissible on issue of guilt to show defendant's motive and intent, in view of fact that circumstances of such other murder and attempt at intercourse were similar and in many respects identical with facts relating to the murders with which defendant was charged.

Judgment affirmed.

1. Homicide ⚷250

Evidence sustained conviction for murder.

2. Criminal Law ⚷1036(1)

In murder prosecution, where no objection was made to introduction of evidence regarding circumstances surrounding killing of a woman other than two women defendant was charged with killing, and of defendant's attempt to have sexual intercourse with a fourth woman, defendant could not question propriety of its admission on appeal to the Supreme Court.

3. Criminal Law ⚷371(4, 12)

In murder prosecution, evidence regarding circumstances surrounding killing of a woman other than the two women defendant was charged with killing, and of defendant's arrest during an unsuccessful attempt to force a fourth woman to submit to sexual intercourse, due to arrival of a police officer, was admissible with respect to both the degree of the crimes and the penalty, and was admissible on issue of guilt to show defendant's motive and intent, in view of fact that circumstances of such other murder and attempt at intercourse were similar and in many respects identical with facts relating to the murders with which defendant was charged. West's Ann. Pen.Code, § 190.1.

◆

Willard Whittinghill, San Diego, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and Jack E. Goertzen, Deputy Atty. Gen., for respondent.

GIBSON, Chief Justice.

On the evening of October 27, 1958, defendant was taken into custody when a motorcycle officer traveling on a side road in Orange County discovered him struggling with Lorraine Vigil for possession of a gun which he had used in an unsuccessful attempt to force her to submit to sexual intercourse. After his arrest defendant confessed that he had killed three women, Judy Dull, Shirley Bridgeford and Ruth Mercado, and he was indicted in San Diego County for the murders of Shirley and Ruth. He pleaded guilty to both counts and waived a jury trial with respect to the degree of the crimes and the penalty. A psychiatrist appointed by the court reported that defendant was sane and that he was able to cooperate fully with his attorney in the presentation of his case. Evidence was received on the issues of degree and penalty, and as to each count the court found defendant guilty of first-degree murder and fixed the penalty at death. The appeal from the judgment is before us automatically pursuant to subdivision (b) of section 1239 of the Penal Code.

[1] The statements of defendant, in which he confessed to the two killings with which he was charged, were recorded, and they were received in evidence after a foundation was laid showing that the confessions were made freely and voluntarily, that there had been no promise of reward or immunity, and that no force or violence had been used. A review of the record shows that defendant received a fair and impartial trial, and the evidence in support of the judgment is overwhelming as to both counts.

In March 1958 defendant obtained the name of Shirley Bridgeford from a "lonely hearts club." He telephoned her, giving a false name, and made an appointment to meet her on Saturday night at her home in Los Angeles. Defendant said his purpose was to have sexual intercourse with her, either with consent or by force, and he was prepared to kill her to avoid arrest if he had to use force. He called for her in his car, and, after driving south for a couple of hours, they parked off the highway. Defendant tried to persuade her to have intercourse, and when she refused he showed her a gun and said he would not use it if she obeyed him. She then submitted to him, and while they were still parked he reached the conclusion that he would have to kill her for his own safety. He drove southeast to a desert area in San Diego County where they stopped until the sun came up. In his confession defendant said that he decided to kill Shirley in the same way that he had previously killed Judy Dull. He had persuaded Judy to pose with her hands and feet tied by telling her that he wished to take some pictures suitable as illustrations for mystery stories, and he killed her while her hands and feet were bound. Similarly he used a desire for pictures as an excuse for tying Shirley's hands and feet without alarming her. After taking several pictures of Shirley, he fastened a rope to the cord around her ankles, pulled it so as to bend her knees, put his knee at the small of her back, looped the rope twice around her neck and pulled as hard as he could for five minutes or so until there did not seem to be any sign of life. At various places on the way back to Los Angeles he threw away Shirley's purse and its contents except about 30 cents in coins, which he kept.

In July 1958 defendant saw a newspaper advertisement stating that Ruth Mercado was available for employment as a model. He called on her in the evening, ostensibly to discuss terms of employment but actually intending to have intercourse with her. When Ruth admitted him to her apartment, he took a gun from his pocket and ordered her to go to her bedroom, where he tied her hands and ankles and gagged her. He then investigated to see how the apartment was laid out and to make sure that there was a back door in the event he had to leave quickly. On his return he told her that he was going to untie her and have intercourse, and he warned her "not to do anything foolish." Afterward he asked Ruth if she had any money and in response to her directions found $20 or $25 in bills which he put in his pocket. About midnight he tied her hands behind her back, put a coat over her shoulders to hide her hands and arms, guided her to his car and drove her southeast from Los Angeles toward the desert in San Diego County. During the following day, which was spent near the desert, defendant took five or six pictures of Ruth, with her hands and feet tied, in poses similar to those in the pictures he previously took of Shirley. Before it got dark, sometime after nine o'clock, he decided that it was too risky to take Ruth back to Los Angeles and that he would kill her. Later, for the asserted purpose of taking some flashlight pictures, he had her pose again with her hands and feet tied. Defendant then killed her by using a piece of rope from her ankles to bend her legs back, putting his knee in the small of her back, looping the rope twice around her neck, and pulling it as tight as he could for about five minutes. He disposed of most of Ruth's belongings at various places along the highway as he drove back to Los Angeles, but he kept about $10 that was in her purse, a wristwatch, and a few personal items such as a wallet with identification papers and some articles of clothing.

After defendant's arrest he took police officers to the places in San Diego County where he had killed Shirley Bridgeford and Ruth Mercado, and the officers, following his directions, found the remains of the two victims. An officer acting under a search warrant visited defendant's apartment and obtained a metal tool box that contained Ruth's billfold, some of her clothing, and the photographs which defendant took of Shirley and Ruth when he had them pose in the desert with their hands and feet tied.

[2, 3] Evidence was also received regarding the circumstances surrounding the killing of Judy Dull and the Lorraine Vigil incident. No objection was made to the introduction of this evidence, and defendant cannot now question the propriety of its admission. People v. Feldkamp, 51 Cal. 2d 237, 331 P.2d 632. Moreover, the evidence was properly admitted with respect to both the degree of the crimes and the penalty. The facts of the Dull case were similar and in many respects identical with those relating to Shirley and Ruth, and it was shown that defendant was following substantially the same procedure with Lorraine Vigil when his attempt to have intercourse was interrupted by the arrival of a police officer. The evidence of the other similar offenses would have been admissible on the issue of guilt to show defendant's motive and intent (People v. Coefield, 37 Cal.2d 865, 869–870, 236 P.2d 570; People v. Peete, 28 Cal.2d 306, 314–317, 169 P.2d 924; cf. People v. McCaughan, 49 Cal.2d 409, 421–422, 317 P.2d 974), and it was likewise admissible on the issue of the degree of the crime to which he had pleaded guilty. The evidence of the other crimes was admissible in the proceeding to determine the penalty under section 190.1 of the Penal Code, which provides that any evidence concerning the commission of the crime that is admissible in the trial deter-

mining the guilt of the defendant may be admitted on the issue of penalty.

We find no error in the record, and the judgment is affirmed.

SHENK, TRAYNOR, SCHAUER, SPENCE, McCOMB, and PETERS, JJ., concur.

171 Cal.App.2d 326

Clinton C. CAMPBELL and Mary V. Campbell, Plaintiffs and Respondents,

v.

Stanley N. NEIGHBORS et al., Defendants, Herbert C. Armstrong and Eva Young Armstrong, Defendants and Appellants.

Civ. 6149.

District Court of Appeal, Fourth District, California.

June 15, 1959.

Action for declaratory relief. From a judgment of the Superior Court of San Diego County, Joe L. Shell, J., certain defendants appealed. On motion of appellants for the court to dismiss appeals as to them. The District Court of Appeal, Griffin, P. J., held that the judgment was interlocutory in character as to the appellants and where it did not appear that the appellants were aggrieved thereby the appeal should be dismissed.

Appeal dismissed.

Appeal and Error ⚷80(1), 151(2)

In suit for declaratory relief that defendants assumed and agreed to pay a mortgage on premises conveyed, where findings recited that defendants agreed to pay mortgage but judgment made no final disposition in so far as it affected appellants and judgment determined only that plaintiffs were not entitled to relief sought, that certain defendants should not be enjoined from asserting their claims against plaintiffs until happening of certain events and that court had no jurisdiction to order such defendants to seek enforcement of any rights until they proceeded against the appellants, judgment was interlocutory in character and defendants not being aggrieved thereby were not entitled to appeal therefrom and their appeal should be dismissed. West's Ann.Code Civ.Proc. § 938.

Martin & Leedy, Encinitas, Gray, Cary, Ames & Frye, and Sterling Hutcheson, San Diego, for appellants.

Homer G. Clark, San Diego, for respondents.

GRIFFIN, Presiding Justice.

Plaintiffs and respondents Clinton C. Campbell and wife filed this action on December 5, 1957, for declaratory relief against defendants Stanley N. Neighbors and wife, Robert W. Strouse and wife, Herbert C. Armstrong and wife, Margaret A. Hudson, Paul D. Dail and wife, and C. B. Martin, alleging generally that plaintiffs were the owners of certain real property in Yuma, Arizona; that on February 1, 1955, plaintiffs conveyed it to defendant Neighbors and wife, and as part of the consideration defendants executed and delivered to plaintiffs, as security, a second mortgage on the premises in the sum of $42,000, and as further security plaintiffs received a chattel mortgage covering all furniture and equipment on said premises; that thereafter, on July 10, 1955, defendants Neighbors conveyed said property to defendants Strouse and wife and as part of the consideration they assumed and agreed to pay said second mortgage above mentioned; that thereafter, on November 3, 1955, defendants Strouse and wife conveyed said property to defendants and appellants Armstrong and wife and as a part of the consideration they assumed and agreed to pay said second mortgage; that on February 20, 1957, defendants and appellants Armstrong and wife conveyed said property to defendant Hudson, and as a part of the consideration she assigned and agreed to pay said second mortgage; that on February 20, 1957, defendant Hudson conveyed the property to defendant Martin and as a part of the consideration he assumed and agreed to pay said second mortgage; that on April 5, 1955, plaintiffs purchased certain described real property in San Diego from defendants Dail and wife; that as part of the consideration plaintiffs assigned to them the second mortgage and chattel mortgage above described; that on May 27, 1957, the holders of the first mortgage on the Yuma property brought an action in Arizona to foreclose it, alleging a default and balance due of $31,240; that said property was to be sold on December 18, 1957, and they believed the property would not sell for a sufficient sum to pay for the first and second mortgages in full, thereby leaving a deficiency due on the second mortgage; that under the law of Arizona a deficiency judgment will lie after the sale of real property under a purchase money mortgage; that the laws of California provide otherwise; that due to the apparent conflict a question of the construction of the applicable law as to the enforcement of the deficiency of said second mortgage, now in the hands of defendant Dail and wife, arises; that the other defendants are interested parties to said controversy in that they assumed payment of said second mortgage; that in the event the Superior Court of San Diego County determines that there existed the legal right to institute an action for said deficiency, there will be a personal liability by reason of said assumption of payment by defendants Martin, Hudson, Armstrong and Neighbors, in said order of priority, and would require a multiplicity of suits if said questions are not determined; that defendants Dail and wife intend to institute an action to recover from the plaintiffs the full amount due under the second mortgage prior to the foreclosure sale.

The prayer is for judgment declaring their respective rights and barring defendants Dail from asserting any claims against plaintiffs until the rights and liabilities of the defendants are determined and exhausted, or in the alternative, declare plaintiffs' rights and the liabilities of defendants, and that defendant Dail and wife have a right to a deficiency judgment after foreclosure, and that the enforcement of said right to a deficiency judgment be postponed until after foreclosure and sale of said real property under the first mortgage and that said liability be enforced in inverse order of assumption against the defendants named before proceeding against these plaintiffs. An amended complaint was later filed which elaborated in more detail these same general allegations.

Defendant Dail and wife denied the allegations of the complaint but admitted that said suit against plaintiffs in the nature of a direct action as guarantors of the note is contemplated.

Defendants and appellants Armstrong deny generally the allegations of plaintiffs' complaint and allege that no summons or complaint was ever served on them in any action brought in Arizona on foreclosure proceedings.

Defendants Neighbors denied generally all of the allegations of plaintiffs' complaint.

After trial the court found generally according to the allegations of the complaint in reference to the several conveyances *and the agreements to pay the second mortgage.* In the conclusions the court stated each grantee *did assume and agree to pay the second mortgage;* that on May 27, 1957, the holders of the first mortgage on the real property in Arizona did institute an action to foreclose it, naming plaintiffs and defendants in this action as defendants; that a judgment was recovered foreclosing said mortgage and the real property was sold on December 18, 1957, to the highest bidder for $35,145.65, being the amount due on the first mortgage plus costs, etc.; and that there was no surplus to apply on the second mortgage; that there is now due on said second mortgage $38,812.80, plus interest; and defendant

Dail and wife have demanded payment of said sum from plaintiffs herein; that no evidence was offered in respect to the chattel mortgage and therefore the court found such allegations to be untrue; and that under the laws of Arizona a deficiency judgment may lie.

The court then specifically found that it had no jurisdiction to order the defendants Dail and wife to proceed against the other named defendants before proceeding against plaintiffs for the recovery of the sums due under the promissory note for which said second real estate mortgage was given as security. Judgment was entered that the Dails be not "enjoined or barred from asserting claims against plaintiffs, if any they have, until there having been a prior determination of the rights and liabilities of the defendants * * * or enjoined or barred from asserting said claims prior to the foreclosure of that certain chattel mortgage referred to in the findings of fact and conclusions of law." It further decreed that the court had no jurisdiction to order defendants Dail and wife to seek enforcements of any rights they might have against the plaintiffs unless and until they shall first proceed against the other named defendants, including appellants herein.

Defendants Armstrong and wife appealed from this judgment. They apparently claim that the judgment was interlocutory in character, did not in fact determine any rights of these appealing defendants; that they were not aggrieved by the judgment; and that if the finding entered endeavored to determine that the Armstrongs did in fact assume and agree to pay the second mortgage obligation over and above the security of the land itself such finding was not supported by the evidence, or if supported, the judgment entered upon such finding did not so indicate and accordingly any such finding was not binding on these appellants, citing such authority as Ouzoonian v. Vaughan, 64 Cal.App. 369, 221 P. 958; In re Estate of Funkenstein, 170 Cal. 594, 150 P. 987; Albertson v. Raboff, 46 Cal.2d 375, 295 P.2d 405; and Rosenberg v. Knesboro, 80 Cal. App.2d 36, 180 P.2d 750.

We conclude the dismissal of the appeal from the judgment here involved is in order. It is true the findings and conclusions recite that appellants assumed and agreed to pay said second mortgage, but the judgment makes no final disposition of the case insofar as it affects these appellants. Appellants claim they did not agree to assume or pay said second mortgage and would not want to be barred from raising that issue in a subsequent action based thereon. Even if it could be assumed that the court did find on that issue, it is not reflected in the judgment, as entered, for therein it was determined, in effect, that plaintiffs were not entitled to the relief sought; that the Dails should not be enjoined from asserting their claims against plaintiffs until the happening of certain events; and that the court held it had no jurisdiction to order the Dails to seek enforcement of any rights until they proceeded against certain defendants, including appellants. The judgment seems to be interlocutory in character. Craig of California v. Green, 89 Cal.App.2d 829, 202 P.2d 104; Ulrey v. Gillett, 147 Cal. App.2d 621, 623, 305 P.2d 611; Scarbery v. Bill Patch Land & Water Co., 170 Cal. App.2d 368, 338 P.2d 916; 28 Cal.Jur.2d p. 625 [Judgments] Sec. 9. Accordingly, in its present state, it does not appear that the judgment would aggrieve these appealing defendants. Craig of California v. Green, 89 Cal.App.2d 829, 202 P.2d 104; Record Machine & Tool Co. v. Pageman Holding Corporation, 132 Cal.App.2d 821, 283 P.2d 724; Maxwell Hardware Co. v. Foster, 207 Cal. 167, 170, 277 P. 327; Neilsen v. Saylors, 146 Cal.App.2d 139, 303 P.2d 781; Sec. 938, Code Civ.Proc.

Appeal dismissed.

MUSSELL and SHEPARD, JJ., concur.

ABBOT KINNEY COMPANY, a corporation; Ethel Fraser Prentiss; Fraser Prentiss; Ethel Fraser Carman Ryles; Olive Byrne Jones; Ruth Jones Wright; California Bank, a corporation, as Trustee under decree of distribution in the matter of the Estate of Herbert Richmond Gage, Deceased, Los Angeles County Superior Court case #110526, Probate, Plaintiffs, Appellants and Respondents,

v.

CITY OF LOS ANGELES, a municipal corporation, Department of Recreation and Parks of the City of Los Angeles, Defendants. City of Los Angeles, a municipal corporation, Defendant, Respondent and Appellant.*

Civ. 23425.

District Court of Appeal, Second District, Division 2, California.

May 27, 1959.

Rehearing Denied June 23, 1959.
Hearing Granted July 22, 1959.

Action for judgment declaring title to certain property dedicated to city for public park or beach upon condition that it be kept open and unobstructed for use and enjoyment of public and as a pleasure park or beach reverted to plaintiffs as result of violation of converting portion of property into a public parking lot, wherein evidence was in conflict and would have supported a finding in city's failure on whether such use violated condition of dedication. From a judgment and order of the Superior Court, Los Angeles County, Clarence M. Hanson and Bayard Rhone, JJ., adjudging a forfeiture of portion of premises and granting city's motion for a new trial, the plaintiffs appealed and the city cross-appealed from the judgment. The District Court of Appeal, Ashburn, J., held that a new trial was properly granted.

Order granting new trial affirmed and appeal from judgment dismissed.

1. Appeal and Error ⟹790(3)

If an order granting a new trial is affirmed on appeal, an appeal from the judgment becomes moot and must be dismissed.

2. Appeal and Error ⟹1015(1)

An order granting a new trial will not be reversed by reviewing court unless it concludes as a matter of law that there is no substantial evidence to support a contrary judgment.

3. New Trial ⟹114

A substitute judge occupies same position as one who tried the case with respect to granting a new trial for insufficiency of evidence to support the findings, and it is immaterial whether there was a jury or nonjury trial.

4. Boundaries ⟹14

Tract maps showing west boundary line of lots as a wavy line opposite the word "ocean" implied mean high tide line as the boundary.

5. Navigable Waters ⟹44(3)

Artificial alluvion does not accrue to the title of owner of upland.

6. Navigable Waters ⟹44(3)

Although structures were built from shore out into bay from time to time and such structures had individual tendencies to affect gradual accretion processes at work, such type of alluvion belonged to upland owner and not to the public.

7. Navigable Waters ⟹39(1)

Littoral rights of an upland owner, who owns no title to tidelands adjoining his property, are subject to determination by whatever disposition of tidelands state chooses to make.

8. Navigable Waters ⟹37(4)

Any conveyance of tidelands is taken by grantee subject to public right of navigation.

9. Navigable Waters ⟹36(3)

State retains right to enter upon tidelands and make such erections thereon, or changes therein, as it may find necessary or advisable to adapt premises for use in navigation, and provide access thereto for that purpose, or in furtherance thereof.

10. Navigable Waters ⟹44(3)

Accretions to the seashore, formed gradually and imperceptibly by natural causes, belong to the upland owner but artificially filled tidelands, filled rapidly and not gradually and imperceptibly, belong to the state and its grantees.

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* Opinion vacated 346 P.2d 385.

11. Navigable Waters ⚷44(3)

Accretions formed gradually and imperceptibly, but caused entirely by artificial means, such as wharves, groins, piers, etc., belong to the state, or its grantee, and do not belong to the upland owner.

12. Navigable Waters ⚷44(1)

Same rules of accretion apply to tidal and nontidal navigable waters.

13. Navigable Waters ⚷44(3)

Alluvion resulting from a gradual and imperceptible accretion belongs to owner of upland where that alluvion has resulted from the combination of natural and artificial causes.

14. Navigable Waters ⚷44(3)

In action for judgment declaring that title to certain property situated upon high tide line and dedicated to city for public park or beach had reverted to plaintiffs as result of violation of conditions subsequent by converting a portion of premises into a parking lot, evidence sustained finding that the entire parking area was situated upon original upland plus gradual accretion which had become a part of that upland.

15. Dedication ⚷64

Question of whether a given use of dedicated land violates a specific condition of the dedication ordinarily presents a question of fact.

16. New Trial ⚷71

In action for judgment declaring title to certain property dedicated to city for public park or beach upon condition that it be kept open and unobstructed for use and enjoyment of public and as a pleasure park or beach reverted to plaintiffs as result of violation of certain conditions subsequent by converting portion of property into a public parking lot, wherein evidence was in conflict and would have supported a finding in city's failure on whether such use violated condition of dedication, a new trial was properly granted.

17. Deeds ⚷156

A possibility of reverter is a contingent estate and is transferable. West's Ann. Civ.Code, § 1046.

18. Joint Tenancy ⚷12, 13
Tenancy in Common ⚷44, 46

A cotenant, whether he be a joint tenant or a tenant in common, may sell or encumber his interest in property forming subject of tenancy at his pleasure, regardless of knowledge, consent, or approval of other cotenants.

19. Husband and Wife ⚷15(4)

Where husband and others named in original deed owned equal interests in land which was dedicated to city, and thereafter husband and his wife conveyed to husband's wholly owned corporation all his property by a deed by which they transferred all the right, title and interest of husband and wife in and to certain tracts of land, wife's joinder in deed implied nothing more than a desire to pass title to exclusion of any questions or problems concerning present or potential interest of wife in property and did not imply an intent to convey only jointly owned property, and wife's joinder did not prevent reversion from passing to company on ground that she had no interest in subject property, and company had a right to maintain an action for judgment declaring that property had reverted by violation of conditions subsequent by city.

20. Dedication ⚷55

Where property owners conveyed land to city for a public park or beach, subsequent deed conveying 20-foot strip of land for construction of a public sidewalk was in furtherance of purposes of original dedication and did not constitute a waiver of conditions in original deed.

21. Estoppel ⚷52

Waiver, when implied, rests essentially upon elements of estoppel.

22. Dedication ⚷65

Where property owners dedicated land to city for public park or beach and city by ordinance designated easterly 40 feet of property as a sidewalk thereby increasing width of public thoroughfare by 10 additional feet, if ordinance and subsequent use of entire 40 feet as a sidewalk was a violation pro tanto of conditions of grant, it did not follow that entire property could have been forfeited as a result, since such violation could only effect a partial reversion where remainder of property continued to be used in conformity with terms and conditions of grant.

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Paul R. Hutchinson, Los Angeles, Davis & Davis, Beverly Hills, for plaintiffs, appellants and respondents.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., Ralph J. Eubank, Deputy City Atty., Los Angeles, for defendant, respondent and appellant.

ASHBURN, Justice.

Plaintiffs sued for a judgment declaring that the title to certain property situated upon and bounded by the high tide line of Santa Monica Bay of the Pacific Ocean had reverted to them as a result of the violation of certain conditions subsequent upon which their predecessors in interest had conveyed the property to the city of Ocean Park.

The deed provided in the habendum clause that the premises should be held "in the hereinafter named trust, forever, as a pleasure park or beach for the use, benefit and enjoyment of the public in general and particularly the inhabitants of said City and the owners of the property lying adjacent to the property hereinbefore described." Among the conditions was the requirement that "said lands and every part thereof must at all times be kept free from teaming, open and unobstructed for the use and enjoyment of the public and as a pleasure park or beach, and said property shall be kept clean at said City's expense."[1]

The trial court found that the conditions had been breached and adjudged a forfeiture of that portion of the premises which has been converted into a parking lot for the use and convenience of persons desiring to visit the beach.

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[1] The grant conveyed:

"Lot 179, of the Crescent Bay Tract, as per Maps recorded in Book 2, Pages 13 and 14 of Maps.

"Lots 'A', 'B', 'C', 'D', 'E', 'F', G', 'H' and 'I' of the Golden Bay Tract, as per Map recorded in Book 2 Page 15 of Maps.

"Also Blocks 8, 9, 10, 11, and 12, of the Country Club Tract, as per Map recorded in Book 3, Page 76 of Maps.

"Together with all and singular the tenements, hereditaments, and appurtenances, thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

"To Have and To Hold, all and singular the said premises together with the appurtenances unto the said party of the second part and its successors and assigns, in the hereinafter named trust, forever, as a pleasure park or beach for the use, benefit and enjoyment of the public in general and particularly the inhabitants of said City and the owners of the property lying adjacent to the property hereinbefore described; provided, that this conveyance is made upon the condition that no house or houses or building of any kind or character, or miniature, steam, street, or electric railway or roadway, or any gas, water or sewer pipe shall ever be erected, constructed, laid, maintained or operated, or be permitted or allowed to be erected, constructed, laid, maintained, or operated, in, along, upon or over said lands or any part thereof; and that no games of any kind shall ever be permitted to be conducted or carried on upon said lands or any part thereof, and said lands and every part thereof must at all times be kept free from teaming, open and unobstructed for the use and enjoyment of the public and as a pleasure park or beach, and said property shall be kept clean at said City's expense.

"Provided, further, that if said party of the second part or its successors or assigns shall at any time violate said trust or at any time, either directly or indirectly, violate either or any of the conditions or restrictions hereinbefore contained, immediately thereupon, all right and title hereby conveyed shall revert to and become vested in the said parties of the first part their heirs or assigns, and said parties of the first part, their heirs, administrators or assigns shall be entitled to immediate possession of said lands and every part thereof."

[1] The trial judge having retired, defendant's motion for new trial was heard by another judge who granted it upon grounds of insufficiency of the evidence and errors of law. Plaintiffs appealed from that order and defendant City of Los Angeles took a cross-appeal from the judgment. We shall consider first the order granting a new trial; if that is affirmed the appeal from the judgment becomes moot and must be dismissed. 3 Witkin on California Procedure, § 122, p. 2299; Freeman v. La Morte, 148 Cal.App.2d 670, 675, 307 P.2d 734. We have concluded that the order granting a new trial must be affirmed and therefore we shall refer to plaintiffs as appellants and to defendant City of Los Angeles as respondent.

[2] The rule governing review of an order granting a new trial was stated by us in Brown v. Guy, 144 Cal.App.2d 659, 661, 301 P.2d 413, 414: "Upon the consideration of a motion for a new trial the court must make an independent appraisal of the evidence, including all presumptions and reasonable inferences, and must judicially determine whether the judgment effects a miscarriage of justice. In considering such motion the trial court is not bound by a conflict in the evidence but may be governed by any substantial proof that would reasonably warrant a judgment for the moving party even though such evidence consists of nothing more than inferences from established facts. On appeal from the order it will not be reversed unless the reviewing court concludes that as a matter of law there is no substantial evidence to support a contrary judgment."

[3] Contrary to the contention of appellants the law is settled that a substitute judge occupies the same position as the one who tried the case with respect to granting a new trial for insufficiency of the evidence to support the findings. See, Empire Investment Co. v. Mort, 169 Cal. 732, 736, 147 P. 960; Commander Oil Co., Ltd. v. Bardeen, 48 Cal.App.2d 345, 346, 119 P.2d 969. There is no distinction in this respect between jury and non-jury trials. Both of the cited cases involved non-jury trials, as does the one here on appeal.

Two major questions emerge from the instant record. Does alluvion resulting from a gradual and imperceptible accretion belong to the owner of the upland where that alluvion has resulted from a combination of natural and artificial causes? Is an automobile parking lot a permissible incident to the use of land conveyed to a municipality for a public park or beach upon condition that it be kept "open and unobstructed for the use and enjoyment of the public and as a pleasure park or beach"?

First, as to the status of the property which the court held to have reverted to plaintiffs as successors in interest of the grantors.

In 1904, Abbot Kinney and associates laid out the town of Venice on Santa Monica Bay. The site was then but a strip of ocean beach and sand lots. The town was obviously intended as a beach resort. On February 20, 1904, in furtherance of that project, Abbot Kinney, A. R. Fraser, G. M. Jones and H. R. Gage conveyed to the city of Ocean Park[2] (within the limits of which the land was situated) some 15 contiguous fractional lots of beach frontage situated in 3 adjoining tracts. The property was described by lots as designated upon the respective subdivision maps, which showed them to be 50 feet (plus or minus) to 70 feet (plus or minus) in depth, bounded on the east by a 10-foot plank walk, and on the west[3] by the ocean. The parking lot in question adjoins three of the most northerly lots in the Crescent Bay Tract (the most northerly tract) and extends a north-south distance of approximately 750 feet, and from east to west some 130 to 150 feet.

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[2] Ocean Park later changed its name to Venice, and Venice was consolidated with the City of Los Angeles in 1925.

[3] The coast in this locality runs northwesterly and southeasterly, but counsel have discussed the case as if the coast line runs due north and south and for convenience we shall do likewise.

[4] Counsel for both sides rely upon a composite map which was introduced in evidence as exhibit "J" and which shows the tide line as depicted by various maps or surveys in 1876, 1902, 1926, 1931, 1935, 1946, 1953 and 1956. The tract maps show the west boundary as a wavy line opposite the word "Ocean." This implies mean high tide line as the boundary. Strand Improvement Co. v. City of Long Beach, 173 Cal. 765, 770, et seq., 161 P. 975; 8 Cal. Jur.2d, § 11 p. 723.[4] The 1876 line as shown on exhibit "J" was taken from a coast survey map which was not designed to locate the high tide line with any accuracy. The subdivision maps were filed in 1902 and said exhibit depicts the 1902 line as a straight one which at the north end separates the fractional lots of Crescent Bay Tract from the parking lot. Those fractional lots opposite the parking area scale less than 50 feet in depth.

It is apparent from the map and other evidence that the parking area is located partially upon upland included in the conveyance of 1904, and partially upon land to the west which is alluvion from some source. The parking lot was laid out in 1954; the map shows that the mean high tide line at that time was more than 400 feet west of the location of the 1902 high tide line as shown on said exhibit. The trial judge found "that in or about the year 1946 artificial alluvial was pumped onto the tide land seaward of the ordinary high water mark of the Pacific Ocean, adding about 200 feet of sand seaward. That said artificial alluvial has at all times since been used as a public beach." The last survey prior to 1946 was made in 1935 and the tide line was then some 250 feet west of its 1902 location.

All the evidence indicates that this growth prior to the 1946 fill was gradual and imperceptible. Appellants make no claim to the alluvion caused by the 1946 filling, which was done by the city of Los Angeles (corporate successor to Ocean Park and Venice), but insist that the added land caused by accretion prior to 1946 belongs to them, whether induced by natural means or a combination of natural and artificial causes. Respondent's expert witness took the position that any alluvion caused by such a combination of natural and artificial causes requires that it be classified as artificial, with the result that it belongs to the City as grantee of the State. Appellants' expert: "Q. Now, Dean, Mr. Oleweiler testified that there were many structures in Santa Monica Bay affecting the movement of the currents of the water within the bay, and that by virtue of the fact that all such currents within the bay were affected by such artificial structures that all accretion that was formed within the bay, in his opinion, was not natural but artificial accretion. Have you ever heard such a doctrine or is there such a doctrine in existence in your profession? A. I have not, no. * * * Q. This map shows that at least between the 1876, * * * down to the time before the fill was put in from the Hyperion development that there was a substantial change in accretion in the shoreline? A. Yes. Q. Now, it isn't your testimony, I take it, that that accretion was wholly natural accretion? A. Up until the time, I would consider it all natural accretion except that that was actually dumped in there or carried in there, yes. Q. In other words, any accretion that may be formed there because of the Santa Monica breakwater or the Santa Monica pier or Ocean Park pier, Venice Pier, Venice Breakwater, would you still call that natural accretion as you use the term? A. Yes."

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[4] Such a line cannot be located by the naked eye. It is an engineering concept, —the projection upon the land of a determined elevation, in this instance 4.66 feet above the datum plane of mean lower low water (see, Borax Consolidated v. City of Los Angeles, 296 U.S. 10, 26-27, 56 S.Ct. 23, 80 L.Ed. 9). "The plane of ordinary high tide is an imaginary plane fixed by observation and calculation as to the average high tide, and its location is fixed by running of this level on the shore." Miller & Lux, Inc. v. Secara, 193 Cal. 755, 762, 227 P. 171, 172.

[5, 6] Our examination of the record discloses that there is no evidence to warrant a finding that any part of the parking lot is on artificial alluvion[5] unless it be true as matter of law that gradual and imperceptible accretion caused by both artificial and natural processes falls within the classification of artificial alluvion which does not accrue to the title of the owner of the upland. The evidence reveals that over the years prior to the filling done by the city of Los Angeles in 1946, there was a fairly constant and gradual accretion process at work along the shores of the bay; that there were from time to time structures built out from the shore, such as groins, piers, breakwaters, etc., which varied in size and were not all present in the bay at the same time; that they had individual tendencies to affect the gradual processes then at work, but to a degree which was never measured and upon the record before us is not measurable.

[7–9] Consideration of the authorities convinces us that this type of alluvion belongs to the upland owner and not to the public. We are not now speaking of discernible alluvion caused by artificial means, such as the dumping of several thousand tons of dredged material in the neighborhood of the subject property, which was done in 1946 by respondent in furtherance of its tideland trust, improvement of the harbor. "The littoral rights of an upland owner who owns no title to tidelands adjoining his property are subject to termination by whatever disposition of the tidelands the state chooses to make. [Citations.] Since navigable waters are held by the state in trust for all the people, any conveyance of tidelands is taken by the grantee subject to the public right of navigation. The state retains 'the right to enter upon such lands and make such erections thereon, or changes therein, as it may find necessary or advisable to adapt the premises for use in navigation, and provide access thereto for that purpose, or in furtherance thereof.'" Miramar Co. v. City of Santa Barbara, 23 Cal.2d 170, 174, 143 P.2d 1, 3. However, these considerations have no pertinence to changes worked by structures placed by private individuals in navigable waters. They exercise none of the State's prerogatives. Any rule that alluvion resulting from their interference with natural processes creates land belonging to the State would unnecessarily and unreasonably destroy the littoral rights of owners of frontage receiving such alluvion, would cut them off from their ocean frontage, would confer upon the State or its grantee title to untold miles of frontage for which it has no use and no desire.

[10, 11] The result of the California authorities is set forth in Carpenter v. City of Santa Monica, 63 Cal.App.2d 772, 789, 147 P.2d 964, 973, as follows: "Thus we start this phase of the discussion with the proposition that accretions to the seashore, formed gradually and imperceptibly by natural causes, belong to the upland owner. It is also admitted by all concerned that artificially filled tidelands, filled rapidly and not gradually and imperceptibly, belong to the state or its grantees and do

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[5] The testimony of Thornton Kinney to the effect that part of the parking lot area was below mean high tide mark until 1946 does not amount to substantial evidence because he was attempting to locate it from memory based upon the location of the "crest" of the sand and its relation to what he deemed to be the mean high tide line. As we have pointed out, that line cannot be located by the naked eye. Hence any attempt so to do does not constitute substantial evidence. See, as to those exceptional instances in which evidence should be declared inherently improbable evidence, People v. Headlee, 18 Cal.2d 266, 267, 115 P.2d 427; Herbert v. Lankershim, 9 Cal.2d 409, 471–472, 71 P.2d 220; Hall v. Osell, 102 Cal.App.2d 849, 853, 228 P.2d 293; In re Estate of Teed, 112 Cal.App.2d 638, 644, 247 P.2d 54. This is one of those occasions. On a parity with the Kinney testimony about the location of the mean high tide line is that of Mrs. Ethel Fraser Carman-Ryles, who, looking back over 50 years, said she "felt" it was 200 feet from the cement (formerly plank) walk.

not belong to the upland owner. The problem we are presented with falls between these two well defined groups—who owns artificially filled or accreted tidelands, formed gradually and imperceptibly, as between the state, or its grantees, and the upland owner?" At page 794 of 63 Cal.App. 2d, at page 975 of 147 P.2d: "From these cases it must be accepted as settled in this state that accretions formed gradually and imperceptibly, but caused entirely by artificial means—that is by the works of man, such as wharves, groins, piers, etc., and by the dumping of material into the ocean—belong to the state, or its grantee, and do not belong to the upland owner." But the court added, on the same page: "It should be noted that we are not presented in this case with the problem as to what is the proper rule where such accretions are the result of both natural and artificial causes. On that subject we express no opinion." That is our specific problem.

The nearest approach to it found in the decisions in this State is Forgeus v. County of Santa Cruz, 24 Cal.App. 193, 140 P. 1092. In that case the owner of frontage on Monterey Bay had granted to the county a right of way for a public highway; it had built a raised roadbed which caused accretion and the land so formed was the subject of controversy; neither the State nor its grantee was a party to the action. At page 199 of 24 Cal.App., at page 1094 of 140 P., the court said: "Again, if any accretion or reliction was formed it was not caused by any act of Kimble or his successors in interest, but it was due to the act of the county in raising the roadbed along said right of way. It could hardly be contended that the county by such artificial means could secure the fee to the alluvion as an addition to its right of way. The alluvion would be an accession to the fee and not to the easement." It then quoted from an early case decided by the United States Supreme Court, St. Clair County v. Lovingston, 23 Wall. 46, 66, 23 L.Ed 59, 63, as follows: "'It is insisted by the learned counsel for the plaintiff in error that the accretion was formed wholly by obstructions placed in the river above, and hence that the rules upon the subject of alluvion do not apply. If the fact be so, the consequence does not follow. There is no warrant for the proposition. The proximate cause was the deposit made by the water. Whether the flow of water was natural or affected by artificial means is immaterial.'"

The Lovingston case was followed in 1957 in Littlefield v. Nelson, 10 Cir., 246 F. 2d 956. The case involved land deposited by accretion in the Arkansas River and the question of whether it was land formed by imperceptible degrees and from natural causes within the purview of the applicable Oklahoma statute, 60 O.S.1951, § 335. In order to stabilize the shifting course of the river the United States had constructed certain bank stabilization controls; the Kansas City Southern Railroad had also built a revetment to protect its right of way. "The opinions of expert engineering witnesses were in sharp conflict as to the extent of the effect of the construction work upon the river's course. The trial court found, however, that the river's channel was not changed suddenly by either revetment project although each may have added impetus or direction to the flow." At page 958. The court pointed out that the Oklahoma statute was identical with § 1014 of the California Civil Code, and that each was a codification of the common law. "Cases based upon the common law and similar codifications are virtually unanimous in their holdings that a riparian owner is not precluded from acquiring land by accretion where the accumulation is but hastened by artificial constructions lawfully constructed by third parties. See Frank v. Smith, 138 Neb. 382, 293 N.W. 329, 134 A.L.R. 467. Since the additions to plaintiff's riparian lands appeared gradually, were not caused by his own acts and were but hastened by the lawful acts of others we see no fact in the instant case requiring exception to the statement in St. Clair County v. Lovingston, 23 Wall. 46, 23 L.Ed. 59." At page 958. The Lovingston case was then quoted and the court added: "We think it clear that the influence of the revetment work of the government and others upon the flow and course of the Arkansas River does not defeat plaintiff's title to the accreted lands. The alluvion was occasioned essentially from natural causes as intended by Oklahoma statute. To interpret sec. 335 to mean 'entirely from natural causes' would be unrealistic." At pages 958–959.

134 A.L.R. has an annotation of the subject: "Waters: rights in respect of changes by accretion or reliction due to artificial conditions." At page 467. At page 468, it is said: "Generally, a riparian owner is not precluded from acquiring land by accretion or reliction, notwithstanding the fact that the accumulation is brought about partly by artificial obstructions erected by third persons, where the riparian owner had no part in erecting the artificial barrier." See, to this effect, Nordale v. Waxberg, D.C.Alaska, 84 F.Supp. 1004, 1005; Adams v. Frothingham, 3 Mass. 352, 362; Burke v. Commonwealth, 283 Mass. 63, 186 N.E. 277, 279; State v. 6.0 Acres of Land, 101 N.H. 228, 139 A.2d 75, 77; Frank v. Smith, 138 Neb. 382, 293 N.W. 329, 334, 134 A.L.R. 458; Solomon v. Sioux City, 243 Iowa 634, 51 N.W.2d 472, 476; State v. Gill, 259 Ala. 177, 66 So.2d 141, 145; State ex rel. Duffy v. Lakefront East Fifty-Fifth Street, Corp., 137 Ohio St. 8, 27 N.E.2d 485, 486; Block v. Franzen, 163 Neb. 270, 79 N.W.2d 446, 452; Tatum v. City of St. Louis, 125 Mo. 647, 28 S.W. 1002, 1003; Whyte v. City of St. Louis, 153 Mo. 80, 54 S.W. 478, 480; In re Hutchinson River Parkway Extension, Sup., 14 N.Y.S.2d 692, 693; 4 Tiffany Real Property (3d Ed.) § 1223, p. 626; 65 C.J.S. Navigable Waters § 82, p. 178; 56 Am. Jur. § 486, p. 899.

[12] Of course, the same rules of accretion apply to tidal and non-tidal navigable waters. See, Brundage v. Knox, 279 Ill. 450, 117 N.E. 123, 128–129; City of Los Angeles v. Anderson, 206 Cal. 662, 666, 275 P. 789; 56 Am.Jur. § 477, p. 894; § 491, p. 902.

City of Los Angeles v. Anderson, supra, is not opposed to these views. It holds that alluvion caused in perceptible degrees by a breakwater belonged to the city and not the upland owner whose access to the water it cut off. See discussion of this case in Carpenter v. City of Santa Monica, supra, 63 Cal.App.2d 772, 790, 147 P.2d 964.

[13] There was no evidence in the instant case of any alluvion caused by artificial means employed by City or State at any time before the filling of 1946, and there is no evidence that the alluvion caused by that artificial process is included in the parking lot area; exhibit "J" shows it to be approximately 100 feet seaward of the westerly line of the parking lot.

[14] On this state of the record the trial court could not grant a new trial upon the theory of insufficiency of the evidence to support a finding that the entire parking area is situated upon original upland plus gradual accretion which has become a part of that upland. We have discussed the problem because it will inevitably arise upon the new trial (Code Civ.Proc. § 53), which was properly granted for the reasons hereinafter set forth.

Whether the subject parking lot was a proper incidental use of the beach park presents an ultimate question of fact. Appellant's counsel assert that as matter of law the devoting of a part of the deeded premises to parking lot use was a violation of these conditions subsequent; namely, that the beach be kept "open and unobstructed for the use and enjoyment of the public and as a pleasure park or beach"; that "said property shall be kept clean at said city's expense"; that "no house or houses or buildings of any kind or character" shall be erected or operated upon the beach; that "said lands and every part thereof must at all times be kept free from teaming"; and finally, that the parking lot "violated the over-all plan" of the grantors. But counsel at the trial impliedly recognized these questions to be fact questions. They resorted to parol evidence to show that the parking lot, which is paved, has a house for an attendant and a building containing public toilets at the rear of the park, and that these things did violate "the basic intent" of the grant and the "over-all plan" of the grantors. To the end of further showing that this parking lot was not necessary for use of the beach, plaintiffs introduced evidence of the condition of the premises which were granted and those retained by the grantors in 1904, the wholly residential nature of the properties fronting on the bay in that area, the existence or building of pleasure piers in the bay, the gradual change of the neighborhood from residential to one preponderantly commercial, the meaning of the word "teaming" in 1904, particularly whether it fairly included the use of automobiles, the extent of obstruction to the ocean view caused by the parking lot and its buildings and use by automobiles, the noise and fumes emanating from the same. Indeed it even appeared from plaintiffs' proof that one of them, Mrs. Carman-Ryles, owned a block 220 feet long fronting upon the north end of the parking lot, and that about nine years before the trial she had built a motel and a public parking lot upon it. After her sale of same the purchaser devoted part of that property to use as a Bridgo or Bingo Parlor, retaining and using the auto park in connection therewith. Respondent also introduced evidence upon the original conditions, changes therein and present uses of the frontage in the tracts from which the fractional lots had been deeded, a frontage of approximately 3500 feet.

Appellant's reply brief says: "We do not dispute the right of a city which has condemned and dedicated land for a public park, to put in an auto park where necessary for people to use in getting to the park, but the case is not authority in the instant situation for two reasons:

"First, the land in the instant case was not dedicated by the City, but was received as a gift under conditions that expressly or by fair construction prohibited such use.

"Second, the evidence did not show that the auto park was necessary for the use of the beach. This is just a supposition which defendant would seek to have taken for granted by virtue of the increasing population in Southern California. But the evidence rebutted the assumption."

Bearing particularly upon the question of whether an automobile park was necessary for the use of the beach in this instance, respondent also showed that prior to its construction this beach had been little used, due largely to inadequate parking facilities in the immediate vicinity; that the use of automobiles has grown to such an extent since 1904 that the crowds at the various beaches now vary in proportion to the availability and adequacy of parking facilities; that this parking lot was conceived, authorized and constructed as an inducement and aid to a fuller enjoyment of the beach by the general public and the result has been a very substantial increase in attendance.

There is, as appellant contends, a recognized distinction between parks located upon land belonging to a municipality and those upon property dedicated to park use through deed of a private owner. See, 37 Cal.Jur.2d § 16, p. 293; 39 Am.Jur., § 27, p. 823; 64 C.J.S. Municipal Corporations § 1820, p. 304. In Spinks v. City of Los Angeles, 220 Cal. 366, 368, 31 P.2d 193, 194, it is said: "Where a tract of land is donated to a city with a restriction upon its use—as, for instance, when it is donated or dedicated solely for a park—the city cannot legally divert the use of such property to purposes inconsistent with the terms of the grant. A less strict construction is adopted as to dedications made by the public. Slavich v. Hamilton, 201 Cal. 299, 303, 257 P. 60." In that case the court upheld the extension of Wilshire Boulevard across Westlake Park in Los Angeles. In Spires v. City of Los Angeles, 150 Cal. 64, 87 P. 1026, the building of a public library in a public park was held legally permissible. Harter v. San Jose, 141 Cal. 659, 665–666, 75 P. 344, held that a lease of a portion of a public park for hotel purposes was a legitimate park use. Ritzman v. City of Los Angeles, 38 Cal. App.2d 470, 101 P.2d 541, made a like ruling with respect to extension of a highway through Arroyo Seco Park within said city. These cases involved parks which had not been dedicated by private donors.

Wattson v. Eldridge, 207 Cal. 314, 278 P. 236, grew out of Abbot Kinney's founding of the city of Venice, as does the instant case. The subdivision map showed a system of waterways and canals resembling those of the famous Italian city. On May 20, 1912, the Abbot Kinney Company conveyed to the city of Venice certain areas which had been designated and used as canals. The deed stated that "the premises herein conveyed shall be used by said second party and its successors solely and only for permanent waterways, and canals, free to the public forever." 207 Cal. at page 317, 278 P. at page 237. These canals were operated by the city as ways open to the use of the public for boating, bathing, swimming, transportation of persons for hire, etc. In 1929 plaintiff Wattson sought a writ of mandamus to compel the city of Los Angeles (corporate successor to Venice) to execute a contract which had been awarded to him for the filling and improving for surface streets the areas theretofore used as canals and artificial waterways. Respondents were members of the Board of Public Works of the city. In granting the writ and holding that conversion of the canals into dirt highways was a lawful use of the dedicated areas the court said, 207 Cal. at page 320, 278 P. at page 238: "In support of their position that the municipality is without authority to 'divert' these canal areas to surface streets, the respondents rely upon the universally accepted rule of law that land which has been dedicated to a definite and specific purpose must be used in conformity with the terms of the dedication, and not diverted to any other purpose or use. [Citations.] With this rule we have no quarrel. *However a dedication must be understood and construed with reference to its primary object and purpose.* [Citation.] In Hall v. Fairchild-Gilmore-Wilton Co., 66 Cal.App. 615, 624, 227 P. 649, 653, it is declared that '*nothing is improper which conduces to that object.*' The real question always is, therefore, whether the use in a particular case, and for a designated purpose, is *consistent or inconsistent with such primary object.* Whether or not a particular use amounts to a diversion from that for which the dedication was made *depends on the circumstances of the dedication and the intention of the party making it.* It has been held that such use is authorized as is fairly within the terms of the dedication and reasonably serves to fit the property for enjoyment by the public in the manner contemplated. Spires v. City of Los Angeles, 150 Cal. 64, 68, 87 P. 1026, 11 Ann.Cas. 465. In other words, the dedicator is presumed to have intended the property to be used in such way by the public as will be most convenient and comfortable, and according to *not only the proprieties and usages known at the time of the dedication, but also to those justified by lapse of time and change of conditions.*" (Emphasis added.) At page 321 of 207 Cal., at page 239 of 278 P.: "There cannot, therefore, be any question but that a canal is a highway of a peculiar kind. [Citation.] The dedication of a highway to public use authorizes any ordinary use for highway purposes. With changing conditions of travel and use a city has the right to adapt and appropriate its highways from time to time to such uses as in its judgment would be most conducive to the public good, and the courts should be slow to interfere with the exercise of this discretion. [Citation.] In our opinion, it would be most unreasonable to conclude that the Abbot Kinney Company by its dedication of the canal areas 'for permanent waterways and canals free to the public forever' intended thereby to indelibly and irrevocably impress upon these lands a trust solely for canal purposes. *A liberal interpretation and one more conducive to the public good, which the dedicator is presumed to have had in mind when making the dedication,* warrants the conclusion that it was merely intended by the employment of the quoted language to secure to the public generally some manner or means of ingress and egress. When these canals were originally acquired by the City of Venice from the Abbot Kinney Company it may not have been actually contemplated by any of the parties to the acquisition and grant that they would be used for surface highways or streets, *yet it may properly be said to have been within the legal contemplation of all that they were to be used for all purposes by which the object of their creation—as public highways or thoroughfares—could be promoted.* It cannot reasonably be supposed that the dedicator intended otherwise than *that they should respond to whatever demands, new improvements, and increased facilities might make upon them, so only that such demands must always be consistent with their character and purpose as public highways.* In our opinion, the filling in and improving of these canal areas as surface thoroughfares constitutes but a new adaptation of their original dedication to the advancement of public convenience—a more suitable and more economical enjoyment of them by the public as highways. The contemplated improvements would rather increase than diminish their fitness and convenience as public highways. We conclude, therefore, that the improvement of the canal areas as surface streets is *fairly within the scope of the powers which it was reasonbly contemplated the municipal authorities might exercise from time to time during the years subsequent to the original dedication for public purposes.*" (Emphasis added.)

Because of the nature of the action no reference was made in the Wattson opinion to the fact that the deed under consideration was made upon conditions subsequent. However, examination of the record shows that such was the fact.

The case discloses that the rule of strict construction voiced in Spinks v. City of Los Angeles, supra, 220 Cal. 366, 31 P.2d 193, and similar cases, is but an aid to ascertainment and enforcement of the primary purposes and objects of the dedication, whether made by private donor or by a municipality with respect to land owned by it.

The same philosophy as that of the Wattson case is voiced in 16 Am.Jur., § 61, p. 407, as follows: "Whether a particular use amounts to a diversion from that for which the dedication was made depends on the circumstances of the dedication and the intention of the parties making it, and is, therefore, largely a question of fact. Furthermore, a different construction is placed on dedications made by individuals from those made by the public, the former being construed more strictly than the latter. In any case, however, such use is authorized as is fairly within the terms of the dedication and reasonably serves to fit the property for enjoyment by the public in the manner contemplated. The dedicator is presumed to have intended the property to be used by the public, within the limitations of the dedication, in such way as will be most convenient and comfortable and according to not only the proprieties and usages known at the time of the dedication, but also to those justified by lapse of time and change of conditions."

Courts of other states have in numerous instances held an automobile parking lot to be an appropriate incident to the use of a public park. Blank v. Browne, 217 App. Div. 624, 216 N.Y.S. 664, 668; Pansmith v. Incorporated Village of Island Park, Sup., 72 N.Y.S.2d 575, 578; Hanna v. Sunrise Recreation, Fla., 94 So.2d 597, 601; McLauthlin v. City and County of Denver, 131 Colo. 222, 280 P.2d 1103, 1106; Odell v. Pile, Mo., 260 S.W.2d 521, 525.

[15, 16] The Wattson decision also points to the conclusion that the question of whether a given use violates a specific condition ordinarily presents a question of fact. Clearly, such is the situation here and the evidence is in substantial conflict. We need go no further, for the evidence would have sustained a finding in defendant's favor upon this cardinal issue and the order granting a new trial must be affirmed.

In view of necessity of a new trial certain other matters will be considered as an aid to correct further proceedings.

Respondent contends that plaintiff Abbot Kinney Company has no right to maintain the action and that, Abbot Kinney having died, his heirs are indispensable parties. The record shows that Abbot Kinney and the other grantors named in the original deed of February 20, 1904, owned equal interests in the land, which would imply tenancy in common. Plaintiffs other than Abbot Kinney Company are heirs of the respective grantors, Fraser, Jones and Gage.

[17] The deed of February 20, 1904, made as it was upon condition subsequent, left in the grantors a possibility of reverter, which is recognized as a contingent estate and transferable under § 1046, Civil Code.[6] Taylor v. Continental Southern Corp., 131 Cal.App.2d 267, 273, 280 P.2d 514; Johnston v. City of Los Angeles, 176 Cal. 479, 486, 168 P. 1047.

[18] The fact that Mr. Kinney's interest in the reversion was an undivided one does not affect the efficacy of said deed, for "[e]ach cotenant, whether he be a joint tenant or a tenant in common, may sell or encumber his interest in the property forming the subject of the tenancy at his pleasure, regardless of the knowledge, consent, or approval of the other cotenants." 13 Cal.Jur.2d § 38, p. 325.

[19] In 1905, Abbot Kinney and wife conveyed to Abbot Kinney Company (the husband's wholly owned corporation) all his property. This was done by deed recorded on March 6, 1905, which in paragraph (15) transferred "[a]ll the right title and interest of the parties of the first part, not hereinbefore mentioned in and to those certain tracts of land"[7] in which the subdivisions covered by the 1904 deed to the city were situated, and added: "And the land lying between the Westerly line of said 115.945 acre allotments and the line of ordinary high tide of the Pacific Ocean." Also: "Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof."

We see no merit in the contention that Mrs. Kinney's joinder in this deed implied an intent to convey only jointly owned property and therefore the reversion in question did not pass because she had no interest in the subject property. As the court judicially knows, the custom of having the wife join in the husband's conveyance has been so general, both before and after the 1927 amendment to the community property law, that Mrs. Kinney's joinder in this deed implies nothing more than a desire to pass title to the exclusion of any questions or problems concerning present or potential interest of the wife in the property. "[I]t is plain from the decisions that as to community property acquired previous to 1927 her joinder in a deed thereof is in legal effect but an expression of her assent to the transfer by the husband." Riley v. Gordon, 137 Cal.App. 311, 315, 30 P.2d 617, 619.

By deed of April 8, 1905, the grantors named in the 1904 deed conveyed to the city of Ocean Park the identical land described in that deed upon the same conditions except that the words "water or sewer" were omitted from the first proviso of the 1904 instrument. Respondent says: "This act conclusively shows that all four grantors considered their interest to be joint, and further it shows that Kinney's intent was that such interest had not been conveyed to the corporation." We think this deeding carries no such inferences. If it did, the fact would be immaterial for Kinney's interest in the land had passed out of him in 1904 and this 1905 deed was nugatory.

[20] It is further contended by respondent that the conditions of the 1904 deed were waived through the making of a quitclaim deed by Abbot Kinney Company, Fraser, Jones and Gage to the city covering the northeasterly 20 feet of the lands originally conveyed in 1904. This deed says: "The above described strip of land adjoins the board walk on the west, along the Ocean Front, from the southerly line of Marine street extended, to the Northerly line of Horizon Avenue." Also: "It being hereby understood and agreed, that said strip of land is to be used for the construction of a

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[6] Civ.Code, § 1046: "A right of reëntry, or of repossession for breach of condition subsequent, can be transferred."

[7] Describing certain "allotments."

public side-walk and for no other purpose." Manifestly, the conveyance was made in order to widen the walk, the ten-foot plank walk, which was part of the original dedication; and it plainly was in furtherance of the purposes therein specified, beach park purposes. There is no evidence to warrant a contrary inference.

[21] Waiver, when implied, rests essentially upon elements of estoppel. First Nat. Bank of Los Angeles v. Maxwell, 123 Cal. 360, 367–368, 55 P. 980; Stewart v. Leasure, 12 Cal.App.2d 652, 656, 55 P.2d 917; Hopson v. Nat. Union, etc., Cooks and Stewards, 116 Cal.App.2d 320, 325, 253 P.2d 733; Roberson v. Industrial Acc. Comm., 146 Cal. App.2d 627, 629, 304 P.2d 202. Nothing in the nature of an estoppel is shown here. The sole effect of this 20-foot deed is to release that strip from operation of the conditions subsequent, not to lift them as to the entire area of which the strip was a part.

[22] In line with this waiver argument respondent points to the fact that the city adopted, on September 30, 1924, an ordinance designating as a public sidewalk the easterly 40 feet of the lots conveyed by the 1904 deed, thus increasing the width of the public thoroughfare by 10 additional feet. The entire width has been paved and used and known as Ocean Front Walk. At a pretrial hearing it was stipulated: "A portion of the property deeded to the City was thereafter taken by the City as a public walk and is not involved in this proceeding. The land involved is that described in plaintiffs' complaint, except the east 40 feet thereof, used as a public walk." The city's action in this regard presented a case of inverse condemnation of the reversionary rights of the donors, but, the statute of limitations having run against recovery of compensation, plaintiffs herein are remediless with respect to the additional 10 feet seized pursuant to this ordinance.

If the ordinance and subsequent use of the entire 40 feet as a sidewalk be said to be a violation pro tanto of the conditions of the grant, it does not follow that the entire property could have been forfeited as a result. Such a violation can effect only a partial reversion where the remainder of the property continues to be used in conformity with the terms of the conditions of the grant. Quatman v. McCray, 128 Cal. 285, 289, 60 P. 855; Tamalpais Land & Water Co. v. Northwestern Pac. R. R. Co., 73 Cal. App.2d 917, 929, 167 P.2d 825; 14 Cal.Jur.2d § 77, p. 86.

Moreover, respondent's brief says: "In view of this quitclaim deed and ordinance, the parties to this action stipulated that the easterly forty feet of the fifteen lots in dispute was not subject to the provisions of either of the deeds of February 20, 1904, or April 8, 1905, and hence was not involved in this action."

No other points require discussion.

Order granting new trial affirmed; appeal from judgment dismissed.

FOX, P. J., and HERNDON, J., concur.

171 Cal.App.2d 144

Orson A. MOODY, Jr., Plaintiff and Respondent,

v.

Vesta V. MOODY et al., Defendants,

Vesta V. Moody, Defendant and Appellant.

Vesta V. MOODY, Cross-Complainant,

v.

Orson A. MOODY, Jr., Cross-Defendant.

Civ. 9521.

District Court of Appeal, Third District, California.

June 4, 1959.

Action for partition of ranch property brought by divorced husband against former wife, after interlocutory decree of divorce had been entered awarding divorce to husband and settling separate and community property rights of the parties. The Superior Court, Sacramento County, James H. Oakley, J., rendered judgment for husband, and wife appealed. The District Court of Appeal, Warne, J. pro tem., held that where question of wife's claimed contribution toward purchase of property was an issue formed by pleadings in divorce action, finding upon that issue was necessary to adjudication of property rights of parties, and finding in divorce action that wife did not contribute towards purchase of ranch property barred wife from reviving issue in partition action, even though such finding was not carried into the judgment.

Affirmed.

Divorce ⚷255

Where question of wife's claimed contribution toward purchase of ranch property was an issue formed by pleadings in divorce action and finding upon that issue was necessary to adjudication of property rights of parties, finding in divorce action that wife did not contribute towards purchase of ranch property barred wife from reviving issue in husband's subsequent partition action, even though such finding was not carried into the judgment.

◆

John A. Young, Woodland, for appellant.

Wilke, Fleury & Sapunor, Sacramento, for respondent.

WARNE, Justice pro tem.

This is an appeal from an interlocutory decree in an action for partition.

At the time of filing this action the record shows that the parties were husband and wife. However in March, 1956, the wife (appellant) commenced an action for divorce, and the husband (respondent herein) answered and also cross-complained for divorce. After a contested trial, the court entered its interlocutory decree awarding a divorce to the husband and settling the separate and community property rights of the parties.

In her amended and supplemental complaint in the divorce action the appellant, among other things, alleged that in the purchase of the real property involved herein she contributed the sum of $14,134.29 of her own separate funds which were in her possession at the time of her marriage to respondent; and "which said funds were her sole and separate property and not community property." In the prayer of her complaint she prayed: "For a decree awarding plaintiff as her separate property the sum of $14,134.29 as her contribution to the acquisition of the community property and for such other division of the community real and personal property as the court may seem [sic] just and equitable."

The answer and cross-complaint of respondent controverted the allegations of the wife's complaint, and thus the question of whether appellant had contributed $14,134.29 of her separate funds towards the purchase of the property became an issue in the divorce action.

The trial court found that all of the real property of the parties was owned by them as joint tenants as their separate property and that appellant had not contributed any sums whatever of separate property to the acquisition of any of the properties owned by the parties. The interlocutory decree of divorce decreed, among other things, that all of the property described in the complaint "is the separate property of the parties and is owned and held by them as joint tenants." It further provided "that defendant and cross-complainant [respondent] pay to plaintiff and cross-defendant [appellant] the sum of $3,850.00 cash." However the finding that appellant had not contributed $14,134.29 of her separate funds towards the purchase price of the property was not carried into the interlocutory decree.

Thereafter respondent brought the instant action to partition the three parcels of real property decreed in the divorce action to be separate property owned by respondent and appellant as joint tenants. Appellant's answer to the complaint in partition admits that the parties owned the parcels of land involved as joint tenants but denied that their interest in the Lincoln Ranch in Placer County, one of said parcels of land, was equal and by way of cross-complaint alleged that there was used to purchase the Lincoln Ranch property approximately $14,000 of her separate funds. She prayed that she be granted a decree establishing that the respondent holds said property in trust for her to the extent of $14,000. The allegations of the cross-complaint were denied by respondent and as an affirmative defense respondent pleaded the findings and decree in the divorce action by way of a bar and estoppel. Over objection, the trial court admitted into evidence the entire file in the divorce action including the findings and interlocutory decree. Also over objection of the respondent, the court refused to receive any testimony relative to appellant's claimed contribution of her separate funds towards the purchase of the Lincoln Ranch upon the ground that the issue of appellant's alleged contribution of $14,000 had already been determined in the divorce action and that the same could not be again litigated in the partition suit. The interlocutory decree in partition found against appellant's claimed contribution towards the purchase of the Lincoln Ranch property, found that each of the parties was the owner of an undivided one-half interest in all three parcels of real property and decreed the partition thereof.

It is admitted that the $14,134.29 contribution was an issue in the divorce action and is the same $14,000 contribution alleged in, and the subject matter of, the cross-complaint in the partition action. However appellant contends that since the interlocutory decree of divorce is silent as to the question of her alleged contribution, resort cannot be had to the findings to support the plea of res judicata.

In Steiner v. Thomas, 94 Cal.App.2d 655, 659–660, 211 P.2d 321, 324 the court said: "A judgment estops the plaintiff from maintaining a subsequent action between the same parties, not only as to the issues raised but also as to every other issue that might properly have been litigated. The estoppel is effective not only where the grounds for recovery in the second action are identical with those pleaded in the first which he failed to prove but he is likewise barred where he failed to allege those grounds in his first suit. Panos v. Great Western Packing Co., 21 Cal.2d 636, 638, 134 P.2d 242; Sutphin v. Speik, 15 Cal.2d 195, 202, 99 P.2d 652, 101 P.2d 497; Slater v. Shell Oil Co., 58 Cal.App.2d 864, 868, 137 P.2d 713; Rest. Law of Judgments, sec. 63a."

And as stated in Basore v. Metropolitan Trust Co., 105 Cal.App.2d 834, 838–839, 234 P.2d 296, 299:

"A complete answer to appellant's * * * contention that the trial court could not consider the findings in ascertaining the issues determined by the prior judgment is found in the case of Sutphin v. Speik, 15 Cal.2d 195, 201, 99 P.2d 652, 101 P.2d 497, wherein the court held:

" 'It is clear from an examination of the findings and judgment therein that plaintiff was adjudged in the prior action to be entitled to her percentage of the production of any wells then drilled on the particular premises regardless of where the wells were bottomed, or the source of the oil delivered by them. *The suggestion made by the defendant that the "judgment alone should be considered and the findings disregarded if outside the scope of the judgment" can have no force in view of the settled rule that the findings constitute the decision of the court.*' (Italics added.)

"* * * The former action, therefore, constitutes a bar to the instant one which seeks to revive the issues settled in the first proceeding, or, at most, to raise issues that might have been raised in the first action. In either event, the former judgment is res judicata in the present action. Olwell v. Hopkins, 28 Cal.2d 147, 152, 168 P.2d 972."

Applying the above rules to the instant case the judgment is correct. The question of appellant's claimed contribution towards the purchase of the Lincoln Ranch property was an issue formed by the pleadings in the divorce action and a finding upon that issue was necessary to an adjudication of the property rights of the parties, and the contention made by appellant that the judgment alone should be considered because the findings were not carried into it "can have no force in view of the settled rule that the findings constitute the decision of the court." The findings in the divorce action clearly show that the issue was adjudicated therein and constitutes a bar in the instant action of an issue which appellant seeks to revive in these proceedings or, at most to raise an issue that might have been raised in the first action. Olwell v. Hopkins, supra; Basore v. Metropolitan Trust Co., supra.

The authorities cited by appellant (In re Estate of Lounsberry, 149 Cal.App.2d 857, 309 P.2d 554, and Hamilton v. Hamilton, 109 Cal.App.2d 145, 240 P.2d 14) in support of her contention that the findings are to be disregarded because they were not carried into the judgment are not controlling in the instant case. In the Lounsberry case the plaintiff attempted to introduce into evidence as res judicata one of the issues raised in said action, i. e., a finding of fact by the trial court in a prior action between the same parties. The court in the latter action refused to admit the finding into evidence. The prior action was one to set aside a deed in conveyance upon two different grounds, one being the ground of undue influence and the other being the ground of abuse of a certain power of attorney granted by decedent to the defendant in said action. The judgment was responsive to said cause of action, but the findings of fact in question went beyond the issues and found that certain false and fraudulent promises and representations had been made to defendant without the intent of performing the same. The plaintiff argued that said findings in the prior action would estop defendant in the latter action from denying that his promises were made without the intention to perform. This court stated at pages 861–862 of 149 Cal.App.2d at page 557, of 309 P.2d: "It is to be noted that the first count places no reliance upon and contains no allegations of fraudulent representations. It is also to be noted that the allegations of fraud in the second count are wholly immaterial to the cause of action therein stated. That cause of action depends wholly upon the fraudulent use by Lounsberry of a power of attorney whereby he obtained decedent's property. It made no difference how he obtained the power of attorney. Whether he got it honestly or induced its execution fraudulently neither added to, nor detracted from, the right of the administrator to compel him to turn in to the estate any sums of decedent's obtained by him by use of the power. The result is that the findings of fact concerning false and fraudulent representations consisting of promises made without intention of performing the same were wholly unnecessary to the decision of the court in the cause." Briefly, the case holds that where a finding of fact is entirely without the issues raised by the pleadings and is not necessary to support the judgment, such finding of fact is not a conclusive adjudication of the fact contained in such findings. The Hamilton case, like the Lounsberry case, holds only that a finding of fact that is not essential to or covered by the subject matter of the actual judgment itself, is not conclusive upon the parties in later litigation.

The instant case is quite different from the Lounsberry and Hamilton cases. In the divorce action the question of appellant's claimed contribution was an issue positively framed by the pleadings, and of necessity it must have been decided by the court in its adjudication of the property rights of the parties. The interlocutory decree of divorce in said action defined which property of the parties was separate property and which was community property, declared the interest of the parties in said separate property to be equal as joint tenants, distributed the community property between the parties, awarded the wife a money judgment against her husband for $3,850 and fixed the obligation of the husband for the support of his wife and children. The parties were settling all of their property rights and the interlocutory decree purported to determine and settle all of their property rights. "Matters which follow by necessary and inevitable inference from an adjudication because the judgment could not have been rendered without determining them are as effectually concluded thereby as those specifically and in terms adjudicated." 2 Freeman on Judgments, 5th Ed., sec. 693.

The judgment is affirmed.

PEEK, Acting P. J., and SCHOTTKY, J., concur.

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171 Cal.App.2d 242

Raymond VENNE and Travelers Indemnity Company, a corporation, Plaintiffs and Respondents,

v.

STANDARD ACCIDENT INSURANCE COMPANY, a corporation, et al., Defendants,

Standard Accident Insurance Company, a corporation, Appellant.

Civ. 23385.

District Court of Appeal, Second District, Division 2, California.

June 10, 1959.

Action by purchaser of automobile and his insurer against seller's insurer and others to have determined the rights, duties and obligations of the parties under the policy issued by seller's insurer with respect to an accident which occurred day after sale of automobile. From adverse judgment of the Superior Court, Los Angeles County, Lester O. Luce, J., the seller's insurer appealed. The District Court of Appeal, Fox, P. J., held that under policy containing omnibus clause covering persons using automobile with permission of insured, insured, who made a bona fide sale of insured vehicle to her brother and delivered possession of automobile and endorsed certificate of ownership and certificate of registration to purchaser had no permission to give or withhold, brother was not a permissive user at time of accident and seller's insurer was not liable although certain formalities set forth in Vehicle Code to effectuate transfer of ownership had not been complied with.

Judgment reversed with directions.

1. Insurance 🔑435.11

Under policy containing omnibus clause covering persons using automobile with permission of insured, insured, who made a bona fide sale of insured vehicle to her brother and delivered possession of automobile and endorsed certificate of ownership and certificate of registration to purchaser, had no permission to give or withhold, brother was not a permissive user at time of accident which occurred day following sale, and seller's insurer was not liable although certain formalities set forth in Vehicle Code to effectuate transfer of ownership had not been complied with. West's Ann.Vehicle Code, §§ 178(a) (1, 2), 186(a) (1, 2), 402.

2. Automobiles 🔑19, 186

Seller of automobile, by delivering automobile, the endorsed certificate of ownership and the registration card to purchaser, fully complied with statute relating to release of an owner from liability for negligence upon transfer and thereby relieved herself of potential civil liability, but such compliance did not necessarily effectuate transfer of title prior to accident which occurred the following day. West's Ann. Vehicle Code, §§ 178(a) (1, 2), 186(a) (1, 2).

3. Automobiles 🔑19

Portion of statute prescribing manner of transferring title to an automobile referring to statute releasing an owner from liability for negligence upon transfer does not have effect of incorporating that statute into statute concerning transfer of title and compliance with statute concerning release from liability does not effect a transfer of title under motor vehicle registration laws. West's Ann.Vehicle Code, §§ 178(a) (1, 2), 186(a) (1, 2).

4. Appeal and Error ⚷1176(1)

Where facts are undisputed and the parties agree that a question of law only is presented, it is appropriate for reviewing court to reverse the judgment with directions.

◆

H. T. Ellerby and Henry F. Walker, Los Angeles, for appellant.

Schell, Delamer & Loring, Fred B. Belanger, Los Angeles, for respondents.

FOX, Presiding Justice.

Standard Accident Insurance Company appeals from an adverse judgment in a declaratory relief action which declared that a policy which it had issued covered an accident that occurred after the owner had sold the car.

[1] The facts in this case are undisputed. Celeste Venne was the owner of a 1950 Oldsmobile. Said automobile was covered by an insurance policy issued by the appellant naming Celeste as the insured. This policy was in full force and effect on June 30, 1956. The insurance policy contained what is referred to as an "omnibus clause," viz., the policy covered persons using the automobile with the permission of the insured. On June 29, 1956, Celeste made a bona fide sale of the Oldsmobile to Raymond Venne (her brother) and at that time delivered possession of the automobile, the endorsed certificate of ownership, and the certificate of registration to the purchaser. Notice of the above transfer was first received by the Department of Motor Vehicles on July 6, 1956. On June 30, 1956, the day following the sale, Raymond was involved in a traffic accident. Raymond had his own insurance which covered the date of the accident. As a result of the above accident, an action was commenced against Celeste and Raymond. Demand was made upon appellant to defend Raymond and save and hold him harmless from and against liability arising out of the accident. Said request was declined. Thereafter, on April 22, 1957, Raymond and his insurance company commenced this declaratory relief action seeking to have determined the rights, duties and obligations of the parties under the policy issued by the appellant. The court found that the subject policy covered the instant accident on a pro rata basis. It is from this judgment that appellant appeals.

Appellant seeks a reversal on the ground that as there was a sale of the vehicle to Raymond, he was not using it with Celeste's permission but rather as his own property. Therefore, argues appellant, the "omnibus clause" does not cover the instant situation. Respondents, on the other hand, contend that as certain formalities set forth in the Vehicle Code were not complied with, there was no effective transfer of ownership, and that Celeste remained the owner and Raymond was a permissive user within the meaning of the "omnibus clause."

Section 186, Vehicle Code, provides in part:

"Transfer Of Title Or Interest. (a) Requirements. No transfer of title or any interest in or to a vehicle registered hereunder shall pass and any attempted transfer shall not be effective unless and until the parties thereto have fulfilled either of the following requirements:

"(1) The transferor shall have made proper endorsement and delivery of the certificate of ownership and delivery of the registration card to the transferee as provided in this code and the transferee has delivered to the department or has placed in the United States mail addressed to the department such certificate and card when and as required under this code with the proper transfer fee and thereby makes application for a transfer of registration * * or

"(2) The transferor shall have delivered to the department or shall have placed in the United States mail addressed to the department the appropriate documents for the registration or transfer of registration of such vehicle pursuant to such sale or transfer *except as provided in Section 178.*" (Emphasis added.)

Section 178 provides:

"Owner or Dealer Released From Liability for Negligence Upon Transfer. (a) An owner who has made a bona fide sale or transfer of a vehicle and has delivered possession thereof to a purchaser shall not by reason of any of the provisions of this code be deemed the owner of such vehicle so as to be subject to civil liability for the operation of such vehicle thereafter by another when such owner in addition to the foregoing has fulfilled either of the following requirements:

"(1) When such owner has made proper endorsement and delivery of the certificate of ownership and delivered the certificate of registration as provided in the code.

"(2) When such owner has delivered to the department or has placed in the United States mail, addressed to the department, either a notice as provided in Section 177, within the time prescribed in such section, or appropriate documents for registration of such vehicle pursuant to such sale or transfer."

Section 177 provides in part:

"Transferor to Notify Department. (a) Whenever the owner of a vehicle registered hereunder sells or transfers his title or interest in, and delivers the possession of, said vehicle to another, said owner shall immediately notify the department of such sale or transfer giving the date thereof, the name and address of such owner and of the transferee and such description of the vehicle as may be required in the appropriate form provided for such purpose by the department."

[2, 3] By delivering the automobile, the endorsed certificate of ownership and the registration card to Raymond, Celeste fully complied with section 178, supra, and therefore relieved herself of potential civil liability. It does not necessarily follow, however, that there was an effective transfer of title prior to the date of the accident. Section 186 prescribes the manner in which an effective transfer of title may be accomplished. It is clear from the facts that, if no effect is given to the italicized portion of 186(a) (2), there was no effective transfer of title on June 30 for the reason that section 186 had not been followed. It is appellant's contention, however, that the italicized portion of section 186(a) (2), which refers to section 178, has the effect of incorporating 178 into 186 and as a consequence thereof, a transfer is effective if section 178 is complied with. If compliance with section 178(a) (1) effects a transfer under the motor vehicle registration laws, then much of the language found in that section is surplusage and confusing for, if title has effectively been transferred, the vendor is not the owner for any purpose, yet section 178 merely says that he "* * * shall not by reason of any of the provisions of this code be deemed the owner of such vehicle so as to be subject to civil liability * * *." Therefore, it would appear that the italicized portion of 186(a) (2) is merely a reference back to section 178 and means no more than that a vendor is relieved of section 402 liability although he has not complied with section 186. No case cited by appellant actually holds 178 compliance effects a transfer of title under the motor vehicle registration laws. Language in Burdine v. Severin Motors, Inc., 147 Cal.App.2d 751, 756, 305 P.2d 1008, indicating the contrary is too broad and was not necessary to the opinion.

While we are of the opinion that 178(a) (1) compliance is not sufficient to transfer title under California's motor vehicle registration laws, it seems equally clear that, as between Celeste and Raymond, there was an actual sale of the vehicle and therefore it would be unrealistic to hold that Raymond was a permissive user of the automobile involved in the accident. The "omnibus clause" extends coverage to the non-owner operator only if he has the permission of the owner to use the vehicle. Once the sale was made, Celeste had no permission to give or withhold;

Raymond had an absolute right to possess and operate the subject automobile. Celeste could not prevent her vendee from using the vehicle nor could she legally reacquire possession herself without Raymond's consent. Since Raymond had the automobile plus the ownership and registration certificates he was at liberty to sell or otherwise deal with the automobile in any manner he desired. Under such circumstances, to argue that Raymond had the express or implied permission of Celeste to use the automobile would be to ignore the realities of the legal relationship between a vendor and vendee. This we may not do. A similar result obtains, although based on different grounds, where suit is brought against a wife under section 402 for the negligence of her husband while the latter was operating an automobile held as community property. "When an automobile which is community property causes injury, the wife is not liable to a party injured by the husband's negligence because the wife has no consent to give." Wilcox v. Berry, 32 Cal.2d 189, 191, 195 P.2d 414, 415. As stated in Cox v. Kaufman, 77 Cal.App.2d 449, at page 452, 175 P.2d 260, at page 261, "* * * no consent of the wife, express or implied, to her husband's use or operation of the community automobile could add anything as a matter of law or of fact to his rights in that respect, which are already plenary and complete."

Superficially, the instant holding may appear to be out of harmony with that reached in Harbor Insurance Co. v. Paulson, 135 Cal.App.2d 22, 29, 286 P.2d 870, where it was held that the vendee of the insured, when there was no compliance with section 186, was a permissive user for the purpose of the "omnibus clause." The result there reached was necessary in order to effectuate the policy behind section 186 and section 402.[1] Such is not true, however, in the case at bar, as the following discussion demonstrates. In Henry v. General Forming Ltd., 33 Cal.2d 223, 227, 200 P.2d 785, 787, the court discusses the policy underlying section 186 as follows: "The requirements for registration of title and ownership, as indicated by the Code provisions, were enacted in the interest of the public welfare to protect innocent purchasers and afford identification of vehicles and persons responsible in cases of accident and injury." In the Paulson case, the vendor, besides failing to comply with section 186, did not deliver the ownership certificate to the vendee-operator, as was done in the case at bar. Therefore, the vendor in the Paulson case was liable under section 402 for damages as a result of the accident. If, however, the vendee were held *not* to be a permissive user, the vendor would have escaped 402 liability even though he clearly did not comply with any of those sections which were enacted to exculpate him upon a sale of the vehicle (§§ 186, 178, supra), for section 402 only imposes liability when the use of the automobile is with the permission of the owner. Hence, a holding that the vendee was a permissive user in the Paulson case was necessary in order to give force and meaning to sections 186 and 402. Once it was determined that a "permissive use" situation existed for the purposes of vicarious liability, it logically followed that the vendee was a permissive user for purposes of the "omnibus clause." In contrast, however, since the vendor in the instant case complied with section 178 and thereby relieved herself of 402 liability, a holding that the vendee was not a permissive user would in no manner offend the policy underlying either section 186 or 402. With the above policy factors in mind, the instant holding is not in conflict with that reached in the Paulson case.

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[1] Section 402(a) reads as follows:

"Vehicle used or operated with owner's consent. Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages."

[4] Therefore, as Raymond was not a permissive user of the vehicle in question, and there is no other basis upon which it may be held that appellant's policy covered the instant accident, the judgment must be reversed. "Since the facts are undisputed and the parties agree that a question of law only is presented, it is appropriate to reverse the judgments with directions." Pacific Home v. County of Los Angeles, 41 Cal.2d 844, 854, 264 P.2d 539, 544; City of Eureka v. McKay & Co., 123 Cal. 666, 673–674, 56 P. 439.

The judgment is reversed, with directions to the trial court to amend its findings of fact and conclusions of law in accord with the views expressed herein, and to enter judgment for appellant.

ASHBURN and HERNDON, JJ., concur.

171 Cal.App.2d 173

PEOPLE of State of California, Plaintiff and Respondent,

v.

Mike O'Malley BLANKENSHIP, Defendant and Appellant.

Cr. 6504.

District Court of Appeal, Second District, Division 3, California.

June 8, 1959.

Defendant was convicted of a hit and run violation and from a verdict of the Superior Court of Los Angeles County and an order denying a motion for new trial, Mark Brandler, J., the defendant appealed. The District Court of Appeal, Shinn, P. J., held that the evidence sustained conviction.

Appeal from verdict dismissed and order affirmed.

1. Automobiles 🔑355(8)

In prosecution for a hit and run violation, where there was circumstantial evidence from which jury could conclude that automobile of defendant's wife sustained damage as a result of collision with another's motorcycle, who identified the defendant as driver of the automobile, evidence justified conviction on the ground that the defendant knew that the motorcyclist had been injured after a rear-end collision with the automobile and that the failure of defendant to stop was a deliberate one. West's Ann.Vehicle Code, §§ 480, 482(a).

2. Criminal Law 🔑1023(10)

An appeal from a verdict must be dismissed.

◆

Leslie & Bernson, Beverly Hills, for appellant.

Stanley Mosk, Atty. Gen., Norman H. Sokolow and David B. Allen, Deputy Attys. Gen., for respondent.

SHINN, Presiding Justice.

In a jury trial, Mike O'Malley Blankenship was convicted of violating Vehicle Code, § 480 and was granted probation on condition that he serve 90 days in the county jail. He appeals from the order denying his motion for new trial and has noticed an appeal from the verdict.

The sole contention on the appeal is the insufficiency of the evidence to establish appellant's guilt of a hit and run violation. As we shall see, this contention is destitute of merit.

John Kingston was riding his motorcycle north on Reseda Boulevard shortly after midnight on May 1, 1958. He came upon a late-model light-colored Cadillac convertible with a white top; a man and a woman were in the car; the man was driving; the driver had a crew hair cut and was wearing a military shirt with emblems on it; appellant was the driver. Upon being shown a photograph of a Cadillac registered to Mrs. Blankenship, Kingston testified that it resembled the convertible he saw on May 1st.

As Kingston started to pass the Cadillac, appellant told him to "get the God damn bike off the road and keep it away from his car." Kingston dropped behind the car and followed it for several blocks in the same lane of traffic at a distance of one or two car lengths. Suddenly, between intersections, the Cadillac's stop lights flashed and the vehicle skidded to a stop. Kingston applied his brakes and swerved to the right to avoid a collision, but his motorcycle struck the right rear end of the Cadillac, precipitating him to the ground and pinning him under the motorcycle. He sustained a compound fracture of the leg and other injuries. On cross-examination, Kingston admitted having been convicted of three violations of Penal Code, § 288, for which he was placed on probation.

The collision was witnessed by a Mr. Azar and his mother, who were driving north on Reseda in a pick-up truck in the same lane of traffic as the two vehicles, about 150 feet behind the motorcycle. They saw the car's rear stop lights flash briefly and the automobile skid to a halt; there was no obstacle ahead of the car; the sound of the collision was quite loud; the car moved forward sightly on impact; then it sped away from the scene. No one got out of the car to identify himself or to render assistance to Kingston. Neither witness could identify the make of the car or the driver; they saw only one person in the car and could not tell whether the driver was a man or a woman. It was brought out on the cross-examination of Mr. Azar that at the preliminary hearing he had stated that Kingston was travelling behind the right side of the car, whereas he testified at the trial that the motorcycle was moving in line with the center of the car prior to the accident.

Police officers investigating the collision obtained from Kingston a description of the Cadillac and its driver. About half an hour later, Officer Giacopuzzi observed a car answering the description going south on Reseda Boulevard three-quarters of a mile north of the scene; it made a right turn off Reseda a block north of the scene. Giacopuzzi halted the car and examined it with his flashlight; there were some fresh marks on the rear end. Appellant was sitting in the front seat; his hair was cut short and he was wearing a military shirt with shoulder emblems. Mrs. Blankenship was also in the front seat; appellant's brother was behind the wheel. When the officer asked them to accompany him to the scene of the accident the Blankenships complied.

The Cadillac and the motorcycle were examined at the scene by Officer Hatter, who was one of the investigating officers in the case. The motorcycle had been severely damaged. The left crash bar was bent back against the motor; the seat was torn off; the left handle bar was bent; the front fender and left foot rest had also been damaged. On the right rear fender of the Cadillac, near the tail light assembly, were what appeared to be splotches of blood; there was a black mark over the top of the rear bumper which extended into the right tail light assembly; scratches and dents were visible along the assembly. Officer Hatter measured and photographed two sets of skid marks left by the vehicles involved in the collision; the car left 37½ feet of four-wheel locked straight skid marks; the motorcycle left 39 feet of marks which ran between the tire marks of the car for half of that distance, then swerved to the right. However, Hatter did not compare the width of the automobile skid marks with the width of the Cadillac's tires. There was opinion evidence given by an expert that the car had been travelling at 24 miles an hour prior to the accident and the motorcycle slightly faster.

The two vehicles were impounded and subjected to further examination the following day by Officer Carter, a qualified police chemist. Carter tested some reddish-brown stains located just above the right tail light of the Cadillac and found them to consist of human blood; there was insufficient blood to perform a blood type test; the stains could have been more than 3 or 4 days old. From the shape of the stains, Carter concluded that the blood was travelling upward when it hit the car. The witness removed a black substance which had left a mark near the car's right tail light and compared it with the left handle grip of the motorcycle; in his opinion, they were of the same general type of rubber-like material. Carter compared some cloth fibers removed from the right tail light assembly with fibers from Kingston's cap; the substances were similar and could have come from the same source. He also compared metal transfers on the left crash bar of the motorcycle with the metallic content of the Cadillac's exhaust port, which had been damaged in the collision. In Carter's opinion, the substances were of the same composition. He found no metal transfers on the car.

Photographs showing the skid marks and the damage to the vehicles and slides containing some of the materials compared by Officer Carter were received in evidence as exhibits.

Appellant and Mrs. Blankenship related their activities on the morning of May 1st. They went to a barroom around 11 p. m. and left shortly after midnight, proceeding north on Reseda Boulevard. Mrs. Blankenship was driving. The top was up, the rear flap closed, the right window shut and the left window partially open. Some motorcyclists, among them Kingston, followed them along Reseda. When Mrs. Blankenship pulled over to the right and stopped, Kingston pulled in on the right side of the car. Appellant rolled down the window and asked Kingston if he was a policeman; Kingston said nothing. Appellant then exchanged seats with his wife and drove on. As they proceeded, Kingston drove up on the left hand side of the car and asked appellant if he had a badge; when appellant denied having a badge, Kingston said that he had one. Kingston rode his motorcycle next to the driver's side of the car for about a mile, cursing and trying to get appellant to pull over to the right, which he refused to do. After a while, they no longer saw any motorcyclists.

The Blankenships denied having been in a collision. They did not recall hearing any loud noise while going north on Reseda; they did not make any sudden stops and they did not stop in the middle of an intersection. They went to the home of appellant's brother and were on their way to take Mrs. Blankenship home when they were stopped by the police. After the Blankenships accompanied the officer to the scene of the accident, Mrs. Blankenship examined the rear end of the car but she did not notice anything unusual. Appellant admitted having said to Officer Hatter: "I don't care to look for any blood on the car. If there is any here, I don't know how it got there." But he denied telling the officer that he had said all he was going to say and that the officer could draw his own conclusions. Appellant's brother testified that he saw no skid marks at the scene of the accident and that he found none when he returned later in the morning to examine the highway.

A Dr. Murasky testified on behalf of appellant that Kingston told him at the receiving hospital that he had consumed five or six beers during the evening and had had no solid food since noon. However, neither Mr. Azar nor Officer Hatter noticed an alcoholic odor on Kingston's breath.

There is no substance to appellant's contention that the evidence was insufficient to establish guilt.

[1] The factual questions were whether appellant was driving the car which was struck by Kingston's motorcycle and whether, knowing that Kingston had been injured, he failed to stop, identify himself and render necessary aid. Vehicle Code §§ 480, 482, subd. (a). There was circumstantial evidence from which the jury could logically conclude that Mrs. Blankenship's Cadillac sustained damage as a result of a collision with Kingston's vehicle and Kingston identified appellant as the driver of the car. Although Blankenship denied knowledge of any accident, knowledge could properly be inferred from the circumstances of the collision. People v. Moody, 93 Cal.App.2d 66, 70, 208 P.2d 692; People v. Kuhn, 139 Cal. App.2d 109, 112, 292 P.2d 964. The fact that Kingston was following closely behind the Cadillac, together with the further facts that the collision was forcible and was audible at

a distance of 150 feet, amply warranted the jury in its determination that appellant knew Kingston had been injured and that his failure to stop was a deliberate one.

[2] The appeal from the verdict is dismissed and the order denying appellant a new trial is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

171 Cal.App.2d 160

Harry C. AUGUSTUS, Plaintiff,

v.

Cecil Compton BEAN, William C. Bean, Aaron Shaffer, First Doe, Second Doe, Third Doe, Fourth Doe and Fifth Doe, Defendants.

Harry C. AUGUSTUS, Plaintiff-Respondent,

and

Cecil Compton Bean and William C. Bean, Defendants and Cross-Defendants,

v.

Aaron SHAFFER, Defendant and Cross-Complainant-Appellant.

Civ. 23406.

District Court of Appeal, Second District, Division 1, California.

June 5, 1959.

Action was brought for injuries arising out of automobile collision, and one of the defendants filed a cross complaint against another defendant for property damage. The Superior Court of Los Angeles County, George A. Dockweiler, J., entered judgment on a verdict in favor of plaintiff against both defendants and against the defendant, who filed the cross complaint, and he appealed. The District Court of Appeal, Lillie, J., held that evidence justified giving of instructions on the subject of recovery of damages for future detriment and expenses for medical treatment.

Judgment affirmed.

1. Appeal and Error ⇨1050(1)

Since, in determination of question whether error in admission of evidence automobile collision case was prejudicial error, test was whether the result would have been different had error not been committed, it was necessary for reviewing court to consider all evidence relating to cause of accident.

2. Stipulations ⇨4

Generally, it is not the best trial practice, and it is often error, to ask for a stipulation before a jury.

3. Stipulations ⇨3

Conduct of counsel in asking for stipulation before jury that important witness to automobile accident was dead, for purpose of introducing statement made by that witness to police officer, did not constitute error and did not result in prejudice to defendant, who was objecting to admission of the statement to the officer.

4. Appeal and Error ⇨1051(3)

Admission of testimony of police officer that, in his opinion, 25 miles an hour was a safe speed at intersection where automobile collision occurred was not prejudicial to one of the defendant motorists, and was not grounds for reversal of judgment adverse to him, where that defendant motorist himself testified that he was going 25 miles an hour as he entered intersection, and he stated to police officer immediately after the collision that he was travelling about 20 to 25 miles an hour.

5. Damages ⇨216(7, 9)

In action for injuries sustained in automobile collision, evidence justified giving of instructions on subject of recovery of damages for future detriment and expense for medical treatment. West's Ann.Civ.Code, § 3283.

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Schell, Delamer & Loring, Fred B. Belanger, Los Angeles, for appellant.

Spray, Gould & Bowers, Los Angeles, for respondents, Cecil Compton Bean and William C. Bean.

Francis J. Gabel, Los Angeles, for respondent Harry C. Augustus.

LILLIE, Justice.

Plaintiff sued defendants for personal injuries arising out of a collision between a Hudson driven by defendant Shaffer and a Buick driven by defendant Bean. Shaffer filed a cross-complaint against Bean for property damage. The jury returned a verdict for $11,500 in favor of plaintiff against both defendants and against cross-complainant Shaffer in favor of cross-defendant Bean. Shaffer is the appellant herein. Bean does not appeal, acquiescing in the judgment in favor of plaintiff.

At the outset, it is conceded that no negligence could rightfully be imputed to plaintiff who was seated in his car at the corner awaiting a signal change. From the verdict it is obvious the jury believed that both defendants were negligent and the negligence of each was a concurrent proximate cause of plaintiff's injury. Appellant does not question the sufficiency of the evidence to support the jury's verdict, but contends that the trial court committed reversible error in denying his motion for mistrial for misconduct of counsel; admitting certain opinion evidence of a police officer; and giving instructions on the subject of future detriment or expense.

Although he predicates his first two contentions on the argument that the conflict in the evidence presented such a close question of liability that "in the light of the entire record" the jury would likely have accepted his theory that Bean was solely responsible for the accident had it not been for the trial court's errors, appellant fails to point out wherein the alleged "close question of liability" lies and of what it consists; or even set forth enough of the evidence to show the alleged conflict.

[1] Since in the determination of prejudicial error, the test is whether the result would have been different had the alleged error not been committed (Weaver v. Shell Co., 34 Cal.App.2d 713, 94 P.2d 364), it is necessary to consider all of the evidence relating to the cause of the accident. Far from the close question of liability contended by appellant, the record reveals a state of facts from which it would not have been reasonable for the jury to have found appellant Shaffer free from negligence or that his acts did not contribute proximately to the happening of the accident.

Defendant Bean testified he was driving his Buick northbound on Sepulveda intending to make a left turn west on Devonshire. As he approached the intersection he stopped in the crosswalk for the traffic light. When it turned green he slowly proceeded turning left between the islands separating the east from the west portion of Sepulveda. He had his foot on the brake but did not stop as his speed was so slow his speedometer was not registering, the car "dragging itself on idle." No other traffic was moving. Approximately three cars eastbound on Devonshire had stopped in the island-way between north and south traffic on Sepulveda. As he straightened out of his turn to go through the balance of the intersection, Bean observed that the traffic in the first two lanes near the island southbound on Sepulveda, filled five or six cars back, was standing still. None had started into the intersection. The driver in the first car in lane No. 1, next to the island, motioned him through and the driver in the first car of lane No. 2 waited. Bean looked up the third lane near the curb and, finding it completely empty as far as he could see, looked back to the left and accelerated "pretty good" to get out of the intersection. He passed in front of the waiting traffic in lanes 1 and 2, and as he started to pass the third lane, appellant Shaffer drove into the intersection through the No. 3 lane, hitting him squarely on the right front tire, moving Bean's car into plaintiff's standing vehicle. Bean did not see Shaffer prior to the impact.

Plaintiff testified he was waiting headed east on Devonshire on the west side of Sepulveda. Bean was trying to turn left on Devonshire and as he entered the southbound portion of Sepulveda he increased his speed to between 20 and 25 miles per hour. The cars in lanes 1 and 2, southbound on Sepulveda, were standing still. Appellant Shaffer, southbound in lane No. 3, drove into the intersection past the standing cars in the first and second lanes. Plaintiff heard the screech of brakes and saw Shaffer turn slightly to the left, striking Bean's car, the impact throwing it into his.

Robert H. Smith testified he was behind Bean, northbound on Sepulveda. As Bean proceeded into the intersection and turned left, he was moving "rather slowly," about four or five miles per hour. No cars entered or passed through the intersection, the first and second lane of southbound traffic remaining stationary. Upon making his turn, he forged ahead "rather rapidly." Smith saw appellant come into the intersection from the third lane next to the curb driving thirty to thirty-five miles per hour but did not see him slow down as he approached, although at the last minute he swerved.

Appellant Shaffer testified he was travelling between twenty-five and thirty miles per hour in lane No. 3 near the curb. Although aware of the cars in lanes 1 and 2, he did not know if they were moving or standing. Lane 3 was clear for 160 feet and no other car entered the intersection before him. Throughout his travel into the intersection he was looking at the traffic light, driving approximately twenty-five miles per hour. There appears to be a conflict in his testimony as to when he first saw Bean, but it is clear that when he did it was too late to avoid the accident. In his statement to the police officer, Shaffer said he was going twenty to twenty-five miles per hour and that he did not see Bean "at all."

The police officer testified he measured twelve feet of skidmarks from the front wheel of Shaffer's car to the point of impact. The evidence also shows that Bean was already through the intersection and into that portion of Sepulveda for southbound traffic a distance of twenty-eight feet before he was struck by appellant.

From the record before us, the jury could have hardly drawn any other conclusion than that appellant was negligent in driving down an open lane past two full lanes of standing vehicles, into an intersection obscured to him by solid traffic on his left, without slowing down, without taking his eyes from the traffic light and paying attention to the intersection before him, and without keeping his vehicle under such control that he could stop in sufficient time to avoid a collision. We perceive neither a close question of liability, nor how a reasonable jury could have exonerated appellant from negligence or found the proximate cause of the accident the exclusive conduct of defendant Bean. We cannot agree that the state of the evidence is such that the alleged procedural errors were responsible for the jury's finding that appellant was liable with Bean.

As to the alleged misconduct of Mr. Gabel, counsel for plaintiff, and Mr. Bradish for defendant Bean, the record discloses that one Reiter was driver of the first automobile in lane No. 1, which remained stationary to permit Bean to go through the intersection.

In his opening statement, Mr. Bradish told the jury that "one of the witnesses to the accident, a Mr. Reader (sic) who was in one of the stopped southbound cars, had passed away and is not available." Thereafter, no further mention of Reiter occurred until on cross-examination of Officer Slattery, Mr. Bradish, without objection, asked if he talked to Reiter. Slattery replied in the affirmative. At this point, a recess was taken, and in chambers a discussion occurred among Mr. Bradish, appellant's counsel, and the trial judge, wherein appellant's counsel objected to any question Mr. Bradish might ask the officer concerning what Reiter told him. Mr. Bradish said he did not intend to ask him the contents of the statement. The judge told Mr. Bradish to "let it stand at that * * * you can't go into the statement." Appellant's counsel then offered to stipulate with Mr. Bradish that Reiter is dead, which offer the record fails to disclose was accepted. Resuming cross-examination in open court, Mr. Bradish, without objection, again asked the officer whether he talked to Reiter at the scene and took a statement from him, and upon an affirmative answer, pursued the subject no further.

Mr. Gabel on cross-examination of the officer asked: "This witness right here that you talked to was here in number one lane at the crosswalk and stopped, wasn't he?" Appellant objected and, having in mind the stipulation offered by appellant's counsel in chambers, Mr. Gabel asked both counsel to stipulate that if his process server were called "he would testify that Mr. Reiter is dead." However, appellant's counsel stated he would not do so, but would stipulate "that each of the *three* parties * * * attempted to subpoena a Mr. Reiter, that each of the *three* parties to this action were advised by their respective process servers that Mr. Reiter is dead," which offer was accepted. Then Mr. Gabel said "If I do not go too far, gentlemen, I have ascertained that there was no adult in the car with Mr. Reiter, only his small son. There was no other member of his family to be brought in. In view of that, will you stipulate that he may read to us the statement and report of Mr. Reiter?" Mr. Bradish agreed, whereupon the trial court said, "All right. Any objection?" to which appellant's counsel replied, "Yes, your Honor, objected to as hearsay," which objection was sustained. Mr. Gabel said he had no further questions. Appellant's counsel asked permission to approach the bench and at the court's suggestion they went into chambers. There he moved for a mistrial "on the ground of prejudicial misconduct of counsel for the plaintiff." After listening to considerable argument, the trial judge said he could see no prejudice, felt there had been none under the circumstances, and denied the motion.

Appellant, having made his motion on the ground of misconduct of plaintiff's counsel, apparently felt that Mr. Bradish did nothing improper. Indeed, the record does not disclose that he did—in fact from all it reveals the inference that Mr. Bradish, not having asked for the content of the statement or indicated his interest in it, was not anxious to have the jury know it was a reasonable one. However, appellant now charges both counsel with acting in concert and in bad faith "to make defendant Shaffer the 'goat' * * *, (O)bviously done to hinder, not to aid the administration of justice," an accusation entirely unfounded and unjustified.

Whether Mr. Gabel's conduct in asking for the stipulation was improper must be considered in the light of what previously transpired. A jury instruction submitted by appellant was given by the court to the effect that if a party could produce stronger and more satisfactory evidence on a point but did not do so, the weaker evidence should be viewed with distrust. Defendant Bean's deposition had previously been taken and it is apparent from the record that all parties knew what it contained and that it was to be offered as his testimony at the trial. Therein, Bean stated that he accelerated in front of southbound traffic on Sepulveda only after a "gentleman in the car next to the island motioned me on through," giving him the right of way, which was respected by the driver of the first car in the second lane. In view of this and other testimony, unless an explanation was forthcoming as to why Bean did not call Reiter to corroborate his story, the jury, in accord with the instruction, could well have inferred that Bean's story was not true and Reiter would have testified to the contrary had he been called. Under these circumstances, Bean's lawyer had some obligation to explain Reiter's absence or otherwise submit to the unfavorable inference. The importance of this is further borne out by the fact that appellant testified that he did not know if the two lanes he passed were standing or moving; and in the statement Bean gave the officer he failed to mention that anyone in the first two lanes had motioned him through the intersection.

Since plaintiff was suing both Bean and Shaffer, plaintiff and defendant Bean were adverse parties. Bean's counsel not having indicated he wanted the jury to know Reiter's statement, any showing that plaintiff also wanted to explain why he was not calling Reiter and have the statement read, would reasonably justify the inference that Reiter's statement to the officer had not borne out Bean's claim that he was waved through the intersection by standing southbound traffic.

It was appellant who called the officer and questioned him concerning his investigation, the statements taken, and the point of impact. Counsel for the other parties had the right to cross-examine him relative to these matters. In chambers, appellant's counsel had already said to Mr. Bradish: "I will stipulate, as Mr. Gabel will, I am sure, that Mr. Reiter is dead." With this in mind, Mr. Gabel asked him before the jury to stipulate that if his process server were called, he would testify Reiter is dead. Refusing to do so, appellant's counsel in lieu thereof offered his own carefully worded stipulation that *each* of the parties attempted to subpoena Reiter and *each* was advised he was dead, making it obvious that appellant's counsel intended to, and actually did, create the impression that he also wanted Reiter as a witness, had tried to subpoena him and would have used him had he been available. It was in this climate that Mr. Gabel asked for the stipulation that Mr. Reiter's statement to the police officer be read.

[2, 3] Although we agree that it is generally not the best trial practice, and often error, to ask for a stipulation before a jury, under the circumstances at bar we find the conduct of Mr. Gabel neither sufficient to constitute error, nor resulting in prejudice to appellant; nor do we believe it created an "unfavorable atmosphere" contended by appellant. No discussion indicating that appellant's counsel was unwilling to have the jury know the contents of the statement because it might not have been favorable to appellant occurred before the jury. At most, it knew only that he had made the familiar legal objection of "hearsay." This ended the matter and Mr. Gabel dropped the subject. For all the jury knew, Mr. Reiter's statement was as favorable to appellant Shaffer as to plaintiff or defendant Bean.

Upon denial of appellant's motion for mistrial, no request was made to admonish the jury concerning the matter, or for any special cautionary instruction. Actually given was one instructing it not to consider as evidence any statement of counsel or conjecture the answer to a question to which an objection was sustained, or assume or speculate to be true any insinuation suggested by a question put to a witness by examining counsel or by the court.

Counsel has cited numerous cases all presenting wholly unrelated factual situations, but generally holding that utmost care must be taken by the trial judge and counsel to avoid any conduct calculated to prejudice jurors. We find nothing in the authorities cited to justify a reversal of the instant judgment.

Commenting briefly on appellant's argument that counsel's conduct "is clearly an attempt 'to create an atmosphere before the jury'" designed to prejudice the appellant, we find from the record the existence of no such atmosphere, nor did the trial judge, for in denying the motion for mistrial he stated he found no prejudice. He is in a far better position than we to determine from all of the circumstances, having heard counsel and observed their conduct whether prejudice resulted. Lafargue v. United R. Railroads, 183 Cal. 720, 192 P. 538; Wills v. J. J. Newberry Co., 43 Cal.App.2d 595, 111 P.2d 346. Appellant has failed to sustain the burden of showing that the conduct complained of was sufficiently prejudicial to justify a reversal (Hill v. Hill, 82 Cal.App.2d 682, 187 P.2d 28), or that such alleged errors have resulted in a miscarriage of justice (Winchell v. Lorenzen, 123 Cal.App.2d 704, 267 P.2d 398; Const. Art. VI, sec. 4½).

We likewise find the contention that the trial court committed reversible error in admitting certain testimony of a police officer, to be without merit.

Appellant called as his witness one Slattery, who for eleven years had been a police officer, and for nine a specialist in accident investigation. Having made a complete investigation at the scene, he was thoroughly examined concerning skidmarks, the point of impact, measurements, and damage. Appellant's counsel asked him if he knew the speed limit for southbound traffic at the location of the accident, to which he answered, "Yes"; then, what it was, to which an objection was sustained. Upon further questioning by counsel for appellant, he testified that for southbound travel on the westerly portion of Sepulveda, a 45-mile speed limit was posted a quarter of a mile north of the intersection.

On cross-examination Mr. Bradish asked him where in his report it was indicated that the 45-mile zone was posted, whereupon the officer located it in the first box thereof entitled "Prima Facie Speed: 45." Mr. Bradish then said "but, that box does not say anything about the posted speed limit there, does it?" To which he answered, "this page (4.2) called for my opinion of the accident and my findings," based "on the posting of the street at that time." Then questions were asked concerning whether he saw the posting and if it actually was there. The following thereafter occurred:

> "Q. (By Mr. Bradish) Now, if you will just drop one box from where it says, 'speed factor,' you have indicated that the basic speed was 25 miles per hour, haven't you?"

Appellant objected on the ground the 4.2 form was based on his opinion. The objection was overruled and the officer testified:

> "I arrived at that from the—oh, the nature of the damage, the length of skidmarks—no, the basic speed is my own opinion as to what I thought it should have been for these particular cars at this particular time."

Then Mr. Bradish asked:

> "At this particular time under the conditions that prevail at this time, is that right?" and the officer answered: "That's right."

Appellant moved to strike the last two answers on the ground that they were based upon the opinion and conclusion of the witness, and then asked the court that the matter be heard in chambers. Mr. Bradish, in response thereto, said "Well, counsel's reasons for his objections are made in the presence of the jury. I think I have a right to urge this court to overrule the objection in the presence of the jury. I don't like this business of having him sound off and then ask to go into chambers when I have something to say." With very little further discussion, the motion was denied and another subject was pursued.

Appellant argues that the court erred in denying the motion to strike and permitting a discussion of the matter in the presence of the jury. Since we perceive no resulting prejudice to appellant, we refrain from discussing the propriety of the court's ruling.

It cannot be denied that it was appellant's speed that was in the mind of all parties at the time the officer was questioned. The purport of the officer's testimony is that 25 miles per hour was what he thought should have been the basic speed for "these particular cars" "under the conditions that (then) prevailed." He, in effect, stated to the jury that 25 miles per hour was a safe and proper speed for the vehicles involved. Appellant himself testified he was going 25 miles per hour as he entered the intersection. To the police officer, immediately after the accident, he stated he was going south on Sepulveda at about 20 to 25 miles per hour.

[4] Obviously, the officer's opinion that 25 miles per hour was a safe speed at that intersection was testimony favorable to appellant, could not have been prejudicial to him, and constitutes no ground for reversal (Downey v. Bay Cities Transit Co., 94 Cal.App.2d 373, 210 P.2d 713; Driskill v. Thompson, 141 Cal.App.2d 479, 296 P.2d 834).

The contention that the trial court erred in giving instructions on the subject of recovery of damages for future detriment and expense for treatment is answered by the testimony of plaintiff and his doctor. Plaintiff testified he is still under the care of Dr. Raney, uses diathermy and traction for his neck, and presently suffers from headaches, pain in the cervical area up and down the spine and in his arms, causing his hands to shake. Dr. Raney was asked if plaintiff "has continued" to need treatment, and he answered: "Yes, he is going to need treatment, mainly in the form of physiotherapy." Questioned concerning future treatment and care the doctor mentioned physiotherapy and the use of an infra-red lamp which should be applied on his back to relieve muscular spasms. He further testified that, although physiotherapy will probably improve his condition, it would not make him well because the treatment only helps the spasm, the trouble still remaining; and that each time he subjects himself to stress or strain he will have difficulty which he may be able to help with physiotherapy.

This does not seem to leave the matter of future treatment to speculation, either as to plaintiff's physical condition or the treatment and care which will be needed. It is clear from the record that plaintiff has not fully recovered and will continue to need treatment. The instruction given relative to the reasonable value of physicians' and surgeons' charges for services "reasonably certain to be required and to be given in his future treatment," and the reasonable value of services of nurses and attendants "reasonably certain to be required and to be given in his future treatment, if any," clearly advises the jury that plaintiff is entitled to an amount for future treatment *only* if it finds from the evidence it is reasonably certain to be required and given. In addition, in a separate instruction the court advised the jury that it was not permitted to award plaintiff speculative damages.

[5] Although we have no way of determining whether the jury took into account future detriment and treatment in arriving at its verdict, there is nevertheless ample evidence in the record to justify the giving of an instruction covering these elements of damage. Under the instructions given, the jury was free to determine *if* any detriment was certain to result in the future (Sec. 3283, Civil Code) and if it did not so find from the evidence, it was its responsibility to disregard the instructions. We conclude that neither the giving of the instruction was error, nor that it could have prejudiced appellant or resulted in a miscarriage of justice.

For the foregoing reasons, the judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

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171 Cal.App.2d 313

Bettie F. PRENTICE and Herbert L. Prentice, Plaintiffs and Appellants,
v.
Harry ROBERTS, Jr., and Winifred Roberts, Defendants and Respondents.
Civ. 23186.

District Court of Appeal, Second District, Division 3, Califorina.
June 12, 1959.

Action for damages sustained in an intersectional collision of automobiles, wherein the defendants filed a cross complaint. From an adverse judgment of the Superior Court of Los Angeles County, Joe Raycraft, J., the plaintiffs appealed. The District Court of Appeal, Vallée, J., held that plaintiffs were not estopped to complain of an instruction because of invited error and that giving of instruction on unavoidable accident required a reversal.

Judgment in favor of defendants reversed.

1. Negligence ⚷140

It is error to give an instruction on unavoidable accident in a negligence case where plaintiff has the burden of proving that injury complained of was proximately caused by defendant's negligence and where the ordinary instructions on negligence and proximate cause adequately so inform the jury.

2. Appeal and Error ⚷882(12)

In action for injuries sustained in automobile collision, where plaintiffs were represented by counsel of their own choice in the action against defendants and by counsel for their insurance carrier as cross-defendants in the action on the cross complaint, and it was counsel for the insurance carrier who requested the instruction on unavoidable accident and not counsel for plaintiffs as plaintiffs, plaintiffs were not estopped to complain of the instruction on the ground of invited error.

3. Pleading ⚷138

In action for damages sustained in an automomile collision, action on the complaint and answer thereto was a distinct and independent action from the action on the cross complaint and answer thereto.

4. Appeal and Error ⚷1064(1)

In determining whether giving of an instruction was prejudicial, the question is whether on the facts the party complaining was deprived of a fair trial.

5. Appeal and Error ⚷1064(1)

The determination whether the probable effect of an instruction on unavoidable accident has so misled the jury and whether the error has been prejudicial so as to require a reversal depends on all the circumstances including the evidence and other instructions given.

6. Appeal and Error ⚷1066
Trial ⚷252(7)

In action for damages sustained in an automobile collision where there was no element of unavoidable accident established by the evidence which would support a determination that the sole proximate cause of the accident was negligence of the defendants and that plaintiffs were not negligent, giving of instruction on unavoidable accident was prejudicial error where it was highly probable that the instruction may have tipped the scale in defendants' favor thereby depriving plaintiffs of a fair trial.

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Joseph R. Grillo, South Gate, for appellants.

Spray, Gould & Bowers, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by plaintiffs from a judgment for defendants entered on a jury verdict in an action for damages for personal injuries and property damage arising from an intersection collision of automobiles. The issues were made by the complaint and the answer thereto, and by a cross-complaint on the part of defendants and plaintiffs' answer thereto. The judgment was that plaintiffs take nothing on the complaint and that defendants take nothing on the cross-complaint. Defendants did not appeal from the judgment for plaintiffs-cross-defendants on the cross-complaint.

The collision occurred shortly before 4 p. m. on March 31, 1956 at the intersection of Firestone Boulevard and Rives Avenue in the Downey section of Los Angeles County. Firestone runs generally east and west; Rives, north and south. Firestone was 76 feet wide; Rives was 50 feet wide north of Firestone. The day was dry and clear, but overcast; visibility was good. The street was level. There were two double white lines three feet apart dividing eastbound and westbound traffic on Firestone. There were two traffic lanes on each side of the double lines. There was a 25-mile-an-hour speed-limit sign posted on Firestone 50 feet east of the east curb line of Rives facing eastbound traffic. There was a 45-mile-an-hour sign on Firestone about 50 feet east of the east curb line of Rives facing westbound traffic. The speed limit for westbound traffic to the east of this sign was 25 miles an hour.

Traffic at the intersection was controlled by electric stop signals.

Plaintiff Bettie Prentice was driving a Chevrolet automobile eastbound in the lane next to the south of the two double white lines on Firestone. She testified: she stopped behind a car ahead of her for a red light; when the signal turned green, she gave a left-turn signal and entered the intersection; she stopped, with the wheels of her car on or slightly over the westerly crosswalk across Firestone, and permitted two or three oncoming cars from the east to pass; a car westbound in the lane next to the double line signaled for a left turn and as it turned, she "inched" into the lane for westbound traffic, advancing about three-quarters of a car length at a speed of one or two miles an hour; as she did this, she looked eastward in the second lane of westbound traffic a distance of 200 feet where a nursery was located and "saw an empty lane of traffic"; she had a clear and unobstructed view of both westbound lanes; between her and the nursery there was nothing at all; she discontinued her hand signal and started to turn; from that point she remembered nothing until after the collision; she remembered starting to turn her wheels; the next thing she remembered, her head was near the rear view mirror in the center of the windshield; there were people around; she did not hear any brakes, or the squeal of any tires, or any horn blowing, and did not feel an impact.

Defendant Harry Roberts, Jr., was driving a Buick automobile westbound on Firestone in the second lane north of the two double white lines. Defendant Winifred Roberts, his wife, was in the front seat beside him and their two children were in the rear seat. Mrs. Roberts testified: defendants' car was traveling 30 to 35 miles along Firestone; it did not decrease its speed as it approached Rives; she saw plaintiffs' automobile for the first time when defendants' car was "almost at the intersection" just east of the crosswalk. When asked where the Chevrolet was when she first saw it, she said: "A. I really don't know. I just know it was ahead of us and that it was just in front—the front wheel perhaps turned, and I know it was coming out of that lane and it was near the cross walk."[1] When she saw the "left front wheel" of plaintiffs' car turn, she yelled "Harry", and her husband put on the brakes. Mrs. Roberts also testified: "Q. Tell me this, Mrs. Roberts, isn't it true that as you were driving down the street, all at once you saw a car in front of you and you yelled 'Harry' and that is about all you know about this accident? A. Well, there is not much more than that, no."

Mr. Roberts testified: he had three beers that day, he did not know the time interval between them, he had one just before leaving home; while driving along Firestone he did not notice any speed limit signs; he was traveling between 30 and 35 miles an hour as he approached Rives; there were business establishments on the north side of Firestone leading to its intersection with Rives; as he approached Rives he did not decrease his speed; when his wife exclaimed "Harry," he immediately took his foot off the gas and "started for the brake"; he saw plaintiffs' automobile for the first time as he applied the brakes; it was moving northeasterly in the middle of the intersection and had crossed both double white lines; he had no idea how fast or how slow plaintiffs' automobile was going; he believes there was westbound traffic in the lane next to the double white line as he approached the intersection; he did not know whether it was in motion or stopped; his automobile left skid marks commencing inside the east crosswalk and extending 30 feet; it collided with the right side of plaintiffs' car slightly front of center, and the main impact of his car hit the center post of plaintiffs' car.

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1. At her deposition Mrs. Roberts testified the Chevrolet was in the intersection when she first saw it.

Mr. Roberts testified further that immediately after the accident one of his boys said to him, "Daddy, it serves you right, you were going too fast," that he told them "to go away. They had said too much already."

A customer and the gas station attendant who were standing in the gas station on the northwest corner of the intersection gave testimony substantially corroborating plaintiffs' testimony regarding the movements of her automobile. One of them testified that after the collision one of the boys who had been in the accident said to his father, "Serves you right, Daddy. You were going to[o] fast," and the Buick driver told the boy to keep quiet.

The gas station attendant testified: Mrs. Prentice "granted leeway to somebody else to go past and she had a clear field where he come from when I first seen him down there"; she "conceded to a couple of cars to get through"; "she had a clear field to go across"; he first saw defendants' car when it was at the nursery, "probably a couple of hundred feet" away, and that it was going 50 to 60 miles an hour; there was nothing to obstruct his view.

A witness who was waiting in a car at the stop light southbound on Rives testified that the signal "was getting ready to turn" when he first saw the cars; the Chevrolet was headed north, going between 25 and 30 miles an hour, and the Buick was in the intersection, going between 35 and 45 miles an hour and was still "traveling 35 or 40" while braking; the Chevrolet was going straight north; "Momentarily I seen him when he started sliding in with the screeching of brakes"; it all took "place pretty quickly" and "You can draw some funny conclusions"; it all happened in less than a second.

An officer who investigated the accident testified the point of impact was 20 feet south of the north curb of Firestone and 17 feet east of the west curb of Rives; there were right front skid marks, prior to the impact, 29 feet 9 inches long, and left front skid marks 23 feet 6 inches long; the skid marks turned northwesterly at the point of impact, the right front marks being 9 feet 9 inches long and the left front 11 feet 4 inches long.

On the impact the Chevrolet spun around, making about a 180-degree turn clockwise. Its rear end struck the front end of the car which had been stopped for the signal southbound on Rives. It came to rest in the intersection directly in front of that car facing south and slightly east. It was a complete wreck.

Plaintiffs were represented by counsel of their own choice in the action against defendants Roberts and by counsel for their insurance carrier as cross-defendants in the action on the cross-complaint. Counsel for the insurance carrier, representing plaintiffs as cross-defendants, and counsel for defendants requested and the court gave the former standard instruction on unavoidable accident. (BAJI 134.) Plaintiffs assert prejudicial error.

[1] It is error to give the instruction on unavoidable accident in a negligence case where the plaintiff has the burden of proving that the injury complained of was proximately caused by the defendant's negligence and where the ordinary instructions on negligence and proximate cause adequately so inform the jury. Butigan v. Yellow Cab Co., 49 Cal.2d 652, 659, 660, 320 P.2d 500. The jury was adequately so instructed.

[2, 3] In response to plaintiffs' contention, defendants assert plaintiffs invited the error. They say that plaintiffs, as cross-defendants, requested the instruction and hence may not complain. We disagree. It is asserted by plaintiffs and tacitly conceded by defendants that the answer to the cross-complaint, which pleaded unavoidable accident, was prepared by counsel for the insurance carrier. It was counsel for the insurance carrier who requested the instruction, not counsel for plaintiffs as plaintiffs. The action on the complaint and the answer thereto was a distinct and independent action from the action on the cross-complaint and the answer thereto. Pacific

Finance Corp. v. Superior Court, 219 Cal. 179, 181–183, 25 P.2d 983, 90 A.L.R. 384; Case v. Kadota Fig Ass'n, of Producers, 35 Cal.2d 596, 603, 220 P.2d 912; Douglas v. Superior Court, 94 Cal.App.2d 395, 398, 210 P.2d 853; Shearer v. United California Theatres, 133 Cal.App.2d 720, 723–734, 284 P.2d 934. The insurance carrier was the real party in interest in the action on the cross-complaint and the answer thereto. Plaintiffs had no choice of counsel on the defense to the cross-complaint. The attorneys for the cross-defendants were chosen by the insurance carrier; they were employed by the insurance carrier to defend against the cross-complaint; they were not employed by plaintiffs to assist in recovering damages for the injuries Mrs. Prentice sustained. Counsel for the insurance carrier did not represent plaintiffs and had no duty to, and did not prosecute or assist in, the prosecution of the action on the complaint. Prior to the arguments to the jury the court instructed counsel for all parties as to the order of argument and they agreed thereto. The court stated that counsel for plaintiffs would make the opening argument and that he should confine himself to the complaint, that counsel for the insurance carrier would argue the cross-complaint and confine himself to his answer and the defense of the cross-complaint, that counsel for defendants and cross-complainants would then argue in response to both arguments and in behalf of the cross-complaint, and that counsel for plaintiffs would close, "limiting his argument to the issues in the complaint and not mentioning the issues in the cross-complaint." It would be highly technical and grossly unfair to plaintiffs to hold them responsible for the action of counsel for the insurance carrier in submitting the instruction on unavoidable accident.

[4, 5] The question is: Was the giving of the instruction prejudicial? The question in every case is whether, on the facts of the case, the party complaining was deprived of a fair trial. Halleck v. Brown, 164 Cal.App.2d 586, 330 P.2d 852. The determination whether, in a specific instance, the probable effect of an instruction on unavoidable accident has been to mislead the jury and whether the error has been prejudicial so as to require reversal depends on all the circumstances of the case, including the evidence and other instructions given. Butigan v. Yellow Cab Co., 49 Cal.2d 652, 660–661, 320 P.2d 500. In Halleck v. Brown, 164 Cal.App.2d 589, 330 P.2d 852, at page 854, this court said:

> "It is well settled that the giving of the unavoidable accident instruction is prejudicial where the evidence discloses no condition and no action or conduct apart from the conduct of the parties that could reasonably have been found sufficient to acquit them of negligence."

Martz v. Ruiz, 158 Cal.App.2d 590, at page 592, 322 P.2d 981, at page 982, states:

> "In the instant case there is no evidence that the accident resulted from any cause other than negligence. There is no suggestion that any other vehicle interfered with the movement of either of the two cars or that either of them developed any mechanical difficulty that caused or contributed to the collision. It is thus clear there was no basis in the evidence for giving an instruction on unavoidable accident."

[6] There was no element of unavoidable accident established by any evidence which would justify the giving of the instruction under the Butigan decision. Plaintiffs had a right to have the jury determine whether Mrs. Prentice was contributively negligent uninfluenced by the theory of unavoidablility. The evidence would support a determination that the sole proximate cause of the accident was the negligence of defendant Roberts, Jr., (cf. Briscoe v. Pacific Elec. Ry. Co., 89 Cal.App.2d 439, 200 P.2d 875), and that plaintiff Mrs. Prentice was not negligent. As pointed out in Butigan, "the giving of the instruction obviously overemphasized" defendants' case and "suggested to the jury that they should consider unavoidability as an issue or ground of defense separate and apart from the questions of negligence and proxi-

mate causation. An attempt by the jurors to carry out such a direction could be expected to result in confusing and misleading them." Butigan v. Yellow Cab Co., 49 Cal. 2d 652, 661, 320 P.2d 500, 506. It appears highly probable that the application of the instruction by the jury in its deliberations may have tipped the scale in defendants' favor, thus depriving plaintiffs of a fair trial.

We conclude on the record that the giving of the instruction on unavoidable accident must be held prejudicial to plaintiffs.

It is unnecessary to consider plaintiffs' other points.

The judgment in favor of defendants Harry Roberts, Jr., and Winifred Roberts and against plaintiffs Bettie F. Prentice and Herbert L. Prentice is reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

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171 Cal.App.2d 92

Ed DAVIS, by Nina Davis, his Guardian ad litem, and Nina Davis, Plaintiffs and Appellants,

v.

John F. GOODRICH et al., Defendants,

William G. Dickinson and John Mart, Inc., Respondents.

Civ. 23503.

District Court of Appeal, Second District, Division 2, California.

June 3, 1959.

Action for personal injuries sustained by a 2½-year-old child who fell from an abandoned roller coaster structure. The Superior Court, Los Angeles County, Herbert V. Walker, J., entered judgment for owner of the structure and an appeal was taken. The District Court of Appeal, Fox, P. J., held that liability could not be imposed on owner of the property under the attractive nuisance doctrine, in view of fact that there was no evidence which would support a determination that owner knew or should have known that children who would not appreciate the danger involved were likely to trespass upon the property.

Judgment affirmed.

1. Negligence 🔑33(1)

Generally an owner of land is under no duty to keep his premises safe for trespassers.

2. Negligence 🔑33(3)

A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if the place where condition is maintained is one upon which possessor knows or should know that children are likely to trespass, condition is one of which possessor knows or should know and which he realizes or should realize involves an unreasonable risk of death or serious bodily harm to children, the children because of their youth did not discover the condition or realize risk involved, and utility to possessor of maintaining condition is slight as compared to risk to young children involved therein.

3. Negligence 🔑39

Liability does not attach to the owner of land under the attractive nuisance doctrine, unless the risk involved is one which, because of his tender years, the trespassing child is incapable of appreciating.

4. Negligence 🔑136(19)

In action for injuries sustained by a child, on theory of landowner's responsibility under the attractive nuisance doctrine, where the injured child does not testify, and there is no other evidence as to his knowledge of the danger involved, determination of whether the child had sufficient ability to appreciate the danger ordinarily is a question for the trier of fact.

5. Negligence ⚿121(1)

Liability could not be imposed on owner of property on which an abandoned roller coaster structure was located under the attractive nuisance doctrine, where there was no evidence which would support a determination that owner knew or should have known that children who would not appreciate the danger involved were likely to trespass upon the property.

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Arthur J. Crowley, Hollywood, Horace A. Ruderman, Los Angeles, and Julian I. Harmon, Beverly Hills, for appellants.

Callaway, Kirtland & Packard, Henry E. Kappler, Los Angeles, for respondent Dickinson.

Mark E. O'Leary, Santa Monica, for respondent John Mart, Inc.

FOX, Presiding Justice.

Plaintiff,[1] through his guardian ad litem, appeals from an order granting defendants' motions for nonsuit in plaintiff's action to recover damages for personal injuries.

On January 20, 1955, plaintiff's father took plaintiff and his older brother and sister to a large open field for the purpose of flying kites. This field was about one mile from plaintiff's home. The trip was made by automobile. In the vicinity of this area was a roller coaster which was in disuse. It was a wooden structure; there were no cars thereon and no movable machinery was involved. The structure was surrounded by an open field for one half a mile to the south, two or three blocks to the west, one block to the north (bounded by Washington Boulevard), and one half a mile to the east. The roller coaster was about thirty feet high. There were no fences or other barricades around either the structure or the vacant field. Plaintiff, who was two and one half years old, strayed away from his father and apparently fell from the roller coaster while playing thereon. The nearest residence, identified by distance, a trailer court, was about three blocks to the west. At the conclusion of plaintiff's case, defendants' motions for a nonsuit were granted. Plaintiffs have appealed.

[1,2] As a general rule, the owner of land is under no duty to keep his premises safe for trespassers. Peters v. Bowman, 115 Cal. 345, 348, 47 P. 113, 598. The evidence in this case does not suggest that plaintiff occupied any position other than that of a trespasser. However, since the case of Barrett v. Southern Pacific Company, 1891, 91 Cal. 296, 27 P. 666, California has recognized an exception to the above rule in the form of the attractive nuisance doctrine. See Puchta v. Rothman, 99 Cal.App.2d 285, 287, 221 P.2d 744. The conditions necessary to bring this doctrine into play are stated in section 339, Restatement of Torts. This statement of the attractive nuisance principle has been approved by California decisions. Courtell v. McEachen, 51 Cal.2d 448, 334 P.2d 870; Reynolds v. Willson, 51 Cal.2d 94, 331 P.2d 48. Section 339 provides as follows:

"A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if

(a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and

(b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and

(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and

(d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved therein."

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[1] Although the mother and child are both plaintiffs, for convenience, we are referring only to the minor child as the plaintiff.

[3] Liability does not attach unless the risk involved is one which, because of his tender years, the trespassing child is incapable of appreciating. In the instant case, there is no claim nor any evidence that this nonoperating roller coaster contained a trap of any sort, was inherently unsafe, or had any loose or moving parts. The sole danger presented was the possibility of injury resulting from a fall from an otherwise safe structure. "The doctrine has been applied in cases where hidden dangers exist which would be outside the experience of young children, including cases involving drowning under certain conditions, access to dynamite or dynamite caps, movable machinery, high tension wires, and boards piled near where children play, in a manner that is inherently unsafe." Lopez v. Capitol Co., 141 Cal.App.2d 60, 65, 296 P.2d 63, 65. In Prosser on Torts (Hornbook Series, 1941), at page 622, it is stated that "[a]ny child of sufficient age to be allowed at large may be expected to appreciate the ordinary risks of fire and water, of falling from a height or into an excavation. * * *" In the Lopez case, supra, the court stated at page 65 of 141 Cal.App.2d, at page 65 of 296 P.2d, that "[t]hus far, the doctrine has never been applied in a case involving only an opportunity to climb upon something, the danger of falling being something that is known and realized by all children from earliest infancy, or in a case involving a mere attraction to something as an opportunity to play." With regard to climbing in general, the court in the Lopez case stated at page 68 of 141 Cal.App.2d, at page 66 of 296 P.2d: "It can hardly be said, in reason, that this child [seven years of age] was too young to appreciate the danger involved. From the time they are born all children realize the danger of falling and instinctively clutch at something when they feel that danger is near. While the instinct to climb is practically universal, and it is carried on in a venturesome spirit, a consciousness of the risk of falling is always present. Beyond question, the minor plaintiff when climbing this scaffold knew that there was a risk of falling if he was not careful, knew that if he slipped he would fall, and knew that if he fell he might hurt himself." In Loftus v. Dehail, 133 Cal. 214, 218, 65 P. 379, 380, the court remarked that "Venturesome boys and even girls, make playgrounds of unfinished buildings, climb perilous heights, and scamper over insecure boards and rafters. If an owner became responsible merely because children were attracted, it would burden the ownership of property with a most preposterous and unbearable weight." In Severance v. Rose, 151 Cal.App.2d 500, 311 P.2d 866, the plaintiff, age ten, was injured as a result of a fall. At page 502 of 151 Cal.App.2d, at page 867 of 311 P.2d, the court commented: "The only risk attendant upon its use as a slide when thus resting upon the ground was perfectly obvious, the hazard of falling off the upper end or over either side. No sign warning of this hazard would be necessary for any adult nor for most children, even children of tender years. * * * There was involved no hidden risk, no element of entrapment, no moving machinery to impose upon defendant a duty toward plaintiff to install guard rails, post warning signs or take other precautions for plaintiff's protection should he choose to use this ski jump as a slide." The court then approved the language quoted above from the Lopez case. In 145 A.L.R. 322, 323, it is stated that decisions "* * * are generally to the effect that, under the attractive nuisance doctrine or a kindred principle, liability does not attach to an owner or occupant for an injury to a trespassing child who climbs upon and jumps or falls from a nondefective and stationary structure, at least where the structure is useful and properly located." In Reynolds v. Willson, supra, 51 Cal.2d at page 102, 331 P.2d at page 53, a swimming pool case, the court recognizes that under the attractive nuisance doctrine, "the duty of the possessor does not extend to dangerous conditions on the land which

are obvious even to children, such as the usual risks of fire, water, falling from a height and the like (citation)."

[4] In the instant case, the record is wholly silent as to whether plaintiff actually knew of the danger incident to climbing or playing on elevated structures. If he knew, the attractive nuisance doctrine would clearly be inapplicable; liability only exists if "the children because of their youth do not discover the condition or realize the risk involved. * * *" (Restatement, Torts, § 339(c), supra.) A problem may arise where, for one reason or another, the injured child does not testify and there is no other evidence as to his knowledge of the danger involved in climbing and falling. Such is the instant case. As noted in the authorities referred to above, the danger of falling is something that is deemed known and realized by children from an early age. However, when dealing with a child of plaintiff's tender years, it cannot be stated as a matter of law that he either did or did not have sufficient mental development to fully appreciate the consequences of a fall from a high elevation. "The ability to appreciate danger varies, of course, with the age of the child. * * *" Garcia v. Soogian, 52 Cal.2d —, 338 P.2d 433, 436. Under such circumstances, this determination would ordinarily be a question for the trier of fact.

[5] Assuming, *arguendo,* that had the case gone to the jury and it was found that plaintiff was in fact unaware of the danger, the evidence would, nevertheless, have been insufficient to warrant a recovery. Before liability may be imposed under the attractive nuisance doctrine, evidence must be presented which would support a determination that the defendant knew or should have known that children who would not appreciate the danger involved were likely to trespass upon the property. (§§ 339(a) and (b), Restatement, Torts.) In the instant case, there is no evidence that the defendants actually knew children had been accustomed to be in or about or upon the roller coaster, if such were the fact. While defendants should have realized that youngsters old enough to be allowed to venture unattended might find their way to the roller coaster, it would be equally reasonable for defendants to assume that children of this age-group would be cognizant of the hazards presented in playing upon the structure. Severance v. Rose, supra; Lopez v. Capitol Co., supra. The following language from Knight v. Kaiser Co., 48 Cal.2d 778, 782, 312 P.2d 1089, 1091, which involved a sand pile, is apposite: "The dangers connected with and inherent in a sand pile are obvious to everyone, even to a child old enough to be permitted by its parents to play unattended." However, as to children who, because of their tender age, would not realize the potential hazard, it seems unreasonable to charge defendants with knowledge that such children were likely to find their way upon the property. In the first place, the nearest residence was at least three blocks away. The roller coaster was surrounded by an open field for one half a mile to the south and east. While we do not impute the negligence of a parent to the child, it would be entirely reasonable for defendants to believe that children who were so young that they could not understand the danger of falling would not have the opportunity to roam across city streets and travel substantial distances alone. As stated in the Lopez case, supra, 141 Cal.App.2d at page 67, 296 P.2d at page 66: "It is not claimed that such a thing was known to have occurred before, and it seems unreasonable to hold that small children were likely to trespass in the manner alleged under the circumstances as they existed at the time." Likewise, there is no basis for concluding that defendants knew or should have contemplated that children of plaintiff's age would be brought upon their property by adults or taken such substantial distances from their homes by other children.

Therefore, since the facts in this case, as shown by plaintiff's evidence, demonstrate the inapplicability of the attractive nuisance doctrine, and no other basis of liability was suggested by plaintiff's evidence, the nonsuit was properly granted.

The judgment [order granting motions for nonsuit] is affirmed.

ASHBURN and HERNDON, JJ., concur.

171 Cal.App.2d 59

Charles DE LA FOREST and Mast Lumber Co., Inc., a corporation, Plaintiffs and Appellants,

v.

Fred C. YANDLE, Hugh S. Yandle and William N. Yandle, individually and as copartners doing business as W. J. Yandle & Co., and Wesley Temple, individually and doing business as Mark Haines Welding Shop, Defendants and Respondents.

Civ. 9449.

District Court of Appeal, Third District, California.

June 2, 1959.

Action to recover indemnity against defendant joint tort-feasors. Judgment for the defendants in the Superior Court, Sonoma County, Hilliard Comstock, J., and the plaintiffs appeal. The District Court of Appeal, Van Dyke, P. J., held that plaintiffs were entitled to indemnity from the defendants, and that the action was not barred by limitations.

Reversed.

1. Indemnity 🔑13(1)

Where one has supplied to another a chattel which because of the supplier's negligence is dangerously defective for use for which it is supplied and both have become liable in tort to a third person injured by such use, the supplier must indemnify the other for expenditures properly made in discharge of the claim of the third person, if the other used the chattel in reliance upon the supplier's care and if, as between the two, such reliance was justifiable.

2. Contribution 🔑5

The common-law rule of noncontribution between joint tort-feasors is subject to the exception that where the injury to the third party arose from a violation of a contractual duty owed by one tort-feasor to the other, the latter may recover from the former.

3. Indemnity 🔑13(2)

Where owner of truck employed plaintiff to repair the axle and he sublet the work to the defendants, who negligently did the work with the result that the truck ran off the highway and struck an automobile operated by the deceased, and the plaintiff and owner of the truck settled the suit by the representatives of the deceased for $45,000, all parties were concurrent tort-feasors and each was directly liable for his own wrong and each could be held liable for the entire damage suffered, so that the plaintiffs were entitled to indemnity from the defendants.

4. Limitation of Actions 🔑56(2)

An action to recover indemnity against joint tort-feasors was not barred by limitations where the right to indemnity did not arise until the compromise with the representatives of deceased had been perfected and plaintiffs had obtained the release of all the tort-feasors which occurred on May 6, 1955 and the present action was begun less than a year thereafter.

George F. Jansen, San Francisco, for appellants.

Augustus Castro, San Francisco, for respondents Yandle.

Frank W. Finn, Sebastopol, for respondent Temple.

VAN DYKE, Presiding Justice.

This appeal is from a judgment in favor of respondents following an order sustaining a demurrer without leave to amend. Accepting the allegations of the complaint as true, the facts may be stated as follows:

Plaintiff-appellant De La Forest was the operator of a truck repair shop. Plaintiff-appellant Mast Lumber Co. owned and operated a truck and trailer. The middle axle of the trailer had become so worn as to require repair. Mast employed De La Forest to repair the axle and he sublet the work of rebuilding and resurfacing the axle to Temple, a welder, and to Yandle, a machinist, both of whom, in the operation of their respective businesses, held themselves out as qualified, equipped, skilled and expert in their crafts. When they had finished welding and machining the axle they returned it to De La Forest as completed and ready for use. Justifiably relying upon their having done their work properly, De La Forest and Mast, without first inspecting the axle, installed it in Mast's trailer. The work of respondents was negligently done and the axle was unsafe for use. Mast used the trailer on the highways and during such use the axle, due to the negligent repair, failed at or near the point where defendants had welded and machined it, with the result that two wheels came off, crossed the highway and struck an automobile being operated by Donald Urban, proximately causing his death. The widow and minor child of Urban filed suit against Mast and De La Forest alleging that the death of Urban had been proximately caused by the carelessness and negligence of Mast and De La Forest "in the driving, operating, ownership, sale, manufacture, repair, inspection, control and maintenance of said trailer." These two demanded that Temple and Yandle indemnify and hold them harmless from loss resulting by reason of the death of Urban and the suit by his widow and child; and also demanded that they defend the action. This Temple and Yandle refused to do. Thereupon Mast and De La Forest, in good faith, compromised the Urban action, taking releases in favor of all persons. The amount of the settlement was $45,000 as against a demand in excess of $100,000 and was reasonable.

[1–3] The complaint states a cause of action. We quote the following from Restatement of Restitution, Sec. 93:

> "(1) Where a person has supplied to another a chattel which because of the supplier's negligence or other fault is dangerously defective for the use for which it is supplied and both have become liable in tort to a third person injured by such use, the supplier is under a duty to indemnify the other for expenditures properly made in discharge of the claim of the third person, if the other used or disposed of the chattel in reliance upon the supplier's care and if, as between the two, such reliance was justifiable.
>
> "(2) The rule stated in Subsection (1) applies where a person has negligently made repairs or improvements upon the land or chattels of another whereby both become liable in tort to a third person." See, also, Prosser, Law of Torts, 2d ed. 1955, p. 250.

According to the complaint, the death of Urban was attributable to respondents' negligent repair of the axle, to its installation without inspection by De La Forest and Mast and to its use without inspection by Mast. As to the plaintiffs in the Urban action all four parties to this action were concurrent tort-feasors. Each was directly liable for his own wrong and each could be held liable for the entire damage suffered. Peters v. City and County of San Francisco, 41 Cal.2d 419, 429, 260 P.2d 55; City and County of San Francisco v. Ho Sing, 51 Cal.2d 127, 330 P.2d 802. In this case all parties hereto were engaged in activities dealing with a subject capable of injury to the public if their duties with respect thereto were not properly performed. Use of a defective axle on a trailer traveling the public highways would be dangerous and could reasonably be foreseen as likely to cause injury to other users of the highway. Respondents were bound to use commensurate care in repairing the axle. De La Forest was charged with the duty of inspecting their work before installing the axle on the Mast trailer and Mast was charged with the duty of inspecting the axle before reinstallation and use. Nevertheless, according to the allegations of the complaint, appellants reasonably relied upon the care of respondents and such reliance was justified. Under the circumstances appellants are entitled to indemnity.

The common-law rule of non-contribution between joint tort-feasors is subject to the exception that where the injury to the third party arose from a violation of a contractual duty owed by one tort-feasor to the other, the latter may recover from the former. It is stated in San Francisco Unified School District v. California Bldg. Maintenance Co., 162 Cal.App.2d 434, 446, 328 P.2d 785, 793:

> "* * * 'In all cases where one party creates the condition which causes the injury, and the other does not join therein, but is exposed to liability, and suffers damages on account of it, the rule that one of two joint tort-feasors cannot maintain an action against the other for indemnity does not apply.'"

[4] Respondents contend that the cause of action relied upon by appellants is barred by the statute of limitations. The contention is without merit. The right to indemnity did not arise until the compromise had been perfected and appellants had obtained the release of all the tort-feasors. According to the complaint that occurred on May 6, 1955, and this action was begun April 9, 1956, less than a year after the accrual of the cause of action. The action therefore was not barred by any statute of limitations pleaded.

For the reasons given the judgment is reversed.

PEEK and SCHOTTKY, JJ., concur.

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171 Cal.App.2d 221

Norman B. FRANCIS and Helen M. Francis, Plaintiffs,

v.

Lillian R. EISENMAYER, Paul James Williams, Nellie Mae Williams, Paul Baltz, Jean Gordon, R. W. Smiley, Title Insurance & Trust Company, a California corporation, Security-First National Bank of Los Angeles, a national banking association, City of Los Angeles, Doe One, Doe Two and Doe Three, Defendants.

Norman B. FRANCIS and Helen M. Francis, Plaintiffs and Cross-Defendants in certain pleadings,

and

Paul James Williams and Nellie Mae Williams, Defendants and Cross-Defendants in certain pleadings, Respondents,

v.

SECURITY–FIRST NATIONAL BANK OF LOS ANGELES, a national banking association, Defendant and Cross-Complainant in certain pleadings, Appellant.

Civ. 23394.

District Court of Appeal, Second District, Division 1, California.

June 9, 1959.

Rehearing Denied June 29, 1959.

Action for fraud against vendors of real property and bank who handled the escrow between them wherein the bank cross-complained against both purchasers and sellers for its costs and attorney's fees expended in defense of the action. From a judgment of the Superior Court of Los Angeles County, Kenneth A. White, J., the bank appealed from that portion of the judgment denying recovery of its attorney's fees. The District Court of Appeal, Lillie, J., held that under terms of escrow instructions, the bank was not entitled to recover attorney's fees.

Judgment affirmed.

1. Escrows ⚿5

Escrow instructions providing that bank should have right to commence or defend action to determine conflicting claims to money deposited in escrow and that parties to escrow should pay reasonable attorney's fees incurred by bank in connection with "or arising out of" the escrow, attorney's fees were provided only in event of litigation contemplated therein such as arising out of conflicting demands made on the bank relative to terms of the escrow, funds, property or documents deposited therein, by an action by the bank for breach of the escrow or the bank's suit in interpleader and where the gravamen of purchaser's action against the bank was for fraud independent of the escrow instructions sounding in tort, it was not based upon or "arising out of" the contract so as to entitle the successful bank to attorney's fees.

See publication Words and Phrases, for other judicial constructions and definitions of "Arising Out Of".

2. Banks and Banking ⚷100

A cause of action in tort may arise against a bank for misrepresentation of its duties and functions independent of any contractual relationship.

3. Appeal and Error ⚷1008(3)

Where the construction given an agreement by the trial court appeared to be consistent with the true intent of the parties, the appellate court will not substitute another interpretation though it seems equally tenable.

4. Escrows ⚷5

Intent of parties to escrow instructions is controlling. West's Ann.Civ.Code, §§ 1639, 1648.

5. Escrows ⚷5

Where bank presented to the parties for their signature printed form of escrow instructions it had theretofore prepared, any uncertainty therein must be construed against the bank. West's Ann.Civ.Code, § 1654.

◆

Littlejohn, Callister & McNabb, E. Talbot Callister, Los Angeles, for appellant.

Richards, Watson, Smith & Van Petten, Abe Mutchnik, Los Angeles, for respondents.

LILLIE, Justice.

Plaintiffs, respondents herein, brought an action for damages for fraud and misrepresentation against defendants Williams who sold them a parcel of real property, and defendant Security-First National Bank of Los Angeles, appellant herein, who handled the escrow between them. As to the bank, plaintiffs alleged that an agent thereof falsely represented to them that if they would make their purchase through escrow nothing could be "wrong" with the property and they would be fully protected. Defendant bank cross-complained against both plaintiffs (purchasers) and defendants Williams (sellers) for its costs and attorneys' fees expended in the defense of the main action. The trial court, hearing the matter without a jury, rendered judgment in favor of the plaintiffs and against defendants Williams holding that they fraudulently concealed from plaintiffs that the property had been severed from a larger lot in violation of a city ordinance and was below the minimum size required by it, but denied recovery against the bank; and further held that the bank was not entitled to recover attorneys' fees on its cross-complaint. Neither plaintiffs nor defendants Williams have appealed from the judgment. The bank appeals from that portion denying recovery of its attorneys' fees.

The record before us discloses the following evidence relating to the participation of appellant bank in the transaction between plaintiffs and defendants. Plaintiffs contracted to buy from defendants Williams a parcel of real property. Both plaintiffs testified that before retaining the bank, entering into any escrow, or executing escrow instructions they asked the escrow officer of appellant bank if they would be protected in all respects if they purchased through escrow, to which she replied: "That is what escrow is for. If there is anything wrong or anything hidden in the property, escrow will find it," and that if the property were purchased through escrow "everything would be all right." The escrow officer, although not directly denying she made the statement, said that she did not recall the conversation but that ordinarily she would not make such a statement.

After the purported conversation the plaintiffs entered into escrow with appellant bank, the parties executed escrow instructions, the escrow was completed and a policy of title insurance was delivered by appellant to plaintiffs, which policy excepted the effect of ordinances from its coverage. This exception afforded no protection to plaintiffs relative to the legality of the property's size or use under the city ordinance.

Approximately two years later, plaintiffs discovered that maintenance of the property was a violation of a municipal ordinance. They were ordered by the Department of Building and Safety to demolish a portion of the improvements and then found for the first time that the property had been previously severed from a larger lot in violation of an ordinance of the city of Los Angeles and was below the minimum size required by it. The trial court found that these facts had been fraudulently concealed from plaintiffs by defendants Williams and ordered judgment against them in the sum of $4,500. On the issue of the fraudulent concealment, it found in favor of appellant bank but denied recovery on its cross-complaint. Therein, it claimed against plaintiffs and defendants Williams payment of its expenses and attorneys' fees according to the escrow instructions. In support of its claim, appellant submitted evidence to the trial court that $1,100 was reasonable for services rendered in connection with the trial of the action.

The sole issue on this appeal is whether appellant bank is entitled to recover reasonable attorneys' fees. Its claim is predicated upon the escrow instructions which, among other things, provided:

> "Should you before or after close of escrow receive or become aware of any conflicting demands or claims with respect to this escrow or the rights of any of the parties hereto or any money or property deposited herein or affected hereby, you shall have the right to discontinue any or all further acts on your part until such conflict is resolved to your satisfaction and you shall have the further right to commence or defend any action or proceedings for the determination of such conflict. The parties hereto jointly and severally agree to pay all costs, damages, judgments and expenses including reasonable attorneys' fees suffered or incurred by you in connection with or arising out of this escrow, including, but without limiting the generality of the foregoing, a suit in interpleader brought by you."

The trial court in denying appellant affirmative relief found that the provision in the escrow instructions for attorneys' fees "was not intended to be, and is not, applicable to this action against said bank for oral misrepresentations allegedly made by said bank's employees in breach of a duty owing to plaintiffs independently of the escrow provisions or instructions and not relating to the terms or provisions of said escrow or the performance thereof"; and further "(I)t is not true that cross-defendants or any of them agreed to pay the fees of such counsel in this action, or that this action is an action arising out of said escrow within the meaning of said escrow instructions. The allegations contained in Paragraphs II, III, and IV of the First Affirmative Defense contained in the Answer of said Security-First National Bank of Los Angeles are true, but the escrow provisions alleged therein are applicable to said bank in its status as escrow holder only and not otherwise." Finding XVIII.

Appellant argues that since it "became involved in this litigation solely because of its position as the escrow holder in the transaction of purchase and sale between the plaintiffs and certain other defendants," under the accepted definitions of the term "arise" in Webster's dictionary and in Schmidt v. Utilities Insurance Co., 353 Mo. 213, 182

S.W.2d 181, 154 A.L.R. 1088, and Johnston v. Rothwell, 54 Wyo. 99, 87 P.2d 13, the provision for attorneys' fees in the escrow instructions applies to the action at bar, the attorneys' fees having been incurred "in connection with or arising out of" the escrow. In support of its contention appellant relies upon Terry v. Terry, 70 Idaho 161, 213 P.2d 906, in which a bank was named as a defendant in an action to quiet title to certain funds deposited in escrow, clearly one brought to determine conflicting claims to the property and funds held by the bank and obviously a proceeding relating to the provisions of the escrow, in which the court awarded to it, and properly so, attorneys' fees and costs.

The fallacy of appellant's argument lies in the presumption that the bank became involved in the litigation at bar only because it was the escrow holder in the transaction out of which the dispute between respondents and defendants Williams arose. Neither the law, the record, nor a reasonable interpretation of the escrow instructions bears this out. The record before us discloses that the action against appellant bank was one for fraud, primarily charging that prior to the opening of the escrow the escrow officer of the bank fraudulently represented to plaintiffs that if they purchased through escrow they would acquire a good and marketable title to the property, free from any defects, and that the purchase of the property would be valid and lawful in all respects (Third Cause of Action). In support of this allegation, both plaintiffs testified that *before* entering into the escrow or executing escrow instructions they inquired of the bank's escrow officer if they would be protected in all respects if they purchased through escrow, to which she replied that they would be, and if they bought the property through escrow "everything would be all right." Although the trial court found no misrepresentation on the part of appellant, it is nevertheless clear that the cause of action sued upon by plaintiffs, as charged in the complaint against appellant, arose out of the alleged oral misrepresentation made by the bank's agent prior to the time the escrow ever came into existence, not out of or "created by" or "brought into being by" the escrow in which the bank was the escrow holder.

[1,2] A proper construction of the contract likewise rejects as not reasonable any contention that the litigation naming the bank was brought against it in its capacity as escrow holder. The action was brought against the appellant as a bank for a breach of duty independent of and not arising out of contract. The attorneys' fees provision of the escrow instruction under which recovery is claimed contains two sentences, the first providing that the bank shall have the right to commence or defend actions to determine conflicting demands or claims to money or property deposited in escrow; the second, that the parties to the escrow shall pay reasonable attorneys' fees incurred by the bank in connection with "or arising out of" the escrow. These two sentences, as part of the same paragraph and without further reference elsewhere in the document, construed together would seem to provide for attorneys' fees only in the event of the litigation contemplated therein—arising out of conflicting demands made on the bank relative to the terms of the escrow, funds, property, or documents deposited therein, an action by the bank for breach of the terms of the escrow, or the bank's suit in interpleader. The gravamen of the instant action against appellant is fraud, the oral misrepresentation allegedly made by its agent in breach of a duty owing to plaintiffs independent of the escrow instructions, and does not relate in any way to the terms, provisions, property deposited, or the provisions of the escrow. The suit is one sounding in tort, brought against appellant not as an escrow holder, but as a bank; and since it alleges a cause of action for fraud it need not be based upon, or arise out of contract, nor does it. Liability is predicated on the alleged fact that the plaintiffs have been misled by the bank's agent to their prejudice. A cause of action in tort may arise against a bank for misrepresentation of its duties and functions independent of any contractual relationship.

Swasey v. L'Etanche, 17 Cal.App.2d 713, 62 P.2d 753.

[3] The trial court construed the attorneys' fees provision in the escrow instructions as not including in its contemplation actions such as the one at bar; and held it applicable to the bank only in its status as an escrow holder, and not otherwise. The trial court's interpretation of this document appears to us to be entirely consistent with the intent of the parties; and it is clear that where "the construction given the agreement by the trial court 'appears to be consistent with the true intent of the parties, and where that is so, the appellate court will not substitute another interpretation, though it seems equally tenable.' Universal Sales Corp. v. California Press Mfg. Co., 20 Cal.2d 751, 772, 128 P.2d 665, 677." Brogdex Co. v. Walcott, 123 Cal.App.2d 575, at page 581, 267 P.2d 28, at page 32 (Rost v. Bryson, 118 Cal.App.2d 489, 258 P.2d 72; Wilson v. Brown, 5 Cal.2d 425, 55 P.2d 485).

[4, 5] It could hardly be said that a buyer and seller executing escrow instructions would actually intend to bind themselves to pay attorneys' fees to an escrow holder in an action for misrepresentations made by it before it was ever retained in that capacity and the escrow entered into. What the parties no doubt had in mind and which appears to be reasonable, was that although the fee the escrow holder exacts for the ordinary service of transferring the documents and money between the parties to an escrow is adequate for that purpose, it is certainly not sufficient to cover any extraordinary services arising out of the situations it may face in its status as escrow holder, such as those mentioned in the instructions at bar, including conflicting demands concerning ownership of funds or documents in escrow or the relations and dealings between the parties therein, or a suit in interpleader, and that under such circumstances they should provide the escrow holder with reimbursement over and above the usual escrow fee. Without question, the intent of the parties to the escrow instructions is controlling (Sections 1639, 1648, Civil Code; H. S. Crocker Co. v. McFaddin, 148 Cal.App.2d 639, 307 P.2d 429). In determining the propriety of the trial court's construction of the document, we also bear in mind that appellant presented to the parties for their signature the printed form of escrow instructions it had heretofore prepared. Therefore, any uncertainty therein must be construed against the party preparing the same (Section 1654, Civil Code; Steeve v. Yaeger, 145 Cal.App.2d 455, 302 P.2d 704).

The construction placed by the trial court on the attorneys' fees provision of the escrow instructions appears to be entirely consistent with the intent of the parties, is a reasonable one and is hereby sustained.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

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171 Cal.App.2d 214

Randolph C. DOHERTY and Burt C. Wheeler, co-partners doing business as Larkspur Lumber Co., and Ernest Ongaro, Plaintiffs and Respondents,

v.

Charles Hugh CARRUTHERS and Marjorie Carruthers, his wife, Defendants and Appellants.

No. 18260.

District Court of Appeal, First District, Division 1, California.

June 9, 1959.

Hearing Denied Aug. 5, 1959.

Action by subcontractors against owner for enforcement of mechanic's lien. The Superior Court, Marin County, Thomas F. Keating, J., entered judgment for the subcontractors and the owners appealed. The District Court of Appeal, Fred B. Wood, J., held that where owners knew that statutory requirement concerning filing of notice of completion of repairs and improvements was to give person with unpaid bills an opportunity to file lien against property, and owners gave contractor authority to write, sign, verify and file for record the notice of completion on behalf of owners and to state the facts which the notice was required to set forth, and owners paid contractor without inquiring whether there were unpaid bills or whether contractor had recorded notice of completion, and notice was filed by contractor, and such notice recited an incorrect completion date and subcontractors relied on the recording data in the recording office as to completion to determine the time for filing their lien claims, owners were estopped from asserting that such date was not true date of actual completion.

Affirmed.

1. Mechanics' Liens ⚿132(1)

Notice of completion of repairs and improvements, filed 69 days after completion instead of within the 10 days required by statute, was invalid, and therefore failed to impose the 30-day statutory limitation for filing of liens, and the lien claimants had the full 90-day period following actual completion within which to file. West's Ann.Code Civ.Proc. § 1193.1(c, f).

2. Mechanics' Liens ⚿157(7)

Where owners knew that statutory requirement concerning filing of notice of completion of repairs and improvements was to give person with unpaid bills an opportunity to file lien against property, and owners gave contractor authority to write, sign, verify and file for record the notice of completion on behalf of owners and to state the facts which the notice was required to set forth, and owners paid contractor without inquiring whether there were unpaid bills or whether contractor had recorded notice of completion, and notice was filed by contractor, and such notice recited an incorrect completion date and subcontractors relied on the recording data in the recording office as to completion to determine the time for filing their lien claims, owners were estopped from asserting that such date was not true date of actual completion. West's Ann.Code Civ. Proc. § 1193.1(c, f); West's Ann.Civ.Code, §§ 2307, 2316, 2319, 2330.

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David D. Ring, San Francisco, for appellants.

David B. Fyfe, San Rafael, for respondents.

FRED B. WOOD, Justice.

Defendants contracted with Jack Bried, the original contractor, for certain repairs and improvements on their real property. The contract contained the following provision: "Notice of completion to be filed by this contractor [Bried]." Bried entered into subcontracts with plaintiffs Randolph Doherty and Burt C. Wheeler for materials and with plaintiff Ernest Ongaro for materials and labor.

The work of improvement was completed August 9, 1955. On October 17, a notice of completion, reciting that the work of improvement was completed on October 14, was filed by Bried. It was signed "C. Hugh Carruthers by Jack Bried (As Owner's Agent)." Plaintiffs filed their claim of lien on November 16, 1955; i. e., within 30 days of the filing of notice of completion 99 days after actual completion.

The applicable statute[1] declares that the "owner shall within 10 days after the completion of the work of improvement file for record a notice of completion * * *. If such notice be so filed, then * * * [certain exceptions not here material]

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[1] Code of Civil Procedure, section 1193.1, as amended by Stats.1951, ch. 1376, p. 3290; operative until September 7, 1955, the effective date of the 1955 amendment (Stats.1955, ch. 1511, p. 2749). The 1955 amendment does not appear to have effected any change significant to us in the present inquiry.

* * * every person, other than an original contractor, claiming the benefit of this chapter must within 30 days after the date of filing for record such notice, file for record his claim of lien. If such notice be not so filed, then * * * [certain exceptions not here material] * * * all persons claiming the benefit of this chapter shall have 90 days after the completion of such work of improvement within which to file their claims of lien." Code Civ.Proc., § 1193.1, subd. (c).

The notice of completion is filed in the office of the county recorder. It must be signed and verified by the owner "or some other person on behalf of the owner" (§ 1193.1, subd. (f), as amended in 1951), changed to "or his agent" by the 1955 amendment of section 1193.1. This notice must, among other things, set forth "the date of completion of" the "work of improvement," but "the recital of an erroneous date of completion shall not affect the validity of the notice if the true date of completion is within 10 days preceding the date of filing for record such notice." Section 1193.1, subd. (f).

[1] In the instant case, the notice of completion, having been filed 69 instead of 10 days after completion, was invalid. It therefore failed to impose the 30-day limitation for the filing of liens. Accordingly, the lien claimants had the full 90-day period following actual completion (August 9), within which to file. That period expired November 7. Their filing on November 16 was, therefore, nine days too late, unless the owners are estopped from asserting that October 14, the date recited in their notice of completion, was not the true date of actual completion. The judgment herein is predicated upon such an estoppel.

[2] The trial court found that the notice of completion was recorded by Bried "acting as agent of defendants," and that although completion actually occurred on August 9, 1955, the "defendants did not so notify plaintiffs * * * nor did * * defendants at any time notify plaintiffs * * * that the Notice of Completion * * * did not set forth the actual date of completion." The court concluded that the defendants "are estopped to deny that the Notice of Completion * * * was not a valid Notice * * * or that completion did not actually occur on October 14, 1955, the date specified therein."

The evidence supports these findings and conclusions. Defendant Charles Carruthers testified that when he entered into the contract he was familiar with the requirement of law concerning the filing of a notice of completion. He knew that the purpose of filing such a notice was to give persons who had unpaid bills an opportunity to file a lien against the property. He left up to Mr. Bried solely and entirely the matter of recording the notice of completion. He had no discussion with Bried on that subject except when they were within a few days of finishing the job and Bried said he would file the notice within the next few days. Carruthers did not ask Bried to furnish him a copy of the notice when filed, nor to advise him as to the date of filing the notice. "I left it up to him. It was agreed he would file it. It was part of our contract [that he was to file the notice of completion]." Carruthers testified that when on August 11, 1955, he made the fourth payment to contractor Bried he did not inquire whether there were any outstanding unpaid bills for labor or materials, nor as to who had furnished the work or materials, nor whether Bried had recorded the notice of completion. He merely made the fourth payment on the basis that the work had been completed on August 9. When the final payment was made (September 11) Carruthers did not inquire of Bried whether he had recorded the notice of completion nor did he inquire if there were any unpaid bills. He made his final payment to Bried upon Bried's representation that 35 days had elapsed since completion of the contract. Carruthers did not until December 14 inquire at the recorder's office whether a notice of completion had been filed. On December 14, he for the first time learned about the notice that Bried had filed. Prior to then he made no inquiry as to whether a notice of completion had been filed. Also, that was the first day that he had notice that there were any unpaid bills.

Plaintiff Doherty testified that prior to the recording of the notice of completion on October 16, he had no knowledge that the work had been completed. On learning of the recordation of the notice setting forth October 14 as the completion date, he carried his time for filing his claim of lien as 30 days from the recording of the notice on October 16.

William A. Gable, on behalf of plaintiff Ernest Ongaro, testified that he had a service which lists documents recorded each day. By examining that service he ascertained that a notice of completion was filed. It is the custom for him to follow the recording data in the recording office as to completion and from that information he carries his time to file liens. This service is gotten out by the Marin County Credit Association. Until he learned about it from this service he knew nothing about actual completion of the job. He relies entirely on that publication to give him his time to commence filing. He did not recall an occasion where it developed that the notice of completion was not filed until months after completion. It has been his experience that he can rely on that data because the contractor will get it on file as soon as he can.

Upon hearing this evidence the trial judge, Honorable Thomas F. Keating, pronounced judgment for the plaintiffs and said: "I think justice dictates that where [one of] two innocent parties are going to be injured * * * I think it will have to be the one who might be charged with having allowed the situation to develop. These materialmen and subcontractors actually had no opportunity whatever to protect themselves in the established way and they took advantage of the established way of doing things and filed their notice within time." We concur.

That Bried had *express* authority, unrevoked authority, from the owner to write, sign, verify and file for record the notice of completion on behalf of the owner, abundantly appears from the written contract between Bried and the owner and from the owner's testimony. This agency was created by "a precedent authorization" (Civ.Code, § 2307) and therefore, contrary to defendants' contention, involves no question of ratification. Also, we are dealing with "actual authority" which the principal "intentionally" conferred "upon the agent." Civ.Code, § 2316.

Accordingly, this agent had authority to make "a representation respecting any matter of fact, not including the terms of his authority, but upon which his right to use his authority depends, and the truth of which cannot be determined by the use of reasonable diligence on the part of the person to whom the representation is made." Civ.Code, § 2319. Given authority to prepare and file the notice, Bried of course had authority to state the facts (including the date of completion) which the statute expressly required such a notice to set forth.

In such a case, the provisions of section 2330 of the Civil Code apply: "An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal." See also Worthen v. Jackson, 139 Cal.App.2d 615, 617, 293 P.2d 797, and cases therein cited; Dastagir v. Dastagir, 109 Cal.App.2d 809, 821, 241 P.2d 656; 2 Cal.Jur.2d 833, Agency, § 143; 2 Am.Jur. 270, Agency § 347. We conclude that this notice had the same effect in every respect as it would if the owner had personally written, signed, verified and recorded it.

Lien claimants are entitled to watch these filings in the office of the county recorder and rely upon them. Hughes Mfg. & Lumber Co. v. Hathaway, 174 Cal. 44, 48, 161 P. 1159; Schwarz & Gottlieb, Inc., v. Marcuse, 175 Cal. 401, 414, 165 P. 1015.

The notice filed in the instant case was regular upon its face. It told the lien claimants that it was timely filed (within ten days after completion of the work of improvement), therefore, valid and fully effective. The conclusion would irresistibly follow, in the mind of a lien claimant, that he could safely file his claim of lien "within 30 days after the date of filing for record such notice" (Code Civ.Proc. § 1193.1).

Such representations of fact made in writing, "signed and verified by the owner or his agent" and filed for record on behalf of the owner (§ 1193.1) furnish just as effective a basis for estoppel as the oral representations made in Hubbard v. Lee, 6 Cal. App. 602, 92 P. 744 and 10 Cal.App. 477, 102 P. 528. There, an owner who declared that the buildings were not completed and that he would not accept them until certain work was done was deemed estopped to deny the validity of a claim filed by contractors who relied upon such declarations in furnishing materials and in calculating the time for the filing of their claims.

Defendants contend there is no room for estoppel under this statute. They say that a tardy filing of the notice of completion is void and cannot furnish any basis for an estoppel. They rely upon C. Ganahl Lumber Co. v. Thompson, 205 Cal. 354, 270 P. 965. That case does not support their thesis. The applicable statute was section 1187 of the Code of Civil Procedure, as amended by the Statutes of 1919, ch. 146, p. 190. It authorized the subcontractor to file his claim of lien after he had completed his work and until 30 days after completion of the work of improvement; directed the owner to file his notice of completion within 10 days after completion of the work, specifying the information it must set forth; declared that the filing of such a notice was the equivalent of completion; and said that if "such notice be not so filed," lien claimants "shall have 90 days after the completion of such work of improvement within which to file their claims of lien." The work was in fact completed September 21, 1923. The owner filed notice of completion on November 30, some 60 days too late. The court held, on the basis of earlier decisions, that this notice was invalid because not filed within the 10 days and could not be treated as the equivalent of completion. The result was that the lien claimant had until 90 days after actual completion (December 19) within which to file its claim. Plaintiff filed too late. It did not file until December 27.

Estoppel was apparently urged against the defendants upon the ground that their notice of completion declared that completion occurred on November 15. Of this contention the court made the following disposition: "Even if it be assumed, without deciding, that the owners by reason of their tardy filing of the notice of completion are estopped to deny that the building was completed on November 15, 1923, as recited in such tardy notice of completion, it would avail the appellant nothing, for its claim of lien would not, even then, have been filed within 30 days after such completion as required by section 1187." At page 356 of 205 Cal., at page 966 of 270 P. By the latter remark the court apparently had reference to the forepart of section 1187 which said that a subcontractor would have until 30 days after completion for the filing of his claim of lien. If the owner were held to the declaration in his recorded notice that November 15 marked the date of completion, plaintiff subcontractor would have had until December 15 to file his claim, which he did not do. He delayed his filing until December 27.

Perhaps the lack of a basis for an estoppel in the Ganahl case may be found in the fact that the owner's notice of completion showed upon its face it was being filed at least five days too late. Filed November 30, it set forth the completion date as November 15. That, conceivably, may have been regarded as a suspicious circumstance which should have put the lien claimant upon his inquiry. There is no such circumstance in our case. Here, the notice was filed October 17, and represented that the work was completed October 14, a filing well within the prescribed 10-day period. In our case the 30-day limitation period runs from the date of filing of the notice, not from the date of completion of the work of improvement. Also the provision that the filing of the notice is the equivalent of completion has been deleted from the statute since the date of decision in the Ganahl case.

The judgment is affirmed.

BRAY, P. J., and TOBRINER, J., concur.

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171 Cal.App.2d 110

George PAVLOVSKY, etc., Plaintiff and Appellant,
v.
BOARD OF TRADE OF SAN FRANCISCO, an unincorporated association, Defendant and Respondent.
Civ. 18310.

District Court of Appeal, First District, Division 2, California.
June 4, 1959.

Hearing Denied July 29, 1959.

Retailer's action against association of wholesalers, manufacturers and retailers, for damages as result of association's listing of retailer as a financially embarrassed debtor party leading to the failure of association members to sell to him on credit. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., entered judgment sustaining demurrer to complaint and retailer appealed. The District Court of Appeal, Draper, J., held that count alleging libelous publication of retailer's name as a debtor party was insufficient to state a cause of action because it showed existence of privilege and lacked allegation of malice.

Affirmed.

1. Libel and Slander 🔑93, 97

Ordinarily privilege must be pleaded as affirmative defense, but where existence of privilege is shown on face of complaint it may be raised by general demurrer. West's Ann.Civ.Code, §§ 45, 47, subd. 3.

2. Libel and Slander 🔑97

Where retailer brought action against board of trade association of wholesalers, manufacturers, and jobbers, claiming damages because of association's publication of retailer's name as a debtor party thereby causing association members to refuse to sell to him on credit, complaint showing that purpose of board was to provide for joint action by all of its members, was sufficient to show on its face that communication was privileged, if made without malice, so that defense of privilege was raised by general demurrer. West's Ann.Civ.Code, § 47, subd. 3.

3. Libel and Slander 🔑44(4)

Publication by board of trade association of wholesalers, manufacturers, and jobbers, of retailer's name as a debtor party thereby leading to association membership's refusal to sell to retailer on credit, was privileged. West's Ann.Civ.Code, §§ 45, 47, subd. 3.

4. Libel and Slander 🔑83

In action by retailer against unincorporated association of wholesalers, manufacturers, and jobbers for damages resulting from association's publication of retailer's name as a debtor party thereby causing association members to refuse to sell to him on a credit basis, complaint failing to allege that association knew or should have known of alleged falsity of publication was insufficient to state a cause of action for libel. West's Ann.Civ.Code, § 47, subd. 3.

5. Libel and Slander 🔑83

When privilege of publication appears from face of complaint, pleading must allege malice in fact in order to state a cause of action and mere falsity is not enough to show actual malice.

6. Libel and Slander 🔑136

In tort of disparagement of title, substantially the same privileges are recognized as in libel.

7. Negligence ⚷111(1)

In retailer's action against unincorporated association of wholesalers, manufacturers, and jobbers, for damages resulting from publication of retailer's name by association as a debtor party thereby causing association members to refuse to sell to him on credit, complaint alleging that association without any preliminary investigation or hearing published name of retailer was insufficient to state a cause of action in negligence.

8. Appeal and Error ⚷863

Where plaintiff was given leave to amend but refused to do so, District Court of Appeal must examine his complaint only to see whether it states a cause of action and not to determine whether plaintiff might have been able to state one.

Maxwell Keith, San Francisco, for appellant.

Alexander, Bacon & Mundhenk, Herbert Chamberlin, James M. Conners, San Francisco, for respondent.

DRAPER, Justice.

Demurrer to plaintiff's complaint was sustained with leave to amend. Plaintiff elected to stand upon the complaint. He appeals from judgment of dismissal thereafter entered.

While the complaint is in three counts, it is apparent that they represent but three statements of a claim based upon a single alleged wrongful act of defendant. All three counts allege that: Plaintiff is a retailer who for 20 years has "maintained a good reputation and credit standing." Defendant Board of Trade is an unincorporated association composed of some 350 wholesalers, manufacturers and jobbers. "Its purpose is to provide for joint action by all of its members in dealing with financially embarrassed or insolvent debtors." Its constitution and by-laws obligate all members to "take joint action with respect to debtor parties whose names have been submitted to the (board) by a member." Customarily, members "cease to deal, on a credit basis, with parties named to the (board), and who appear on said Board's lists of reported debtors." The three counts vary in their allegations of the action of the board as to plaintiff, but all allege in substance that he was so listed by the board, that extension of credit to him was curtailed or terminated, and that he suffered business losses and became ill as a result thereof.

The first count clearly sounds in libel. It alleges that defendant board "published the name of plaintiff as a debtor party," that this led the members of the board to believe plaintiff to be "financially embarrassed or insolvent," when in fact he was not so, and that this "publication was false and defamatory." Conceding that this allegation meets the other requirements of the code definition of libel (Civ.Code, § 45), the issue before us is whether it is unprivileged. Defendant argues that the publication is privileged within the meaning of Civil Code Section 47, subdivision 3, as a communication without malice to persons interested therein by one who is also interested.

[1-3] Ordinarily, privilege must be pleaded as an affirmative defense. Taylor v. Lewis, 132 Cal.App. 381, 22 P.2d 569. But where the existence of the privilege is shown on the face of the complaint, it may be raised by general demurrer. Locke v. Mitchell, 7 Cal.2d 599, 602, 61 P.2d 922. Here the complaint alleges that the purpose of the board is "to provide for joint action by all of its members" as to debtors, and that it is required to "actively engage in causing joint action * * * of all of its members in dealing with debtor parties complained of by any member * * * to said Board." It is implicit in these allegations of the purpose and rules of the board that the members, in joining it, requested it to inform them all of credit complaints made by any member, and that all were interested therein. It follows, under the rationale of the decisions, that the communication from board to members, if made without malice, was within the privi-

lege defined in Section 47(3). Locke v. Mitchell, supra; Emde v. San Joaquin County Central Labor Council, 23 Cal.2d 146, 161, 143 P.2d 20, 150 A.L.R. 916; Maher v. Devlin, 203 Cal. 270, 263 P. 812; Freeman v. Mills, 97 Cal.App.2d 161, 217 P.2d 687; Glenn v. Gibson, 75 Cal.App.2d 649, 171 P.2d 118; Morcom v. San Francisco Shopping News, 4 Cal.App.2d 284, 40 P.2d 940.

[4] Plaintiff cites authority (36 Am. Jur. 182, Mercantile Agencies, § 9; 30 A.L.R.2d 776) for the contention that credit reports by mercantile agencies are not privileged. No California authority is cited, and the texts cited by plaintiff affirmatively show that the weight of authority elsewhere does extend the privilege to such agencies. Moreover, plaintiff's authorities show that a "mercantile agency" is one which collects and distributes credit information for profit. His own allegations establish that defendant board is not of this type. Thus even the minority view does not aid him here.

[5] The privilege here invoked is not absolute. It exists only in the absence of malice. When the privilege appears from the face of the complaint, that pleading must allege malice in fact in order to state a cause of action. Locke v. Mitchell, supra, 7 Cal.2d 599, 602–603, 61 P.2d 922; Washer v. Bank of America, 21 Cal.2d 822, 831, 136 P.2d 297, 155 A.L.R. 1338. Mere falsity is not enough to show actual malice. Emde v. San Joaquin County Central Labor Council, supra, 23 Cal.2d 146, 161, 143 P.2d 20, 150 A.L.R. 916. The compliant here lacks even the pleading of "malice" as a conclusion, and it contains no allegation of facts showing that defendant knew or should have known of the alleged falsity of the communication. Thus it is wholly insufficient to establish malice (Locke v. Mitchell, supra), and the demurrer to the first count was properly sustained.

[6] The second count alleges that defendant board "intentionally and without justifiable cause or excuse, caused to be published the name of plaintiff as a fiancially embarrassed or insolvent debtor." To the extent that this may be treated as alleging libel, it is subject to the same privilege already discussed, and in its failure to allege knowledge or reason to believe the communication to be false, it similarly fails to allege malice in fact. If it be viewed as alleging a wrongful interference with or disparagement of plaintiff's credit standing, it is defective in failing to allege any design or purpose so to injure him. Also, in the comparable tort of disparagement of title, substantially the same privileges are recognized as in libel. Albertson v. Raboff, 46 Cal.2d 375, 378, 295 P.2d 405.

[7] Plaintiff's third count alleges that the board "without any preliminary investigation, without a hearing, without obtaining the consent of the plaintiff * *, and without requesting his version as to any report made against him, negligently, without due care and without reasonable cause, published the name of plaintiff to its membership * * * as a debtor requiring joint action on the part of its membership."

If this count be deemed to allege libel, it meets the same obstacles of qualified privilege and lack of allegation of malice already discussed. If it be regarded as seeking to assert a cause of action for negligence, it is also defective. Nowhere does it define what would constitute "a debtor requiring joint action." Thus we have no means, either in this or any other count, of determining whether plaintiff in fact was within this definition. While it is alleged that plaintiff had long maintained "a good reputation and credit standing" and continued to maintain them at the date of the alleged publication, this does not negate indebtedness nor does it show ability to pay within whatever period and upon whatever terms may be prescribed by the undefined standards of the board and its members. This vague pleading shows no standard of care and thus, obviously, no failure to meet such standard. It is wholly insufficient to state a cause of action in negligence.

[8] Here plaintiff was given leave to amend but refused to do so. Thus we examine his complaint only to find whether it states a cause of action, not to determine whether plaintiff might have been able to state one. Levinson v. Bank of America, 126 Cal.App.2d 122, 125, 271 P.2d 632. The complaint before us does not meet this test.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

Hearing denied; PETERS, J., dissenting.

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171 Cal.App.2d 150

Carolyn Ann GADBURY and Hazel Gadbury, by her guardian ad litem, Harold T. Gadbury, Plaintiffs and Appellants,

v.

Harold James RAY and Elmer Ray, Defendants and Respondents.

Civ. 6017.

District Court of Appeal, Fourth District, California.

June 4, 1959.

Rehearing Denied June 22, 1959.

Hearing Denied July 29, 1959.

Action by guests of westbound automobile driver against owner and driver of northbound automobile for injuries received in collision at intersection which was unobstructed, except for low brush and wire fence, and at which there were no traffic controls. The Superior Court of Tulare County, W. G. Machetanz, J., rendered judgment for owner and driver of northbound automobile, and guests appealed. The District Court of Appeal, Griffin, P. J., held that where evidence did not indicate that guests were aware of any danger or that if they were, they could have done anything, instruction on contributory negligence should not have been given.

Reversed.

1. Automobiles 🔑224(3)

Generally, passenger in motor vehicle has duty to exercise ordinary care under conditions in which he finds himself and which should influence his conduct for his own safety, and while he cannot be presumed to know everything operator must know, he cannot ignore speed at which automobile is traveling or manner in which it is being operated, and he must be reasonably alert to conditions that would affect his own safety, but he does not have absolute duty operator has to know what speed automobile can be driven with safety.

2. Automobiles 🔑224(1)

Negligence of operator with respect to speed is not necessarily negligence of passenger, and conduct of passenger must be judged in light of conditions under which he acts or fails to act, and in accordance with general principles of negligence.

3. Automobiles 🔑224(5), 226(2)

Where passenger knows, or in exercise of ordinary care should know, that automobile is being operated at unreasonably high or imprudent speed and voices no objection, passenger may be guilty of contributory negligence, and if such negligence contributes proximately to accident, passenger cannot recover.

4. Automobiles 🔑224(5)

Where circumstances are such that danger of collision does not become apparent to guest in time to remonstrate, guest's failure to caution driver does not constitute contributory negligence, and this is true though guest fails to maintain lookout or observe traffic on highway.

5. Automobiles 🔑242(8)
Trial 🔑252(8)

Burden of showing contributory negligence of guest is upon driver of automobile by whose negligence guest is injured, and in absence of any showing to that effect, plaintiff in death or loss of memory case may rely upon presumption that guest exercised due care for his own safety, in which event instruction on contributory negligence should not be given.

6. Automobiles ⚷246(58)

In action by guests of westbound automobile driver against owner and driver of northbound automobile for injuries received in collision in intersection which was unobstructed, except for low brush and wire fence, and at which there were no traffic controls, wherein evidence did not indicate that guests became aware of any danger or that, if they did, they could have done anything, instruction on contributory negligence should not have been given.

7. Appeal and Error ⚷843(2)

Where instruction on contributory negligence should not have been given, question pertaining to claimed erroneous form of instruction became moot.

8. Witnesses ⚷330(3)

Witness may not be impeached on immaterial and irrelevant matters, but he may be impeached on matters material and relevant to issues. West's Ann.Code Civ. Proc. § 2055.

9. Witnesses ⚷330(3)

Matter is relevant to issues justifying impeachment thereon if matter tends to illustrate or throw light on transaction involved. West's Ann.Code Civ.Proc. § 2055.

10. Witnesses ⚷324

In action by guests of westbound automobile driver against owner and driver of northbound automobile for injuries received in collision in intersection which was unobstructed, except for low brush and wire fence, and at which there were no traffic controls, wherein trial court allowed northbound driver who had been called as adverse witness to testify, on examination by guests' counsel, that he had stopped at prior intersection and then traveled at no more than 45 to 50 miles per hour up highway to point of collision, trial court should have admitted guests' proffered testimony that northbound driver had traveled 60 miles per hour through prior intersection without stopping and 80 to 90 miles per hour all within minute's time of collision. West's Ann.Code Civ.Proc. § 2055.

McKinney & Ballantyne, Visalia, Ralph Jordan, Visalia, of counsel, for appellants.

Maddox, Abercrombie, Kloster & Jacobus and Frederic A. Jacobus, Visalia, for respondents.

GRIFFIN, Presiding Justice.

Plaintiffs and appellants Carolyn Ann Gadbury, individually, and Hazel Gadbury, by her guardian ad litem, Harold T. Gadbury, brought this action against defendants and respondents Harold James Ray and Elmer Ray, for damages for personal injuries suffered as a result of a collision between two automobiles at the intersection of County Road No. 92 and Avenue 320, in Tulare County, about 4:30 P.M. on January 13, 1957.

Plaintiffs were guests in a 1950 two-door Chevrolet automobile owned and driven by James Gadbury, brother of Hazel Gadbury, who later married plaintiff Carolyn Ann Bray. This Chevrolet collided with a 1950 four-door Oldsmobile car owned by defendant Elmer Ray and driven by defendant Harold J. Ray.

County road No. 92, approximately 16 feet wide, was a rough oiled surface road running north and south. Avenue 320 was a fairly good oiled-surface road approximately 18 feet wide, running east and west. There were no control or stop signs at this intersection and no obstruction of view for north-bound or west-bound traffic, with the exception of some low brush and wire fence. It was described as an "open intersection" in open, uninhabited country. The weather was clear, visibility good, and the surface of the road was dry. Plaintiffs were traveling west on Avenue 320. Defendant Harold Ray was proceeding north on County Road No. 92. At the trial he was called by plaintiffs, under section 2055 of the Code of Civil Procedure and testified that he was driving the Oldsmobile automobile on County road No. 92, and saw no other traffic at all; that he stopped at a boulevard stop intersection about one mile south of the intersection here in question and then proceeded north at about 45 to 50 miles per hour; that as he approached the intersection here involved he looked to his left for about 40 seconds and saw no traffic, then looked to his right about 50 feet before he entered the intersection and then, for the first time, noticed the Chevrolet car about 50 feet east of the intersection; that just before then he had his foot off of the throttle and was traveling about 40 miles per hour; that he did not apply the brakes; that he could not estimate the speed of the Chevrolet car at that time; that when his car reached the center of the intersection the front end of the Chevrolet struck the center of the Oldsmobile car, knocking him out of his car and causing injury to him.

Plaintiff Carolyn Ann Gadbury testified generally that all she remembered was that James Gadbury picked her up in his Chevrolet car that evening; that she remembered riding in the car in the front seat between James and Hazel; that she had ridden with James many times before and he was a careful driver, and that she did not feel she should help watch the road; that she did not remember the highway approaching this intersection; that she thought she had ridden over this road before; that she did not pay any particular attention to it or any intersection and did not remember which way she was looking just before the accident; that she knew where the road was; and that after the accident she woke up in the hospital.

James Gadbury, aged 19, who was injured in the accident, testified he did not even remember picking up Carolyn that day and did not remember anything about the accident until the next morning; that he had driven with her on many occasions before this and never drove recklessly and did not recall ever going through intersections at high rates of speed; that he later found out where the accident happened and he had driven over this road many times and was fairly familiar with the area; that he vaguely remembered telling the officers the next day he didn't see the other automobile and that this was a fact.

Plaintiff Hazel Gadbury testified the three of them left her house about 3 P. M.; that she was seated in the front seat near the right door; that they were driving on Avenue 320; that she remembered when they reached a point about one block from the intersection here involved; that James was then driving about 35 miles per hour; that she was somewhat accustomed to keeping her eye on the road and she does not remember of any warning given; that she did not remember anything after that; that after the collision she was lying out in a muddy field with the Chevrolet car behind her and Carolyn and James were near by; that she remembered speaking to James who was looking for Carolyn, and all were taken to the hospital. All claimed they were unable to testify as to any facts in reference to the accident and collision because of retrograde amnesia caused by shock.

As to the physical facts, photographs of the two roads, the intersection depicting the position of the cars and the surrounding area after the accident were taken and are in evidence. The California Highway Patrol investigating officer testified generally that the point of impact was near the center of the intersection; that there was no indication of any skid marks made by the respective cars prior to the collision, although there were certain skid marks from the intersection extending back about 42 feet easterly on Avenue 320; that he believed at first they were made by the Chevrolet car but later he concluded they were made by some other car; and that tire marks, 42 feet in length, did lead from the point of impact westerly to the position where the Chevrolet came to a stop, about 18 feet north of the roadway of Avenue 320 and about 18 feet west of the westerly edge of Roadway No. 92. The entire front portion of the Chevrolet was badly demolished. The Oldsmobile was found farther north in a northwesterly direction from the intersection, resting on its side against an anchor post of an electric pole. There were tire marks leading from the point of impact and running in a general northwesterly direction for about 66 feet before the Oldsmobile car turned over against the pole. The major damage to it was on its right side near the center door-post indicating the point of collision with the front of the Chevrolet car. These observations were made by the officers about five minutes after the accident.

Three contentions are made on this appeal. (1) Error in an instruction given and error of the court in instructing the jury on the issue of contributory negligence on the theory there was no substantial evidence supporting it, citing such authority as Badostain v. Pacific Electric Ry. Co., 83 Cal.App. 290, 256 P. 576; Buttrick v. Pacific Electric Ry. Co., 86 Cal.App. 136, 260 P. 588; Whitman v. Steiger, 46 Cal. 256; McGowan v. City of Los Angeles, 100 Cal. App.2d 386, 223 P.2d 862, 21 A.L.R.2d 1206; Lasater v. Oakland Scavenger Co., 71 Cal. App.2d 217, 221, 162 P.2d 486; Fugelsang v. Steiner, 115 Cal.App. 167, 1 P.2d 553; Bardin v. Case, 99 Cal.App.2d 137, 142, 221 P.2d 292; Marchetti v. Southern Pacific Co., 204 Cal. 679, 683, 269 P. 529; Wilding v. Norton, 156 Cal.App.2d 374, 379, 319 P.2d 440; Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 748, 134 P. 709; Rush v. Lagomarsino, 196 Cal. 308, 316, 237 P. 1066; Gigliotti v. Nunes, 45 Cal.2d 85, 286 P.2d 809; Murphy v. Atchison, T. & S. F. Ry., 162 Cal.App.2d 818, 329 P.2d 75; Scott v. Burke, 39 Cal.2d 388, 247 P.2d 313; and Swink v. Gardena Club, 65 Cal.App.2d 674, 151 P.2d 313. Defendants argue otherwise and cite such authority as Miller v. Atchison, T. & S. F. Ry. Co., 166 Cal.App.2d 160, 332 P.2d 746; Martindale v. Atchison, T. & S. F. Ry. Co., 89 Cal.App.2d 400, 201 P.2d 48; Lugo v. Atchison, T. & S. F. Ry. Co., 128 Cal.App.2d 402, 275 P.2d 605; Howard v. Alta Chevrolet Co., 111 Cal.App.2d 38, 243 P.2d 804; Seefeldt v. Pacific Greyhound Lines, 155 Cal.App.2d 853, 318 P.2d 723; Miller v. Peters, 37 Cal.2d 89, 230 P. 2d 803; Parmenter v. McDougall, 172 Cal. 306, 156 P. 460; and Hoffart v. Southern Pacific Co., 33 Cal.App.2d 591, 92 P.2d 436. An analysis of the evidence presents a very close question on this point.

[1–5] It is a general rule in respect to a passenger in a motor vehicle that he has the duty to exercise ordinary care under the conditions in which he finds himself and which should influence his conduct for his own safety; that while he cannot be presumed to know everything the operator must know, he cannot ignore the speed at which a car is traveling or the manner in which it is being operated; that he must be reasonably alert to conditions that would affect his own safety, but he does not have the absolute duty the operator has to know at what speed the car can be driven with safety. Negligence of the operator with respect to speed is not necessarily negligence of the passenger, and the conduct of the passenger must be judged in the light of the conditions under which he acts or fails to act, and in accordance with the general principles of negligence. If the passenger knew, or in the exercise of ordinary care should have known, that the car was being operated at an unreasonably high or imprudent speed and voiced no objection, under the conditions above mentioned, he may be guilty of contributory negligence, and if such negligence contributed proximately to the accident he cannot recover. It has been held that if circumstances are such that danger of collision does not become apparent to the guest in time to remonstrate, the guest's failure to caution the driver does not constitute contributory negligence, and this is true though the guest fails to maintain a lookout or observe the traffic on the highway. 7 Cal.Jur.2d p. 249, sec. 342; Hagen v. Metzger, 130 Cal.App. 497, 20 P.2d 117; Wilding v. Norton, 156 Cal.App.2d 374, 319 P.2d 440. The burden of showing contributory negligence of the guest is upon the driver of the car by whose negligence he is injured and in the absence of any showing to that effect the plaintiff in a death or loss of memory case may rely upon the presumption that the guest exercised due care for his own safety, in which event an instruction on contributory negligence should not be given. 7 Cal.Jur. 2d 253, sec. 342; Stoneburner v. Richfield Oil Co., 118 Cal.App. 449, 5 P.2d 436; Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066; Gigliotti v. Nunes, 45 Cal.2d 85, 286 P.2d 809; Scott v. Burke, 39 Cal.2d 388, 247 P. 2d 313.

Swink v. Gardena Club, 65 Cal.App.2d 674, 151 P.2d 313, involved passengers in a station wagon colliding with another car at an intersection. One of the plaintiffs, a passenger in the station wagon, placed its speed as high as 50 miles an hour just prior to the accident. The court there refers to the cases of Thompson v. Los Angeles Ry. Co., 165 Cal. 748, 134 P. 709; and Parmenter v. McDougall, 172 Cal. 306, 156 P. 460, and, quoting from Queirolo v. Pacific Gas & Electric Co., 114 Cal.App. 610, at page 615, 300 P. 487, at page 490, said:

> "'* * * if a passenger is aware that the driver is carelessly rushing into danger it may be incumbent upon him to take steps for his own safety; yet, as pointed out in Marchetti v. Southern Pacific Co., supra, (204 Cal. 679, 269 P. 529), these cases state the rule upon the subject of a passenger's duty in the face of a known danger, and have no application where the danger is not apparent, and it is not shown that there was anything that the passenger could have done to avert the accident after the danger became known to him. The duty of a passenger to remonstrate against excessive speed is dependent upon the circumstances of the particular case * * * It is manifest from the evidence in the present case that the driver, immediately upon discovery of the approaching automobile, endeavored to avoid a collision, and that the interval between the appearance of danger and the happening of the accident was too short to justify the conclusion that any act by plaintiff would have affected the conduct of the driver, or that her failure to act proximately contributed to her injuries.'" [65 Cal.App.2d 674, 151 P.2d 316.]

It then said:

> "It does not appear that respondents had any better or earlier view of the car operated by defendant Drake than did the driver of the station wagon. In view of the facts and the legal principles applicable it is difficult to see how any act or failure to act on the part of the respondents in any way contributed to their injuries."

[6] It appears manifest from any inferences here allowable and from the evidence adduced in the instant case that the interval between the appearance of a danger and the happening of an accident was too short to justify the conclusion that any act of plaintiffs would have affected the conduct of the driver of their car or that their failure to act proximately contributed to their injuries. The evidence does not indicate that plaintiffs did become aware of any danger or if they did, there was anything that could have been done by plaintiffs, after they became aware of the danger, which would have averted the collision. Plaintiffs were clothed with the presumption of due care on their part. The burden of showing their contributory negligence was upon defendants. We are convinced that the evidence presented does not show that defendants here met this burden.

The cases cited by defendants uniformly presented additional circumstances justifying a reasonable conclusion, from the nature of the danger the passenger was approaching and his awareness of it, that ordinary care required some action on his part which might have avoided the collision. A different factual situation arises in railway crossings of streets and highways pertaining to notice of danger, such as in Miller v. Atchison, T. & S. F. Ry. Co., 166 Cal.App.2d 160, 332 P.2d 746, in reference to railroad tracks (which in themselves are some indication that a train does pass over them on occasions, [Loftus v. Pacific Electric Ry. Co., 166 Cal. 464, 137 P. 34]), where there were railway cross-arms, painted signs on the pavement, and other signs indicating a railroad crossing and that care should be taken at such crossing. See Chinnis v. Pomona Pump Co., 36 Cal.App.2d 633, 98 P.2d 560, and cases relied upon by plaintiffs.

[7] (2) Under the circumstances the next question pertaining to the claimed erroneous form of instruction given on the doctrine of contributory negligence becomes moot.

[8, 9] (3) There is one other question involved. It pertains to the rejection by the court of proffered evidence by plaintiffs showing the conduct of defendant driver, in driving 80 to 90 miles per hour just before entering an intersection one mile south of the intersection here involved, traveling through a boulevard stop intersection at 60 miles per hour, and then continuing on at about 80 or 90 miles an hour up the road all within a minute's time prior to the accident. There were no other intersections between these two. Plaintiffs concede in their argument to this court on appeal that the admission of such previous acts and the speed of the car may be held to be too remote, in point of time, unless abuse of discretion appears, citing Jennings v. Arata, 83 Cal.App.2d 143, 147, 188 P.2d 298, and Gritsch v. Pickwick Stages System, 27 Cal.App.2d 494, 497, 81 P.2d 257. We will therefore assume such ruling would be authorized in this case. However, it appears from the record at the trial that upon cross-examination of defendant, under section 2055, C.C.P. by plaintiffs' counsel, the trial court allowed the witness to testify, over objection of plaintiffs' counsel, on the ground it was "irrelevant and immaterial", that he stopped his car at the first intersection and then traveled about 45 to 50 miles per hour up the highway to the next intersection, and that this was the highest speed he attained. The court allowed him to answer with the statement that it was for the purpose of testing his recollection. Thereafter plaintiffs offered the testimony of two independent witnesses who were near the first intersection when defendants' car approached it and said they would testify defendants' car was traveling according to the proof offered, and that he failed to make a boulevard stop; that there was no indication of a decrease in speed after they last noticed him, and that they went up to the scene of the accident and again identified defendants' car. Defendants' counsel objected to the offer on the ground it would be impeaching the witness on a collateral matter and was accordingly not allowable. The exact ruling of the court on the admissibility of this so-called impeaching evidence is confusing. It said: "Counsel * * * have satisfied the court, at this time that it can be admitted, and that is my ruling. I am going to sustain his objection without prejudice." It does not appear that any further offer was made or that the court again considered it. The rule is, as contended by defendant, that a witness may not be impeached on immaterial and irrelevant matters, but otherwise it may be done, if material and relevant to the issues. A matter is relevant to issues justifying impeachment thereon if it tends to illustrate or throw light on the transaction involved. Redington v. Pacific etc., 107 Cal. 317, 40 P. 432; Moody v. Peirano, 4 Cal.App. 411, 88 P. 380; Hyland v. Millers Nat. Ins. Co., D.C., 58 F.2d 1003, certiorari denied 303 U.S. 645, 58 S.Ct. 644, 82 L.Ed. 1107; Batchelor v. Caslavka, 128 Cal.App.2d 819, 276 P.2d 64; 20 Sou.Calif. Law Review, 102.

[10] The court, in the first instance, allowed the witness to testify under section 2055 of the Code of Civil Procedure over the objection noted, and apparently held that the testimony was material and relevant although it apparently limited its application to the question of testing the memory of the witness. A person calling an adverse party is not bound by his testimony and he may rebut it by other evidence. Code Civ.Proc. § 2055; Cioli v. Kenourgios, 59 Cal.App. 690, 211 P. 838; 27 Cal.Jur. p. 67, sec. 50. See also Coos Bay Mfg. Co. v. California Selling Co., 29 Cal.App. 407, 155 P. 817, where the party calling the adverse witness was allowed to impeach his testimony by other evidence.

Considering the fact that the trial court did, in the first instance, allow the testimony of defendant that he stopped at the first intersection and did not go over 40 to 45 miles thereafter to be given, as material and relevant, and allowed it to remain in the case, it would appear only reasonable that the jury should have had the full facts presented on this question either by way of impeachment or in some other proper manner, as bearing on defendant's negligence, memory, or his veracity as to what happened that afternoon. It appears to us that a new trial should be had in accordance with the conclusions here reached.

Judgment reversed.

MUSSELL and SHEPARD, JJ., concur.

171 Cal.App.2d 138

John M. TOMCHIK and Cecilia K. Tomchik, Plaintiffs and Appellants,

v.

Charles W. JULIAN, Edith L. Julian, Overton J. Fitzgerald, Marie A. Fitzgerald, Joseph Bell and Dora Bell, individually and doing business as Bell Products, Defendants and Respondents.

Civ. 9450.

District Court of Appeal, Third District, California.

June 4, 1959.

Action by purchasers of a house against general contractors for death of their daughter from carbon monoxide poisoning and for injuries sustained when they were overcome by carbon monoxide gas, on the ground of negligent construction of a gas furnace. From a judgment of the Superior Court of Napa County, Percy King, Jr., J., the plaintiffs appealed. The District Court of Appeal, Schottky, J., held that erroneous instructions required a reversal.

Judgment reversed.

1. Negligence 🔑55

The rule that a general contractor is not liable for injuries to third persons resulting from his negligence in construction of the work after the work is completed and accepted by the owner is no longer the law; the modern tendency being to hold building contractor to the general standard of reasonable care for the protection of anyone who may reasonably be endangered by negligence even after acceptance of the work.

2. Appeal and Error 🔑1064(1)
Negligence 🔑139(1)

In action by purchasers of a house against general contractors on the ground of death of their daughter from carbon monoxide poisoning and for injuries sustained when they were overcome by carbon monoxide gas, based on negligent construction of a gas furnace, instruction that before jury could hold defendants liable they must find that the work was so negligently done as to be imminently dangerous to third persons, without any definition of "imminently dangerous", was improper as misleading and in view of the lapse of time between the installation and the accident, was prejudicial to the plaintiffs.

3. Appeal and Error 🔑1064(1)

The question of prejudice from an instruction must be decided on the facts of each case.

4. Appeal and Error 🔑1064(1)

In action by purchasers of a house against general contractors on the ground of death of their daughter from carbon monoxide poisoning and for injuries sustained when they were overcome by carbon monoxide gas, based on negligent construction of a gas furnace, erroneous instruction on unavoidable accident was prejudicial to the plaintiffs in view of the evidence.

◆

Daniel C. Miller, San Francisco, and James D. Boitano, Napa, for appellants.

Rutherford & Rutherford, Napa, for respondents Bell.

Marcus Stanton, Napa, for respondents Julian.

SCHOTTKY, Justice.

John M. Tomchik and Cecilia K. Tomchik brought this action to recover damages for the death of their daughter Elaine from carbon monoxide poisoning and for injuries sustained when they were overcome by carbon monoxide gas. They have appealed from the judgment entered after a jury returned a verdict in favor of the defendants Charles W. Julian and Edith L. Julian, his wife, and Joseph Bell and his wife, Dora Bell.

The record shows that the Tomchiks purchased a six-room house in December, 1952, from Charles W. Julian and Overton J. Fitzgerald (Mr. Fitzgerald was not served with summons and was not a party to the action), the general contractors who had erected the house. The house was heated by means of a forced-air gas-type furnace located in a closet three feet by four feet off of the hall near the center of the house. This furnace was installed by the defendant Joseph Bell.

The Tomchiks had occupied the house for a period of two years when about 5 p. m. on November 10, 1954, a George Potter entered the house and found the family ill and Elaine dead. The family had been overcome by carbon monoxide gas. The daughter, Elaine, died from carbon monoxide poisoning. There is no question that the Tomchiks inhaled carbon monoxide fumes. The only question is what caused the fumes to be disseminated through the house.

Robert Mendell, plaintiffs' expert, investigated the matter as part of his official duties as an industrial hygiene engineer for the Department of Public Health of the state of California. He conducted tests which showed that because of a warped inspection door in the furnace carbon monoxide gas was moving from the chimney to the furnace room and then to the blower and from the blower to various rooms of the house.

The gas furnace in the house had a BTU input per hour of 100,000. Heated air was distributed to various rooms by means of a blower which forced the air through ducts leading to grills in the various rooms. The intake air for the furnace was obtained from two floor grills. One was located in the hallway about 5 feet from the furnace and the other in the living room. The only air inlet in the closet was a crack under the door. An exhaust duct was provided for carrying the products of combustion to the outside air by means of natural convection. A draft diverter was located in this exhaust duct.

Mr. Mendell found that a dust filter underneath the furnace in the intake air duct showed a heavy accumulation of dust. The inspection door on the furnace was warped and the locking mechanism on the handle was missing.

When Mendell was conducting his tests he noted that air rushed into the blower of the furnace through the warp in the door. He also noticed that some of the products of combustion instead of going up the chimney were coming back into the closet and then into the furnace blower from which it was distributed to the various rooms of the house. Mr. Mendell concluded that after the furnace had been operating for a while the oxygen in the furnace closet was reduced with the result that poor combustion took place which resulted in a higher production of carbon monoxide gas. He also was of the opinion that the condition was effected because there were no air vents cut into the floor and ceiling as required by the building code. The expert testified that if the cover plate on the furnace had not been bent the accident could not have happened. He also said, in effect, that it would not have happened if the vents had been put in.

The building code requires that a fresh air supply of not less than one square inch for each 1,000 BTU maximum input rating be provided for all gas furnaces. However, the building inspector was authorized to approve any alterations, provided he found that the alternative was the equivalent of that provided in the code. There is no showing that a variance was approved. The house was approved by the building inspector. There was testimony later that the crack under the door would provide sufficient combustion air.

Appellants contend that the trial court committed reversible errors in several instructions given to the jury. The first instructions attacked by appellants read as follows:

> "It is claimed by plaintiffs that there was negligence in the installation of a gas furnace in plaintiff's residence.
>
> "It appears from the evidence that the death or illness, if any, of which plaintiffs complain occurred after the installation of said gas furnace and after the same had been accepted by the builder and after sale to plaintiffs * * * and when said furnace was no longer under the control of * * * defendants.
>
> "Before you may hold defendants (Bell) liable, there are certain findings you must make and they must be supported by a preponderance of the evidence. They are:
>
> "First: that the work done in the installation of the furnace was so negligently done as to be imminently dangerous to third persons.
>
> "Second: that defendants (Bell) knew, or in the exercise of ordinary care should have known, of the defective condition, if any, and its incident danger, and negligently failed to correct such defect, if any you find there was.
>
> "Third: that plaintiffs did not know of the defective condition and could not have discovered it by reasonable inspection in the exercise of ordinary care.
>
> "Fourth: that said defective condition was the proximate cause of the injury of which plaintiffs complain."
>
> "I instruct you that it is a general rule of law that a building or construction contractor is not liable for his negligence resulting in injury or damage to such third person after the completion of the work and acceptance thereof by the owner. However, there is an exception to this rule as follows: That if the contractor does defective work which renders the instrumentality inherently dangerous, he becomes liable in damages to a third person injured as the proximate result of such defect if the contractor knew, or, under the particular circumstances, should have known, that the instrumentality was delivered to the owner or contractor in a condition that was imminently dangerous to third persons and in a condition in which a reasonable inspection would not have revealed such defect or danger to said third person."

[1] The statement in the second instruction "that it is a general rule of law that a building or construction contractor is not liable for his negligence resulting in injury or damage to such third person after the completion of the work and acceptance thereof by the owner" is clearly erroneous. For, as held in the syllabus of the recent case of Dow v. Holly Manufacturing Co., 49 Cal.2d 720, 321 P.2d 736, "The rule that a general contractor is not liable for injuries to third persons resulting from his negligence in construction of the work after the work is completed and accepted by the owner, because of lack of privity of contract, is no longer the law; the modern tendency is to hold building contractors to the general standard of reasonable care for the protection of anyone who may foreseeably be endangered by negligence, even after acceptance of the work."

[2] Furthermore, the statement in the instant case that before the jury could hold defendants liable they must find that the work was so negligently done as to be *imminently dangerous* to third persons, without any definition of "imminently dangerous," could well lead the jury to believe that the phrase meant something that was bound to occur immediately. In view of the lapse of time between the installation and the accident, this portion of the instruction could hardly fail to be prejudicial to plaintiffs.

[3, 4] The third instruction challenged by appellant was one on unavoidable accident. Respondent concedes that this instruction was erroneous, but contends that it was not reversible error. The sole ques-

tion is whether the error was prejudicial, and the question of prejudice must be decided on the facts of each case. In the recent case of Butigan v. Yellow Cab Co., 49 Cal.2d 652, 320 P.2d 500, and several later decisions, the giving of the instruction was held to be reversible error. In the Butigan case the court said at pages 660–661, of 49 Cal.2d at page 505, of 320 P.2d:

> "The instruction is not only unnecessary, but it is also confusing. When the jurors are told that 'in law we recognize what is termed an unavoidable or inevitable accident' they may get the impression that unavoidability is an issue to be decided and that, if proved, it constitutes a separate ground of nonliability of the defendant. Thus they may be misled as to the proper manner of determining liability, that is, solely on the basis of negligence and proximate causation. The rules concerning negligence and proximate causation which must be explained to the jury are in themselves complicated and difficult to understand. The further complication resulting from the unnecessary concept of unavoidability or inevitability and its problematic relation to negligence and proximate cause can lead only to misunderstanding.
>
> * * * * * *
>
> "* * * In this connection, for example, we should keep in mind the tendency which such an instruction would have to induce the jury to believe that the stalling of the taxi engine, if a fact, was an unavoidable occurrence, that it caused the accident and that, accordingly, no one should be held liable. The jury may thus have been led to disregard the permissible inferences that the company was negligent in not properly maintaining the taxi and that its driver was negligent in that he did not take proper precautions in view of his knowledge that the engine had previously stalled. Under all the circumstances, the record indicates that the error of the court in giving the instruction was prejudicial."

See also Emerton v. Acres, 160 Cal.App.2d 742, 325 P.2d 685; Grant v. Mueller, 160 Cal.App.2d 804, 325 P.2d 680.

We are unable to reach any other conclusion than that on the record before us the giving of an instruction on unavoidable accident must be held to have been prejudicial to appellants.

Respondents seek to avoid the prejudicial effect of the above quoted instruction by arguing that the evidence shows conclusively that the "proximate cause" of the accident "was the 2″ to 2½″ warp in the door or coverplate caused by plaintiffs after delivery of possession of the house and furnace by defendants to plaintiffs."

John Tomchik testified that neither he nor his family ever removed the door or made any change in it. This is sufficient to sustain a finding, if one were made, that the furnace cover plate or door was defectively installed. There is also testimony from which it could be found that the failure to install the vents in the floor and ceiling was the cause of the accident.

Respondents' argument, in effect, is that upon the record in the instant case it must be held as a matter of law that the negligence of appellants was the proximate cause of the accident. However, respondents' repeated assertions that appellant John Tomchik committed deliberate perjury only accentuates the conflict in the evidence. We are convinced that if the judgment had been in favor of appellants the record would support it.

No other points raised require discussion.

The judgment is reversed.

VAN DYKE, P. J., and PEEK, J., concur.

171 Cal.App.2d 186

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Thomas SCARBOROUGH, Defendant and Appellant.

Cr. 2955.

District Court of Appeal, Third District, California.

June 8, 1959.

Hearing Denied Aug. 5, 1959.

Defendant was convicted of simple kidnapping, forcible rape and robbery in the second degree. The Superior Court, Sacramento County, Raymond T. Coughlin, J., entered judgment and an order denying motion for new trial, and defendant appealed. The District Court of Appeal, Schottky, J., held that instructing jury, following admonition to examine victim's testimony with caution, that fact that charge of rape was difficult to disprove should not deter jury from returning a verdict of guilty, if jury was convinced beyond a reasonable doubt that defendant was guilty as charged, was not error, and that, in any event, no miscarriage of justice resulted, in view of the record as a whole.

Judgment and order affirmed.

1. Kidnapping 🔑6
Rape 🔑57(1)
Robbery 🔑26

Victim's testimony that, while walking on city street at night, she was seized by defendant and regained consciousness in a park, and that defendant threatened to kill her, raped her twice and took her watch and money, was not inherently improbable, and the weight of such testimony was a question for jury in prosecution for simple kidnapping, forcible rape and robbery in the second degree.

2. Kidnapping 🔑5
Rape 🔑51(4)
Robbery 🔑24(1)

Victim's testimony was sufficient to support conviction for simple kidnapping, forcible rape and robbery in the second degree.

3. Criminal Law 🔑438

Photographs are not admissible in evidence, if their principal effect is to arouse passions of jury and inflame them against defendant because of the horror of crime, but if such photographs have probative value with respect to a fact in issue that outweighs the danger of prejudice, they are admissible in evidence.

4. Criminal Law 🔑438

Colored photograph of victim, showing bruises on her face and eye, had probative value in showing use of force by assailant, and hence was admissible in evidence in prosecution for simple kidnapping, forcible rape and robbery in the second degree.

5. Witnesses 🔑337(5)

In prosecution for simple kidnapping, forcible rape, and second degree robbery, questioning defendant as to four prior felony convictions was not improper, though Code provision, authorizing impeachment of a witness by showing prior conviction for a "felony", uses quoted word in the singular, particularly since another Code section states that the singular number includes the plural. West's Ann.Code Civ.Proc. §§ 17, 2051.

6. Criminal Law 🔑723(3), 730(14)

In prosecution for simple kidnapping, forcible rape and second degree robbery, argument by district attorney as to prevalence of crime, obligation of jurors to victim and community and their opportunity to do something with respect to at least one such crime was not improper, and, even if it were, prompt admonition given by trial judge eradicated any prejudicial error.

7. Criminal Law 🔑723(3)

Range of discussion, illustration, and argument to jury is very wide, and district attorney may properly refer to matters of common knowledge, prevalence of crime, and duty of jury.

8. Criminal Law ⚷1144(15)

Reviewing court must presume that jury obeyed trial court's admonition to disregard objectionable remarks of district attorney and that whatever damaging effect such remarks might otherwise have had upon rights of defendant was overcome by such timely admonition.

9. Criminal Law ⚷768(1), 1186(4)

In prosecution for forcible rape and other offenses, instructing jury, following admonition, to examine victim's testimony with caution, that fact that charge of rape was difficult to disprove should not deter jury from returning verdict of guilty, if jury was convinced beyond a reasonable doubt that defendant was guilty as charged, was not error, in absence of overemphasis thereof, and in any event, no miscarriage of justice resulted, in view of the record as a whole. West's Ann.Const. art. 6, § 4½.

◆

James H. Tredinnick and James M. Woolley, Sacramento, for appellant.

The Attorney General, by Doris H. Maier, and R. M. Momboisse, Deputy Attys. Gen., for respondent.

SCHOTTKY, Justice.

Thomas Scarborough was found guilty by a jury of the crimes of simple kidnapping, forcible rape and robbery in the second degree. He has appealed from the judgment entered and from the order of the court denying his motion for a new trial.

The victim, an employee of a Sacramento hotel, testified that she left her place of employment about midnight. She walked to the Greyhound Bus Depot where she intended to hire a taxicab to take her to her home in Broderick. She was unable to get a cab at the bus depot, but she was told that she could get one at the Southern Pacific Depot. While walking on "I" Street, between 5th and 6th Streets, she heard footsteps behind her, and as she turned someone grabbed her by the throat. She struggled with her assailant and then lost consciousness. She recovered momentarily and saw a colored man, she identified as the defendant, kneeling beside her. She again must have lost consciousness because she did not remember anything until she was in the park near the Southern Pacific Depot. At that time her assailant was pulling her clothes down. He then threatened to kill her. The victim testified further that she was raped twice. After the defendant completed the acts he rolled over on his side, opened her handbag and took the loose change that was in it. He also took a watch that she was wearing. When the victim asked him not to take it because she had not completed paying for it, he allegedly told her that he would help her pay for it. Other conversation ensued between the two. The victim told her assailant that her name was Hester Hunter, that she lived in Broderick, and that she had three children. After the incident the victim walked with her assailant to the corner of 5th Street, where he turned off. She then walked to her home in Broderick. The next day she reported the attack to her ex-husband and to the police. The police officers showed her several hundred pictures and she made a tentative identification of the defendant as her assailant. The defendant was arrested on September 15, 1958, which was two days after the incident. He was informed of the robbery, and he told the police that he had known the victim for two years. He also allegedly told the police that he had intercourse with the victim, but he alleged that she had consented to it. At the trial he denied the incident. After his arrest the victim picked the defendant out of a police lineup and identified him as her assailant.

Appellant's first contention is that the evidence is insufficient to sustain the judgment of conviction. He makes a lengthy and vigorous attack upon the testimony of the victim and argues that it was inherently improbable. He points to testimony that the victim did not report the alleged attack until after she had consulted her ex-husband the next day and to her failure to secure a medical examination after the alleged attack.

[1, 2] We are unable to agree with appellant's contention that the testimony of the victim was inherently improbable. Her testimony, if believed by the jury, was sufficient to support a conviction on each of the three counts. Appellant's argument is merely one as to the weight of the evidence, and it was for the jury to determine the weight of the testimony of the victim. The victim testified that she was attacked while she was walking on "I" Street; that she lost consciousness; that when she regained consciousness she was in the park; and that her assailant raped her twice. Taking the victim to the park would constitute kidnapping. The crime of rape would also have been committed. The victim was knocked unconscious. Her assailant threatened to kill her. When she regained her senses in the park, her assailant was pulling her clothes down. He then committed the acts. There is no question that force had been used prior to the actual acts. The victim was just regaining consciousness when the first act occurred. The evidence is sufficient also to show that appellant forcibly took the watch and small change of the victim. All three counts were to some extent interrelated, but it is a reasonable inference from the evidence that all three crimes were committed with force and against the will of the victim.

[3, 4] Appellant next contends that the court erred in permitting the prosecution to introduce in evidence a colored photograph of the victim which showed bruises on her face and eye. Appellant contends that the only purpose was to inflame the jury, since there was sufficient corroborative evidence in the record as to the bruises. As stated in People v. Carter, 48 Cal.2d 737, at page 751, 312 P.2d 665, at page 673, the rule is: "If the principal effect of * * * photographs is to arouse the passions of the jury and inflame them against the defendant because of the horror of the crime, the evidence must of course be excluded. * * * On the other hand, if the evidence has probative value with respect to a fact in issue that outweighs the danger of prejudice * * *, the evidence is admissible. * * *" In the instant case the photograph had probative value in showing the use of force by the assailant and there was no error in admitting it.

[5] Appellant contends further that it was improper to question him as to four prior felony convictions. He contends that only one should have been allowed to be shown. Appellant concedes that the rule is otherwise, but he contends that the statute, Code of Civil Procedure, sec. 2051, is in the singular and the rule is therefore wrong. There are two answers. Section 17 of the Code of Civil Procedure states that the singular number includes the plural, and therefore the statute can be read that a person may be impeached by showing that he has been convicted of felonies. The second reason is that the rule that each felony can be shown is well established by a long line of decisions beginning with People v. Eldridge, 147 Cal. 782, 82 P. 442.

Appellant also contends that the district attorney was guilty of prejudicial misconduct in arguing as follows to the jury:

> "Just one more point, ladies and gentlemen, and then I will quit. As you are twelve jurors and two alternate jurors selected from among the community, you have an obligation to the whole community. You have an obligation to the defendant and to the rest of this community. You are sitting here on their behalf. Now, it is a terrible thing that a crime of this kind can occur on our streets, and when people read about things in newspapers, we know the remarks they make about it, 'What is this country coming to?' and 'Something ought to be done.'

> "In this case you have the opportunity to do what should be done with respect to at least one of such crimes, and you have—"

The record shows that counsel for appellant objected to the above remarks as a direct appeal to passion, and that the court thereupon admonished the jury as follows:

> "I will admonish counsel he can not refer to any other cases at all. We are not interested in what happened at other times or places at all. What you are concerned with, ladies and gentlemen, is the evidence in this case and the law I will give to you."

[6, 7] We do not believe that the remarks of the district attorney exceeded the bounds of legitimate argument, for as stated in People v. Gingell, 211 Cal. 532, at page 541, 296 P. 70, at page 73: "It has been held in many cases that the range of discussion, illustration, and argumentation is very wide, and that matters of common knowledge may be referred to and allusion may be made to the prevalence of crime and the duty of the jury. People v. Burke, 18 Cal.App. 72, 102, 122 P. 435, and cases there cited. * * *"

[8] Furthermore, even if the portion of the district attorney's argument objected to should be considered prejudicial, the prompt admonition given by the trial judge eradicated any prejudicial error for, as stated in People v. Clayberg, 26 Cal.App. 614, at page 620, 147 P. 994, at page 997: "The prompt and emphatic admonition by the court to the jury to disregard and not to be governed by the objectionable remarks of the district attorney were no doubt obeyed by the jury. At any rate, we must so presume, and that whatever damaging effect said remarks might otherwise have had upon the rights of the accused was overcome by the timely instruction of the court to disregard them. [Citing cases.]"

Appellant's final and most serious contention is that the court erred in giving the following instruction:

> "A charge of rape such as that made against the defendant in this case is one, which, generally speaking, is easily made, and once made, difficult to disprove even if the defendant is innocent. From the nature of a case such as this, the complaining witness and the defendant usually are the only witnesses. Therefore I charge you that the law requires that you examine the testimony of the prosecuting witness with caution.
>
> "However, the fact that the charge here made is one difficult to disprove should not deter you from rendering a verdict of guilty, if you are convinced beyond a reasonable doubt that the defendant is guilty as charged."

Appellant contends that it was error to give the second paragraph of this instruction. He relies on People v. Lyons, 47 Cal. 2d 311, 303 P.2d 329, and People v. Hurlburt, 166 Cal.App.2d 334, 333 P.2d 82. In the Lyons case the judge added the second paragraph to a printed instruction. The addition was in the judge's handwriting, and this was the only instruction which contained additional matter. The instructions were taken into the jury room. The Supreme Court said at page 322 of 47 Cal.2d, at page 336 of 303 P.2d:

> "Since in no other instruction did the trial judge add anything in his own handwriting, it may well be that if the jury read the instructions they might have been influenced to the belief that notwithstanding the cautionary admonition as to the testimony of the complaining witnesses, the court was inclined to the belief of the guilt of the accused To us it appears that in the case at bar there was no reason to add to the cautionary instruction the admonition that notwithstanding the caution with which they should view the testimony of the complainant that 'should not deter you from rendering a verdict of guilty, if you are convinced beyond a reasonable doubt that the defendant is guilty.' They had already been fully advised in that regard, and to emphasize it as

was done in this case might well have turned the scales to the prejudice of appellant. In other words [it would appear] that the court leaned toward the view that notwithstanding the 'recognized existence of the ease with which convictions of men, even those of unblemished reputation, may be secured in cases of the instant kind' (People v. Adams, 1939, supra, 14 Cal.2d [154] at page 168, 93 P.2d [146] at page 153), such was not the case in the instant prosecution. The overemphasis contained in the language appended to the cautionary instruction in the handwriting of the trial judge might well have militated against a fair or dispassionate consideration by the jury of the cautionary elements of the instruction which is the outgrowth of human experience. * * *"

The court also said:

"[Cautionary instructions which concluded with words materially similar to those added here by the trial court, in its own handwriting, have been upheld by a majority of this court in People v. Westek, 1948, 31 Cal.2d 469, 481–482, 190 P.2d 9, and by the District Court of Appeal, second Appellate District, Division Two, in People v. Ernst, 1953, 121 Cal.App.2d 287, 295–296, 263 P.2d 114; People v. Ahsbahs, 1946, 77 Cal.App.2d 244, 250–251, 175 P.2d 33; and People v. Arechiga, 1945, 72 Cal.App.2d 238, 240–241, 164 P.2d 503. The People argue that the decisions last cited preclude a holding that the addition of the handwritten words was prejudicial error. This contention goes too far and misses the point. The fact that the words standing alone do not state an erroneous proposition of law does not mean that the addition of them in the circumstances of this case may not be considered in determining whether the defendant has been accorded a fair trial. The addition of such words to the cautionary instruction was wholly unnecessary. Just as the accurate statement of a proposition of law which is entirely inapplicable to the facts of a case may mislead a jury to the prejudice of a party (People v. Silver, 1940, 16 Cal.2d 714, 722, 108 P.2d 4; People v. Roe, 1922, 189 Cal. 548, 558, 209 P. 560), so may overemphasis on a particular point (People v. Hatchett, 1944, 63 Cal.App.2d 144, 158, 146 P.2d 469). In the circumstances of this case, where the words were wholly unnecessary to a fair and clear statement of the pertinent proposition of law and were supererogated in the handwriting of the judge on the already adequate printed instruction which was taken into the jury room, their overemphasis upon conviction is manifest.]"

Appellant also quotes from People v. Hurlburt, 166 Cal.App.2d 334, 333 P.2d 82, which was a case involving a charge of lewd conduct against a 9-year-old girl. The court said at page 338 of 166 Cal.App.2d, at page 85 of 333 P.2d:

> "Of course, it has been the rule in this state for many years that it is reversible error to fail to instruct that because such charges are easy to make and hard to disprove the testimony of the prosecutrix must be carefully scrutinized. People v. Putnam, 20 Cal.2d 885, 129 P.2d 367; People v. Garrett, 27 Cal.App.2d 249, 81 P.2d 241. In fact, even qualifying the normal instruction by stating that, nevertheless if the jury believes that the defendant is guilty beyond a reasonable doubt a guilty verdict should be returned, is reversible error. People v. Lyons, 47 Cal.2d 311, 303 P.2d 329."

We do not believe that the decision in People v. Lyons, supra, properly analyzed and considered, either justifies or requires a reversal of the judgment in the instant case, for as stated in Porter v. Bakersfield & Kern Electric Ry. Co., 36 Cal.2d 582, 590, 225 P.2d 223, 228: "It is elementary that the language used in any opinion is to be understood in the light of the facts and the issue then before the court." In the Lyons case the prosecuting attorney had committed the very flagrant error in cross-examining the wife of the defendant (who had not yet testified) of alluding to a prior conviction of defendant under another name. The Supreme Court held that the case was closely balanced and guilt was not so clearly established as to render it improbable that the harmful effect of the misconduct of the prosecuting attorney may have turned the scales against the accused and that therefore such misconduct was ground for reversal.

The court then proceeded to the discussion of the instruction hereinbefore set forth and concluded that since the addition was in the handwriting of the judge, and was the only part of the instruction that was in the handwriting of the judge, and was taken into the jury room, "it may well be that if the jury read the instructions they might have been influenced to the belief that notwithstanding the cautionary admonition as to the testimony of the complaining witnesses, the court was inclined to the belief of the guilt of the accused." As hereinbefore quoted, the court felt that "The overemphasis contained in the language appended to the cautionary instruction in the handwriting of the trial judge might well have militated against a fair or dispassionate consideration by the jury of the cautionary elements of the instruction which is the outgrowth of human experience. * * *"

The instruction complained of is in the identical language of CALJIC 510 and has been stated in many decisions to be a correct statement of the law. We believe that People v. Lyons, supra, must be considered to be a case wherein the giving of the special instruction, in addition to the cautionary instruction, was held to be erroneous because of the unique circumstances of the case. In that case this special instruction was written in the judge's longhand immediately following the printed cautionary instruction. The written instructions were taken into the jury room. Thus, this special instruction was overemphasized. It was this overemphasis that the court held to be erroneous and prejudicial.

[9] We believe that the Lyons case is not determinative of the instant case because in the instant case the special instruction was not overemphasized. This special instruction was not attached to the printed instruction in longhand of the judge. The instructions were not seen by the jury. As the instruction is a proper expression of the law and since there is no overemphasis of it in this case, there was no error in giving it.

While it is true that in People v. Hurlburt, supra, the court stated that even qualifying a normal instruction by stating that nevertheless if the jury believes that the defendant is guilty beyond a reasonable doubt a guilty verdict should be returned is reversible error, this statement must be considered as mere dicta because this opinion itself states at page 337 of 166 Cal.App.2d, at page 84 of 333 P.2d that "The sole point urged on this appeal is that it was error to exclude evidence of the fact that the complaining witness had made prior false accusations that other men had committed acts against her similar to those charged against the defendant." There was no discussion in the opinion as to any instructions given or not given in the case.

Furthermore, even if the giving of the criticised portion of the instruction was error, we are convinced after an examination of the entire record that no miscarriage of justice has resulted. The complaining witness' testimony clearly identified appellant as her assailant. While appellant, on the witness stand, denied that he knew her or had attacked or robbed her, the police officers testified that upon being arrested he admitted having known her for two years and admitted that he had had intercourse with her, but asserted that she had consented to it. The following appears in Officer Stanley's testimony, "[H]e says, 'Well, I met her in front of the park on that night.' And we asked him if he had raped her and robbed her, and he stated that she went with him willfully—consented to his advances." And in Officer Stodgill's testimony the following appears: "He stated that on this particular night he met her, he said—this supposed rape, he stated, he said, 'That wasn't no rape.' He said, 'She submitted to me, she consented.' He said, 'That wasn't on the 14th, which was a Sunday morning.' He said, 'That was on Saturday.' He said that it happened, because he specifically remembers the incident, he stated that she consented. He stated he admits he struck her three or four times, the reason he struck her was she wouldn't give him $3.20 with which to get his clothes out of hock. He said they were being kept by the Chinese landlord at 1811½ 3rd Street because he failed to pay his bill, his room rent. He stated that he hit her, he said he had seen her watch on a couple of occasions, he stated he asked her to give it to him and she refused. He stated she had told him she had bought it for $59 and that she owed $37 on it. He denies taking the watch at that time." Appellant's testimony was impeached by evidence of three prior felony convictions.

We are satisfied that the judgment of conviction is amply supported by the record, and having in mind the plain and meaningful language of section 4½ of Article VI of our state Constitution, we conclude that the judgment and order should be affirmed.

The judgment and order are affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

171 Cal.App.2d 256

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert James DILLS, Defendant and Appellant.

Cr. 6519.

District Court of Appeal, Second District, Division 1, California.

June 11, 1959.

Prosecution for robbery. From adverse judgment and sentence of the Superior Court, Los Angeles County, Thomas L. Ambrose, J., and from order denying motion for new trial, the defendant appealed. The District Court of Appeal, Fourt, J., held that the evidence was sufficient to sustain the conviction.

Judgment affirmed and purported appeal dismissed.

1. Robbery ⚿24(1)

Evidence was sufficient to sustain conviction for first degree robbery. West's Ann.Pen.Code, § 211.

2. Criminal Law ⚿1159(2, 3, 4)

It is not the right or duty of reviewing court to resolve conflicts in evidence, pass on credibility of witnesses, or determine where preponderance of evidence lies.

3. Criminal Law ⚿260(11)

In a criminal prosecution tried to the court, it is for the trial judge to determine which witnesses to believe.

4. Robbery ⚿24(3)

In prosecution for robbery of a music company, identification of defendant was ample.

5. Robbery ⚿15

One who stays in an automobile and enables or assists those who are doing the actual robbing to make a successful getaway is as much a principal, and aids and abets the crime completely as though he were present and assisted in the actual taking of the property.

6. Criminal Law ⚿1159(2)

Before reviewing court can reverse case upon ground of insufficiency of the evidence, it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support conclusion reached in court below.

7. Criminal Law ⚿260(11)

In prosecution for robbery, record did not establish that trial court failed to apply presumption of innocence and the doctrine of reasonable doubt in favor of the defendant. West's Ann.Pen.Code, § 211.

8. Criminal Law ⚿1131(4)

Where defendant has filed no motion for a new trial, purported appeal from nonexistent denial of his motion for a new trial will be dismissed.

◆

Bradford A. Arthur, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Marvin L. Part, Deputy Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal from a judgment and sentence and from the denial of a motion for a new trial in a cause wherein the defendant was convicted of first degree robbery.

In an information filed in Los Angeles county, the defendant was charged with robbery in violation of section 211, Penal Code; and further it was charged that the defendant previously had been convicted of robbery on or about January 7, 1955, and had served a term in prison therefor. The defendant pleaded not guilty and denied the prior conviction. A jury trial was waived and it was stipulated that the matter be submitted on the transcript of the preliminary hearing, each side reserving the right to introduce further evidence, and each side did introduce further evidence at the trial. The court found the defendant guilty as charged, and found the prior conviction to be true and sentenced the defendant to the state prison, the sentence to run concurrently "with time owing on parole" for the prior robbery.

[1] The facts are substantially as follows: Mrs. Mildred Delpit was employed as a secretary in the office of Walker's Music Company, which had its place of business on West 96th Street, in Los Angeles. On June 16, 1958, about 4:50 to 5:00 o'clock p. m., a man of stocky build, about five feet three inches tall, dressed in a "parcel post uniform" came to the Walker place of business with a package apparently for delivery. Upon gaining entry, the man held out a gun and said "This is a holdup." The man gave to Mrs. Delpit a roll of friction tape and ordered her to bind up the remaining employees with the friction tape, and she complied with his directions. The robber then demanded money, and Mrs. Delpit took from the files some money, which she estimated to be about $5,000 in amount, and handed it to the man in a container. The man then left, and she called the police.

Mr. Howard Byham resides on West 96th Street, a short distance from the Walker place of business. At or about the time in question, he was in his yard doing some watering, and he observed a cream or light colored car, which was smaller than the usual American-built car, parked about sixty to seventy feet from where he was working. He saw a man get out of the car and then get back into it. Byham further testified at the trial that the defendant "resembles very much the man that walked to the back of the car," "I am pretty sure he is the man." While Byham was in the yard a man dressed in what appeared to him to be a "uniform of some kind with a cap that matched," with a package in his right arm, ran down the alley from the direction of the Walker store to the car, saying, "Go, man, go." The man in the uniform got into the car and it drove away. Byham got the number of the automobile and immediately wrote it down on an old envelope. Shortly thereafter the police arrived and Byham went out to where they were and told them the number of the car which he had observed pulling away. He stated that the number was NAU 936, and gave the police the envelope with the number written thereon.

Abel Armas, one of the arresting officers, stated that he had received information from police department sources that a car bearing the number on the envelope had been used in a robbery. That night he, with his partner, went to the residence of the registered owner of the vehicle, who was the defendant's mother. The mother advised the police that the car was a 1957 Hillman Minx, and that she owned it, but that it was being driven by her son. The officers then went to the address of the defendant's apartment, and in the parking lot at such apartment, located the Hillman Minx automobile in question. The officers then went to the defendant's apartment about 2:00 o'clock a. m., June 17th, and knocked several times on the door, to which there was no reply. They then obtained a pass key from the manager and entered. In the apartment they found Carol Stafford (who, it was later determined, was a girl friend of the defendant) who stated to the police that no one else was there. The officers made a search of the apartment and found the defendant hiding in a clothes closet. A further search turned up a roll of friction tape, a box of .45 caliber ammunition and $1,237 in cash in a dresser drawer. The defendant was questioned by an officer, and the officer testified that the defendant said among other things, "No one drives the car except me and sometimes Carol;" and that there was only one set of keys to the automobile. The defendant was then asked, "Who was driving the car tonight?" and he answered, "Carol," and then added, "But she didn't have anything to do with it." The defendant told the officers that he had given $200 to Carol to take over to his mother to be used in making the payments on the car. As to the shells which were found, he told the officers, "I don't know where the shells came from,"—"I don't keep a gun in the house." As to the money found in the dresser drawer, the defendant said he had won it at a race track, and that he had not worked since February.

The defendant testified at the trial in his own behalf, and said in effect, that he had previously been convicted of first degree robbery and that he was then on parole, and that he had been in his apartent all day on the 16th, excepting to go out about 4:45 o'clock p. m., to the store for some cigarettes for Carol.

Carol Stafford testified, in effect, that she maintained an apartment across the hallway from Dills, where she kept some things, including the wearing apparel of her child; that she lived wih Dills; that on the night in question he had given her $200 cash to give to his mother as payment on the car; that in the early morning of the 17th of June, she heard someone making a lot of noise at the door of the apartment where she and Dills were sleeping, that she did not answer the knocks at the door; that the officers came in; that she signed a statement with reference to the money which set forth in part, "I asked him where it came from and he said, 'Don't ask me. I have told you before not to ask any questions,'" and "When he came at 5:05 he gave me $200.00 to take to his mother's;" further that she found some money ($1,237.00) in the dresser drawer that night, and that she did not know where that particular money came from.

An officer testified that he talked to the defendant and told him that his license number had been obtained at the scene of the robbery and then the defendant was asked who the other man was who was in the robbery, where the gun and the rest of the money were, and the defendant's only answer was, "I have nothing to say."

The appellant now contends that, (1) the evidence is insufficient to sustain the judgment of conviction, and (2) that the trial court erred, as a matter of law, in failing to apply the presumption of innocence and the doctrine of reasonable doubt in considering the evidence.

[2] It is readily apparent from the résumé of the evidence heretofore given that there was ample and sufficient evidence to sustain the judgment. It is not our right or duty to resolve conflicts in the evidence, pass on the credibility of witnesses, or determine where the preponderance of the evidence lies. People v. Tedesco, 1 Cal.2d 211, 219, 34 P.2d 467; People v. Tom Woo, 181 Cal. 315, 326, 184 P. 389; People v. Vest, 65 Cal.App.2d 774, 779, 151 P.2d 666; People v. Deysher, 2 Cal.2d 141, 149, 40 P.2d 259.

[3, 4] The trial court heard and saw the witnesses. The judge evidently disbelieved the alibi witnesses and the defendant, and did believe Byham, Mrs. Delpit and the police. Such was the province of the judge, and our reading of the record leads us to the same conclusion reached by the trial court. But whether or not we reach the same conclusion means little, for it is the trial judge who makes the determination under the law. People v. Frankfort, 114 Cal.App.2d 680, 689, 251 P.2d 401. The identification was ample. People v. Houser, 85 Cal.App.2d 686, 694, 193 P.2d 937; People v. Weems, 157 Cal.App.2d 753, 755, 321 P.2d 884; People v. Mahoney, 146 Cal.App.2d 485, 498, 304 P.2d 73.

[5] One who stays in an automobile and enables or assists those who are doing the actual robbing to make a successful "getaway" is as much a principal, and aids and abets the crime completely as though he were present and assisted in the actual taking of the property. People v. Silva, 143 Cal.App.2d 162, 169, 300 P.2d 25.

[6] Before this court can reverse the case upon the grounds of insufficiency of the evidence, "* * * it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below." People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780. Such a situation does not exist in this case.

[7] There is no merit to the appellant's second contention. The record completely belies any assertion to the effect that the trial court failed to apply the presumption of innocence and the doctrine of reasonable doubt in favor of the defendant.

We have reviewed the entire record in this case and we find no error. The appellant, in effect, is simply asking this court to reweigh the evidence, and he insists that if we do so, we would surely be convinced that the proof offered was not sufficient to convict the defendant as charged. The judge in this case was convinced of the guilt of the defendant beyond question, and properly so.

[8] The purported appeal from the "decision" of the court, and from the sentence is dismissed. People v. Gallardo, 41 Cal. 2d 57, 60, 257 P.2d 29. There was no motion for a new trial, and consequently the purported appeal from the non-existent denial of the defendant's motion for a new trial is dismissed.

The judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur.

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171 Cal.App.2d 49

Randall G. REEL, Plaintiff and Respondent,

v.

CITY OF SOUTH GATE, a Municipal Corporation, Defendant and Appellant.

Civ. 23194.

District Court of Appeal, Second District, Division 1, California.

June 2, 1959.

Rehearing Denied June 29, 1959.

Hearing Denied July 29, 1959.

Motorist brought action against city under the Public Liability Act for injuries sustained when motorist's automobile ran into unlighted barricades in city street, swerved off pavement, and collided with cement wall. The Superior Court of Los Angeles County, Joe Raycraft, J., entered judgment in favor of the motorist, and the city appealed. The District Court of Appeal, White, P. J., held that the act imposes the duty on a municipality to exercise ordinary care to maintain its streets in a reasonably safe condition for their use in a proper manner, and that, though every motorist is required to keep a diligent lookout ahead of him, he is not required to anticipate traps, such as unlighted and unwarned-of barricades directly in front of him on a well-traveled street, and that evidence sustained verdict for motorist.

Judgment affirmed.

1. Automobiles 🔑306(2)

In action by motorist against city under the Public Liability Act for injuries sustained by motorist when his automobile ran into unlighted barricades in street, swerved off pavement, and collided with cement wall, evidence sustained jury's implied finding that unlighted barricades were placed by city's painters in traveled portion of highway. West's Ann.Gov.Code, § 53050 et seq.

2. Municipal Corporations 🔑755(1), 763(1), 764(1)

Though a municipality is not an insurer of the safety of travelers on its streets, the duty is imposed on the municipality by the Public Liability Act to exercise ordinary care to maintain its streets in a reasonably safe condition for their use in a proper manner. West's Ann. Gov.Code, § 53050 et seq.

3. Municipal Corporations 🔑788(2)

Where city's painters, under express orders of city engineer, placed and left unlighted barricades in painted traffic island in city street and near the traffic island in the traveled portion of the street, the city was not entitled under the Public Liability Act to express notice that after sunset the city would be responsible under the Act for the dangerous condition so created in the street. West's Ann.Gov. Code, § 53050 et seq.

4. Automobiles ⚷285

Though every motorist is required to keep a diligent lookout ahead of him, he is not required to anticipate traps such as unlighted and unwarned-of barricades directly in front of him on a well-traveled highway.

5. Automobiles ⚷306(1)

In action by motorist against city under the Public Liability Act for injuries sustained by motorist when his automobile ran into unlighted barricades in street, swerved off pavement, and collided with cement wall, evidence supported verdict for motorist.

6. Appeal and Error ⚷882(12)

Even if giving of instructions on negligence in action by motorist against city under the Public Liability Act was error, fact that city requested many of those instructions would prevent a reversal of judgment in favor of motorist on appeal by city for that reason. West's Ann.Gov. Code, § 53050 et seq.

7. Trial ⚷295(1)

In determining whether instructions are erroneous, reviewing court on appeal is required to consider the instructions as a whole.

8. Appeal and Error ⚷1064(1)

In action by motorist against city under the Public Liability Act for injuries sustained by motorist when his automobile ran into unlighted barricades in street, swerved off pavement, and collided with cement wall, instructions were not prejudicial to city. West's Ann.Gov.Code, § 53050 et seq.

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Schell, Delamer & Loring, Los Angeles, for appellant.

Harney, Drummond & Dorsey, Los Angeles, for respondent.

WHITE, Presiding Justice.

Defendant City of South Gate, a municipal corporation, appeals from the judgment after verdict awarding plaintiff $52,671.42 as damages for injuries suffered by him when his automobile ran into unlighted barricades in the street, swerved off the pavement and collided with a cement wall.

Appellant urges reversal on the basis of errors in the admission of evidence, errors in the instructions to the jury, and its claim that the evidence is insufficient to sustain the judgment.

The action was pleaded and tried under the provisions of the Public Liability Act (Government Code, Secs. 53050 et seq.) which provide that "A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition: (a) Had knowledge or notice of the defective or dangerous condition. (b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition".

The accident occurred at about 5:30 on the evening of Saturday, January 22, 1955, near the fork of Garfield Avenue and Garfield Place and just north of the southern limits of the City of South Gate. The condition of the highway at that point had been changed by moving and repainting the traffic island on Friday, January 21st, but because the plaintiff had never before traveled that highway and knew nothing of its prior condition, it can serve no useful purpose to describe its prior condition or the changes made. The changes were completed about 3:30 p. m. on Friday, and, from that time until the happening of the plaintiff's accident, the highway conditions remained the same, except for the change from daylight to dark and the change from Friday mid-afternoon light traffic to Saturday evening traffic, which is probably the heaviest of the week.

For the sake of clarity, we shall first describe the locale of respondent's collision and injury, as it appears from the photographs, maps, and testimony in the record. Although both parties agreed that the jury might view the site of the accident, the court did not permit it because of the changed conditions. As required on appeal, only the portions of the evidence tending to support the judgment are included in the following description.

For some miles Garfield runs almost due north and south to a point about 230 feet south of the southerly point of the new traffic island. Up to that point, its pavement was 48 feet wide, bounded on the east by a curb and on the west by an asphalt shoulder about 10 feet wide. The northbound traffic was separated from the southbound traffic by a double white line on the pavement and the portion of the pavement for northbound traffic was divided by a single white line into two lanes. There the line dividing the two lanes for northbound traffic stopped, and the double centerline was absent for about 40 feet and then continued on the same line and in the same direction as before.

Near the end of the white line which had divided the two lines of northbound traffic, the easterly edge of the pavement swung gradually to the east slowly widening the pavement east of the double centerline. There was no sign of any kind to slow down the traffic or to warn the drivers of any hazard or changed conditions.

About 230 feet north of the end of the line which had divided the two lanes for northbound traffic and the same distance east of the centerlines, the westerly line of the traffic island began and continued in the same direction. From that point another painted line left at a 15 to 20 degree angle to the northeast and formed the traffic island, about 240 feet long, tapering from points at the ends to about 35 feet wide in the middle. At the south end of the island where the highway forked, the pavement was about 80 feet wide and at the north end about 150 feet wide.

The southbound traffic on Garfield Place continued straight south on the portion of the pavement west of the centerline, and the southbound traffic on Garfield Avenue was required by a sign to "Keep to Right" of the island (northwest of it) and to "Stop" before entering Garfield Place.

No such signs warned the northbound traffic. The painted traffic island completely covered the easterly lane for northbound traffic, leaving only one lane west of the island. The City's painters, upon orders from the City Engineer, when they finished painting the island about 3:30 on Friday, left twenty unlighted barricades similar to sawhorses in and near the painted island, including the three which were broken by plaintiff's automobile from about 30 to 10 feet south of the island. The paint was dry before dark on Friday, but pursuant to the orders of the City Engineer the barricades remained in the island and in the traveled portion of the highway without lights or warning of any kind until after respondent's accident, more than 24 hours after the paint was dry. The orders of the City Engineer to the painters were to leave them there "until the public learned to go around that island".

At dusk on the day of the accident, respondent was for the first time traveling on Garfield, going north at a reasonable and moderate speed in the most easterly of the two lanes of northbound traffic. At a point about 80 feet south of the southerly point of the painted traffic island, respondent's brakes were engaged. At points about 30 to 10 feet south of the point of the island his car collided with and broke three barricades, went out of control, swung left, right, left, right and left again, avoided hitting any automobiles, crossed the entire highway and collided with a concrete wall west of the highway. He was seriously injured and unconscious, and at the trial testified that he had no recollection of the accident, of the time shortly before it, or of anything after the accident until several days later when he became aware that a spinal tap was being made upon him at the General Hospital.

Appellant urges that the evidence is insufficient to support the judgment in the following particulars:

"(1) That there is no evidence that the City or its employees caused respondent 'to leave the highway and drive through the island';

"(2) That there is no evidence that barricades were placed by the City in the traveled portion of the highway; and

"(3) That there is no evidence that the City had notice that barricades had been placed in the traveled portion of the highway."

The highway itself, as well as the island, being public property of the City of South Gate, it is unnecessary to consider appellant's first specification of insufficiency of the evidence.

[1] It is generally known that it is the custom of street painters to place barricades outside of the painted lines so as to prevent motorists from driving over wet paint. That knowledge together with the testimony of the painters quoting their orders from the City Engineer is sufficient to support an implied finding of the jury that the unlighted barricades were placed by the painters "in the traveled portion of the highway", where they were seen by other motorists at the time of respondent's accident, 10 to 30 feet south of the south point of the island.

Appellant insists that, as a matter of law, the existence of the island even without lights indicating its existence was not a dangerous or defective condition, and urges that "a case which on its facts is as close to the present case as can be conceived is Waldorf v. City of Alhambra (1935), 6 Cal.App.2d 522 [45 P.2d 207]"; and that "a case which is closely in point on the same subject is Campbell v. [City of] Santa Monica (1942), 51 Cal.App.2d 626, 629, et seq. [125 P.2d 561]."

The facts of each of the above cited cases are distinguishable from the facts of the instant action. The Waldorf case, supra, involved a "jog" in a city street at an intersection outlined by curbs clearly visible and constituting no danger to motorists driving at the then legal speed. In the Campbell case, supra, plaintiff was injured while walking on the promenade for pedestrians only. She was hit by an automobile driven on the promenade in violation of a city ordinance and signs directing the automobiles into the streets intended for them.

[2] As said by Mr. Justice Curtis, speaking for the Supreme Court, in George v. City of Los Angeles, 11 Cal.2d 303, 308, 79 P.2d 723, 725: "The rule adopted by the courts of this state is that while a municipality is not an insurer of the safety of travelers on its streets, the duty is imposed upon it by the Public Liability Act of 1923 to exercise ordinary care to maintain its streets in a reasonably safe condition for their use in a proper manner. * * *

* * * * * *

"* * * It is well settled in this state that when dealing with cases falling under the provisions of the Public Liability Act of 1923, each of such cases must depend upon its own state of facts and that no hard and fast rule can be applied in the great majority of cases."

In the George decision, supra, an automobile left the highway and collided with a utility pole near the edge of the road just beyond a dangerous dip in the pavement and the place where one of the traffic lanes "blanked out" without warning signs or lights. In the George case, supra, the Waldorf decision is distinguished and judgment for defendant after its demurrers were sustained without leave to amend was reversed.

The facts of the three other decisions cited by appellant in this connection are also quite different from those of the instant action.

In Sinclair v. City of Pasadena, 21 Cal.App.2d 720, 70 P.2d 241, judgment for defendant notwithstanding the verdict was affirmed. Plaintiff's automobile collided with a steamroller parked in a dark street, where a row of lighted lanterns had been so placed as to mislead motorists. The judgment was affirmed because actual notice of the condition was had only by the foreman in charge of the repair work, the operator of the steamroller and the employee who serviced the lanterns.

Loewen v. City of Burbank, 124 Cal.App. 2d 551, 269 P.2d 121, affirmed a judgment for defendant after nonsuit. Plaintiff was a ten-year-old boy who climbed one of three eucalyptus trees which had been topped, trimmed and pulled over into the street. The crews of workmen did not know plaintiff was there. He was injured when he swung out on one of the limbs near the top of the tree, causing it to roll over. It was there held that the city was not liable because no one expects the public streets to be used as a play ground.

Cheyney v. City of Los Angeles, 119 Cal. App.2d 75, 258 P.2d 1099, is a case where judgment for defendant after nonsuit was affirmed. In the Cheyney case, plaintiff had parked her automobile in a public parking lot late at night, walked down a dark stairway toward the beach, and at the bottom where it was so dark she could see nothing she stepped off into the air, falling some 30″ to the sand. It was there held that as a matter of law plaintiff was contributorily negligent in proceeding into a strange place in total darkness.

More nearly analogous with the facts of the instant action are those considered in Wood v. County of Santa Cruz, 133 Cal. App.2d 713, 718, 284 P.2d 923, wherein a judgment for defendant after a directed verdict was reversed for the reason that it is a question of fact whether broken branches piled on the pavement by the County's tree pruners about three days before constituted a dangerous condition of public property for which defendant was responsible under the Public Liability Act; Alvarez v. County of Los Angeles, 132 Cal. App.2d 525, 282 P.2d 531, wherein judgment for plaintiff was affirmed for damages caused by her automobile going out of control when it hit loose gravel dragged by county employees into a dip so as to conceal the dip from drivers, and Barsoom v. City of Reedley, 38 Cal.App.2d 413, 101 P.2d 743, affirming judgment for plaintiff for injuries caused when she fell at night on loose pipe piled along a city street.

[3, 4] In the instant action, the City's painters, under express orders of the City Engineer, having placed and left the barricades in the painted traffic island and near it in the traveled portion of the highway, the City was not entitled to express notice that after sunset it would be responsible for the dangerous condition of a public highway so created. While every driver is required to keep a diligent lookout ahead of him, he is not required to anticipate traps such as unlighted and unwarned of barricades directly in front of him on a well-traveled highway. The City is responsible for the damages caused by such traps created under the orders of its City Engineer.

[5] After a careful examination of the transcript and exhibits in the instant action, this court is convinced, as was the jury and the trial court, that the evidence supports the verdict.

The jury in the instant action was instructed as to the duties and responsibilities under the Public Liability Act, supra; as to the essential elements of proof necessary to justify any judgment for plaintiff; as to negligence, ordinary care, contributory negligence, proximate cause, burden of proof, the duties of the respondent-driver, the rebuttable presumption of due care on his part if the jury should find that he has no memory of the accident or the events immediately preceding it, the degree of care required of a person in imminent peril, lawful speeds, and damages.

[6] Appellant urges that the giving of each instruction on the law of negligence, contributory negligence and proximate cause in this action under the Public Liability Act constitutes reversible error. That is not the law. George v. City of Los Angeles, supra, 11 Cal.2d 303, 308, 79 P.2d 723; Maddern v. City and County of San Francisco, 74 Cal.App.2d 742, 755, 169 P.2d 425. In the instant action, even if the

giving of instructions on negligence were error, the fact that appellant requested many of those instructions given would prevent a reversal on appeal for that reason.

Appellant also urges that the court committed prejudicial error in giving the following instruction to the jury:

> "If, and only in the event, you should find that there was an accidental occurrence as claimed by the plaintiff, namely: That defendant placed or caused to be placed in an area of the street in question open to the use of the public for purposes of vehicular traffic, certain barricades which were unlighted and of which defendant gave no warning, and if you should find that from that accidental event, as a proximate result thereof, plaintiff has suffered injury, you are instructed as follows: an inference arises that the proximate cause of the occurrence in question was some failure of duty on the part of the defendant. That inference itself is a form of evidence, and if none other exists tending to overthrow it, or if the inference (either alone or with any other evidence supporting it) preponderates over contrary evidence, it warrants a verdict for the plaintiff. Therefore, you should weigh any evidence tending to overcome that inference, bearing in mind that it is incumbent upon the defendant to rebut the inference by showing that it did, in fact, perform its duty under the law I have given you or that the accident occurred without being proximately caused by any failure of duty on its part."

After discussing numerous decisions from the courts of other states, appellant, in its brief, states: "There is no exact precedent established in California. The District Court of Appeal in Bodholdt v. Garrett, 122 Cal.App. 566 [10 P.2d 533], stated that to hold the doctrine of '*res ipsa loquitur*' applicable under the Public Liability Act of 1923 'would result in nullifying the intent of the legislature * * * that there shall be at least constructive notice of a defect or danger to those authorized to remedy such condition'. In Bodholdt v. Garrett, it is indicated that the doctrine may apply under the 1923 statute, after notice has been shown to the persons authorized to remedy a defect."

The dangerous public property considered in the Bodholdt decision, supra, was a defective spring in a truck belonging to the City of Oakland, of which no officer or employee of the city was aware until the time of the accident. The language of that decision quoted above from appellant's brief appears at page 570 of 122 Cal.App., at page 534 of 10 P.2d. At page 569 of 122 Cal.App., at page 534 of 10 P.2d of the Bodholdt decision, the court said: "Under the 1923 statutes, notice to or knowledge by the proper authorities of the defect or danger is required. If the authorities should have known of the danger, the doctrine of *res ipsa loquitur* applies. Damgaard v. Oakland High School Dist., etc., 212 Cal. 316, 298 P. 983. But in a case where there is an absence of evidence from which an inference could be drawn that the persons authorized to remedy the defect should have known of such condition, the doctrine of *res ipsa loquitur* does not apply. In Damgaard v. Oakland High School Dist., etc., supra, a teacher undertaking to instruct pupils in experimentation of explosive gases should have known of the attending danger and should have taken the necessary precautions to avert an explosion. Actual notice is not necessary under such facts as appeared in the Damgaard case."

In its opening brief, appellant states that "There is only one situation under the 1923 statute where '*res ipsa loquitur*' logically may apply; that is in the case of 'inherently dangerous acts', where the original plan of construction or operation itself gives notice that injury is reasonably probable or inherent in the conditions created according to such plan, or is inherently involved in its execution."

Accepting appellant's statement, we are satisified that in the instant action wherein evidence was produced by respondent and not refuted by appellant that the City Engineer ordered the street painters to leave unlighted and unwarned of barricades in the traveled portion of the highway an inherently dangerous and defective condition of the highway was created according to the city's plan of operation. Conceding that when the barricades were left in the traveled portion of the highway in mid-afternoon on Friday they could be seen and created no traffic hazard, the City Engineer must be presumed to have known that such barricades would be difficult (or perhaps impossible) for drivers to see and avoid after dark, and particularly in the Saturday evening traffic congestion. Also, the City Engineer must have known that barricades so placed as to prevent drivers from going over the painted lines, while effective in daylight, after dark would merely obscure the white painted lines.

While a driver is required to pay attention to the road ahead of him and to remain alert to unexpected changes, we are satisfied that he is not required to anticipate that he may be approaching a group of unlighted and unwarned-of barricades under conditions as shown by the evidence in the instant action.

[7, 8] Considering the instructions as a whole, as an appellate court is required to do, we are satisfied that the jury in the instant action was fairly and adequately instructed and that the instructions were not prejudicial to appellant.

With regard to appellant's claim that the judgment must be reversed because of errors in the admission of evidence, we have carefully considered the entire transcript of some 1,100 pages of testimony and have determined that, even if it was error to admit certain testimony, appellant was not prejudiced by it. For that reason, it need not be determined whether technically it was error to permit an expert investigator and analyzer of accidents to testify as to the probable visibility of unlighted barricades under hypothetical conditions, particularly where, as in the instant action, eye witnesses testified as to what they could see at the time and place of the accident. The other evidence relied upon by appellant as constituting prejudicial error was plaintiff's statement that he had not been "cited" by any of appellant city's police officers. Since according to the witnesses who saw plaintiff's automobile before it collided with the barricades and went out of control, his car had been driven in a careful and legal manner, the fact that he had not been "cited" could not have been prejudicial.

The judgment is affirmed.

FOURT and LILLIE, JJ., concur.

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171 Cal.App.2d 66

PEOPLE of the State of California, Plaintiff and Respondent,
v.
William C. BLANKENSHIP, Defendant and Appellant.
Cr. 6458.

District Court of Appeal, Second District, Division 1, California.
June 3, 1959.
Rehearing Denied June 15, 1959.

Defendant was convicted of forcible rape and assault with a deadly weapon. The Superior Court of Los Angeles County, Clement D. Nye, J., rendered judgment and entered an order denying a motion for a new trial, and the defendant appealed. The District Court of Appeal, White, P. J., held that the evidence was sufficient to show that the defendant had raped the prosecutrix and held that the trial court had not erred in charging the jury.

Affirmed.

1. Rape 🔑51(4)

Evidence sustained conviction for rape under statutory provision applicable where female is prevented from resisting by threats of great and immediate bodily harm accompanied by apparent force of execution, notwithstanding testimony that she had used a contraceptive diaphragm and jelly. West's Ann.Pen.Code, § 261, subd. 4.

2. Rape 🔑57(1)

When, in a rape prosecution, there is abundance of evidence tending to show that prosecutrix was frightened and terrified, it is for jury to say, whether she was, at time of assault, possessed of such fear as would likely have effect of impairing, if not altogether destroying, her ability to so resist her assailant and prevent actual intercourse. West's Ann. Pen.Code, § 261, subd. 4.

3. Criminal Law 🔑1160

Whether witness' testimony was untrustworthy and inconclusive was matter for jury to determine in first instance, and later, for trial court to consider in passing on motion for new trial. West's Ann.Code Civ.Proc. § 1847.

4. Criminal Law 🔑1159(2)

Reviewing court may not reweigh evidence, or reverse judgment of conviction for insufficiency of evidence, unless it is made clearly to appear that upon no hypothesis whatsoever is there sufficient substantial evidence to support verdict.

5. Criminal Law 🔑1159(2)

Appellate tribunal will not sustain any judgment or verdict based upon evidence which is inherently improbable, but fact that evidence discloses unusual circumstances does not make it inherently improbable.

6. Rape 🔑51(7)

Evidence on issue of identification of defendant was sufficient to sustain conviction for forcible rape and assault with a deadly weapon. West's Ann.Pen.Code, §§ 245, 261, subd. 3.

7. Criminal Law 🔑739(2)

In prosecution for forcible rape and assault with a deadly weapon, evidence on defendant's alibi that he was at his place of employment when the offenses were committed was for jury. West's Ann. Pen.Code, §§ 245, 261, subd. 3.

8. Criminal Law 🔑1166½(1)

In forcible rape prosecution, record revealing that defendant abandoned idea of using doctor who had made prosecutrix' vaginal smear to make examination of his genitalia, assertedly to establish that they were unusually small, failed to sustain defendant's contention that he had been prejudiced by deputy district attorney's refusal to allow that doctor to make the examination.

9. Constitutional Law 🔑268

Only where prosecution knowingly and deliberately suppresses evidence favorable to the accused is there thereby a deprivation of due process of law and a denial of fair trial.

10. Criminal Law 🔑1171(1)

Fact that police "Vehicle Impound Inventory" was not placed at disposal of defendant could not constitute a ground for reversal, as a withholding of evidence, in absence of any indication that prosecutor knew of existence of such report.

11. Criminal Law 🔑1031(1)

Complaint that defendant had assertedly been denied a fair trial in that he had not been taken before a magistrate, following his arrest, within the time prescribed by law, could not be urged successfully for first time on appeal. West's Ann.Pen.Code, § 825.

12. Criminal Law 🔑1166(1)

Even if there was a failure to take defendant before a magistrate within time prescribed by law, such failure could not constitute a denial of a fair trial in absence of any showing that defendant had not been allowed to see an attorney during his detention or that he had made any incriminating statement during that period. West's Ann.Pen.Code, § 825.

13. Criminal Law 🔑1036(1)

Where defendant at trial made no objection to the introduction of certain items as evidence, he thereby waived his right subsequently to claim that such items were improperly received in that they had been illegally seized.

14. Criminal Law ⚷1036(1), 1044

Where, at trial, defendant made no objection in any form to, or any motion to strike, testimony which he subsequently claimed indicated that he was a felon, he could not, for first time on appeal, assert that such testimony was prejudicial in indicating that he was a felon.

15. Criminal Law ⚷1036(1), 1044

Where witness' statement, which defendant, on appeal, asserted prejudiced him by indicating that he had been implicated in other criminal activities, was made in response to a question propounded by his own counsel which clearly invited the statement, and counsel made no objection or motion to strike, such testimony could form no ground for reversal of conviction.

16. Criminal Law ⚷829(1)

Where instruction given correctly stated law and substantially covered the issues presented by defendant's proffered instruction, refusal to give proffered instruction was not error.

17. Criminal Law ⚷785(16)

Instruction stating that a witness wilfully false in one material part of his or her testimony is to be distrusted in others and that jury may reject the whole of the testimony of a witness who has wilfully sworn falsely to a material point correctly stated the law.

18. Criminal Law ⚷784(1), 814(17)

Instruction that, if evidence is susceptible of two constructions, each of which is reasonable, and one of which points to guilt and other to innocence, jury should adopt interpretation admitting innocence, correctly states law and should be given whenever proof of some essential fact depends upon circumstantial evidence, but it need not be given where prosecution relies on direct evidence, and any circumstantial evidence is merely incidental to and corroborative of the direct evidence.

19. Criminal Law ⚷755½

While, under the Constitution, trial court is invested with privilege of commenting on evidence, it has no duty to do so. West's Ann.Const. art. 6, § 19.

William C. Blankenship, in pro. per.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Arthur C. DeGoede, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

The District Attorney of Los Angeles County filed an information wherein defendant was charged in one count with the crime of forcible rape (Penal Code, § 261, subd. 3), and in a second count with the offense of assault with a deadly weapon (Penal Code, § 245). The information also charged prior convictions of the crime of attempted kidnapping and rape and kidnapping. Defendant pleaded not guilty and admitted both prior felony convictions. Trial was had before a jury which found defendant guilty as charged in both counts. His motion for a new trial was denied and he was sentenced to state prison. From the judgment of conviction and the order denying his motion for a new trial, defendant prosecutes this appeal.

As to the factual background surrounding this prosecution, we regard the following as a fair epitome of the evidence presented by the prosecution. On the morning of April 1, 1958, at 11:00 a. m., Mrs. Diane Williams, a housewife, was at home in her apartment with her two children of the ages of four months and two and one-half years. Mrs. Williams' husband had departed earlier that morning for work. Answering a knock at her apartment door, Mrs. Williams was confronted by defendant who said that he represented an insurance company and inquired if she was Diane Williams. Upon receiving an affirmative answer defendant stated that a person of that name had been mentioned in a will and that his purpose was to ascertain whether she was the person therein named. Mrs. Williams testified: "* * * and I thought well, he knew my name so I'll let him in, and I opened the door and he sat in the chair next to the door, and I picked up the baby out of the bassinet and my other little girl and I walked over to the couch and sat down". For a period of about forty-five minutes the defendant asked Mrs. Williams questions to which she gave answers which the defendant wrote down on lined paper in a black loose-leaf notebook. The defendant perspired during this period of conversation. He then asked Mrs. Williams to sign her name to a piece of paper so that her signature could be compared. She signed her name once or twice on some paper in the loose-leaf binder. The defendant then put his hand over her mouth and placed a knife at the right side of her throat and told her not to scream or make any kind of move or her baby, who was lying on the couch, would be killed. Mrs. Williams nodded her head and, when the defendant's hand was removed from her mouth, said she wouldn't scream and asked him what he was going to do. The defendant pulled the knife away from her throat a little bit and replied, "You know what I'm going to do," and told her to put the older girl, who was standing next to Mrs. Williams, in the bathroom. After some discussion the older child was put in the kitchen and the baby in the bassinet. The defendant finally consented to Mrs. Williams placing a contraceptive diaphragm in her person so that "I wouldn't become pregnant". The defendant followed her in her movements throughout the apartment, still holding the knife. He continually perspired and told her to hurry. They went into the front room and the defendant told her to lie on the floor. Mrs. Williams lay down, rigid and scared. He then unbuttoned her blouse and touched her breasts, raised her skirt, unzipped his pants, put the knife away and had sexual intercourse with Mrs. Williams. She allowed him this act of intercourse because she was in fear of her own life and safety and because she was in fear for the lives and safety of her children, one of whom the defendant had threatened to kill. The defendant tied Mrs. Williams' hands with twine and left the apartment. Within five minutes, and as she was untying her hands, a friend of the family, William Sweeney, knocked on the door. Mrs. Williams had gotten one hand loose and let him in. She screamed to him that she had just been attacked. Sweeney went out to look for the man but could not find him and then telephoned the police who arrived in about five or ten minutes. The police officers took Mrs. Williams to the Central Receiving Hospital at which place a vaginal smear was taken from her private parts. The smear contained spermatozoa.

A payroll card of the company for which the defendant worked was introduced in evidence. It indicates that the defendant was credited with eight hours of work on April 1, 1958 and that he had lost no time on that day. This card was prepared by the defendant. The defendant's supervisor, Harold Smith, indicated thereon that he approved the hours as recorded on the card.

In rebuttal, Harold Smith testified that it was not common practice to mark on the time card when someone in management, such as the defendant, takes an hour or so off during the day.

Defendant did not testify in his own behalf but presented evidence of an alibi and also in contradiction of some of the testimony offered by the prosecution. This testimony will hereinafter be referred to as we discuss the issues presented on this appeal.

As grounds for a reversal of the judgment and order herein, appellant contends:

"1. The evidence is insufficient to support the judgment in that:

"(a) There is insufficient evidence to support a finding that Mrs. Williams resisted her assailant or that her resistance, if any, was overcome by force or violence, or that she was prevented from resisting by threats of great and immediately bodily harm accompanied by apparent power of execution.

"(b) There is insufficient evidence to support a finding that the defendant was the person who attacked Mrs. Williams.

"2. The defendant was deprived of due process of law in that:

"(a) The deputy district attorney was guilty of prejudicial misconduct in withholding evidence favorable to the defendant.

"(b) He was not taken before a magistrate within the time required by law.

"(c) Evidence which was illegally seized was admitted at the trial.

"(d) The trial court indicated its sympathies lay with the prosecution.

"3. The trial court committed prejudicial error in admitting evidence which imputed of another crime.

"4. The trial court erred in its instructions to the jury in that:

"(a) It failed to give the defendant's requested instruction on evidence susceptible of different constructions.

"(b) It failed to give the defendant's requested instruction on the effect of false testimony.

"5. The trial court erred in failing to comment on the evidence."

In his contention that the evidence is insufficient to sustain the judgment of conviction, appellant states that, "he is not prosecuting this appeal on the grounds that Mrs. Williams was not attacked. Whether Mrs. Williams was attacked or not is of no consequence to appellant. Appellant raises the points on her behavior in that they reflect on her credibility as a witness and should be scrutinized by the court. Mrs. Williams may very well have been attacked. If so, her behavior and the events, she relates, during that hour and one-half in her apartment makes an incredible story." In his claim that the testimony of the victim as to her "behavior" not being that of a woman forced to comply with a demand for sexual intercourse but rather indicative of cooperation and willing participation in the act, appellant points to the fact that she used a contraceptive diaphragm and jelly, "felt no shame", and that her attacker did not have to force her legs apart to gain entry.

[1] It is not contended by respondent that there was any active resistance to the act of sexual intercourse. The victim herself testified that she permitted the act to be committed because she was in fear of her own life and as well for the lives and safety of her two children. Subdivision 4, Section 261 of the Penal Code is directly applicable to Count I of the information herein, which applies where the female is prevented from resisting "by threats of great and immediate bodily harm, accompanied by apparent power of execution". That the fears of the prosecutrix were reasonable is at once apparent when consideration is given to the testimony that her attacker had threatened to kill the youngest child while holding a knife at the mother's throat, unless she complied with his demands. And the knife was not put away until the act of intercourse was commenced. There was evidence that after holding the knife against the throat of his victim, appellant continued to keep the weapon out while following Mrs. Williams throughout the house. When the latter inquired of appellant as to what he was going to do, the latter replied, "You know what I'm going to do.", at which time he continued to menace Mrs. Williams with the knife. Whether or not the evidence would have sustained a conviction under Subdivision 3 of Penal Code Section 261, we entertain no doubt that all of these circumstances and the acts and conduct of appellant constituted a very real threat to the complaining witness within the meaning of Subdivision 4, and that they more than sufficiently explain the absence of active resistance on the part of the victim. It requires no strain on the imagination to appreciate the plight of the prosecutrix herein. What would have happened to her at the hands of appellant, if she had pursued a course different than she did, is problematical.

[2] Furthermore, in all cases, of which the instant one is typical, since there is an abundance of evidence in the record tend-

ing to show that the prosecutrix was frightened and terrified, it is always with the jury to say, where there is some creditable evidence of the fact, whether the female was, at the time of the assault, possessed of such fear as would likely have the effect of impairing, if not altogether destroying, her ability to so resist her assailant as to prevent actual intercourse.

[3] Appellant's next contention that no substantial evidence appears in the record to support the finding that he perpetrated the attack upon Mrs. Williams cannot be sustained. What appellant asks this court to do is to retry the cause, reweigh the evidence and hold that the testimony of the victim, William Sweeney and F. L. Thomas, is without evidentiary value. The evidence hereinabove recited amply answers appellant's objection and his argument that the testimony of the foregoing witnesses was untrustworthy and inconclusive in many respects. However, that was a matter for the jury to determine in the first instance (Code Civ.Proc. § 1847), and later for the trial court to consider in passing on the motion for a new trial (People v. Green, 13 Cal.2d 37, 42, 87 P.2d 821; People v. Hightower, 40 Cal.App.2d 102, 106, 107, 104 P.2d 378).

[4] A reviewing court may not reweigh the evidence, nor reverse a judgment of conviction for insufficiency of the evidence unless it is made clearly to appear that upon no hypothesis whatsoever is there sufficient substantial evidence to support the verdict (People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Jones, 36 Cal.2d 373, 375, 224 P.2d 353; People v. Gould, 111 Cal.App.2d 1, 5, 243 P.2d 809).

[5, 6] While it is true that an appellate tribunal will not sustain a judgment or verdict based upon evidence inherently improbable, that category does not embrace testimony which merely discloses unusual circumstances. As was said by our Supreme Court in People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758, 759: "To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. (Citations.) Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. Hicks v. Ocean Shore Railroad, Inc., 18 Cal.2d 773, 781, 117 P.2d 850." The identification testimony of the complaining witness cannot be strictured as being inherently improbable. About two weeks after the assault upon her, Mrs. Williams was shown about twenty photographs. She went through these photographs and when she came to a picture of the appellant, picked it out without hesitation as a picture of the man who had attacked her. She went to the police station on the evening of the same day and viewed the appellant through a "one-way" glass window. She identified him then and also recognized his voice in a conversation which she had with him at the police station. At the trial she unequivocally identified appellant as the person who attacked her. Mrs. Williams had ample opportunity to observe appellant in the approximate one hour during which he was at the apartment. For the first forty-five minutes of this period she sat facing the defendant who was approximately twelve feet away.

Also, during the time Mrs. Williams was being interrogated by her assailant, he was writing down her answers on white lined paper in a black loose-leaf notebook. There were several pieces of pink paper in this notebook also. Approximately two weeks after the attack occurred, a loose-leaf binder (People's Exhibit 4) was found in the appellant's locker or in his mailbox at his place of employment. Mrs. Williams testified that it appeared similar or identical to the one that she saw in the hands of her attacker. This binder also contained pink paper and white lined paper therein, which, according to Mrs. Williams' testimony was similar to that contained in her assailant's notebook. Appellant discounts this evidence because Mrs. Williams, in her testimony, sometimes referred to her attacker's article as a brief case, whereas she testified that she would call People's Exhibit 4 a "looseleaf binder". However, Mrs. Williams, in her testimony, first referred to the article as a "black looseleaf binder".

A knife was found in appellant's locker at his place of employment and was introduced in evidence as Exhibit 3. Mrs. Williams testified that she recognized this knife as the one which her attacker had held at her throat and that she had never seen a knife of that shape before or since that time. The knife is commonly used in the factory where the defendant worked. A supervisor of that factory testified that he had never seen a similar knife anywhere other than in the factory.

Mrs. Williams' assailant tied her hands with some twine (People's Exhibit No. 1) after he had completed his act of intercourse. A ball of twine (People's Exhibit No. 14) was found in the glove compartment of the appellant's automobile on the day of his arrest. An expert witness testified that People's Exhibit 1 and People's Exhibit 14 had the same color, four strands each, a similar number of fibres in the strands of each, and a similar origin. He further stated that in his opinion People's Exhibit 1 could have come from People's Exhibit 14. In tying Mrs. Williams' hands with the twine her assailant used "funny" knots which she had never seen before. An investigating officer found a pamphlet in the defendant's car which was entitled "How to Tie Knots".

The appellant's wife testified, as did her neighbor, Georgia Patton, that they saw no ball of twine in the glove compartment of the car which they used on the morning of the appellant's arrest. Since the latter had the opportunity to place People's Exhibit 14 in the car after this time and before he was arrested, such testimony did not in fact impeach Officer Thomas' Testimony as to finding the ball of twine.

William Sweeney, a friend of Mr. and Mrs. Williams, stopped in his automobile in front of the apartment house in which Mrs. Williams lived at about twelve noon on April 1, 1958. A black 1947 or 1948 Plymouth coupe which contained one male person left a parking place into which Sweeney parked his car. The appellant's automobile is similar to the one which Mr. Sweeney saw pull away from the curb. Mrs. Williams' attacker left her apartment shortly before this car pulled away from the curb. This is reasonably inferable in that Sweeney, who left his car to go to the Williams' apartment, got there within five minutes of the defendant's leaving the apartment. At this time Mrs. Williams was still untying her hands, she having commenced this action upon the attacker's leaving the apartment. On finding out that Mr. Sweeney was at the door she stated that her attacker had just left. It can also be reasonably inferred from the testimony of a boy who lived in an apartment in the same building. This boy testified that he saw a man run from the apartment house and, a minute or two later, saw Sweeney in the hall of the apartment building. Appellant attempts to attack, on two counts, Sweeney's testimony that he saw a black 1947 or 1948 Plymouth sedan pull away from the building. Appellant contends that the neighbor boy saw no cars in front of the apartment building between ten and twelve a. m. However, the boy merely testified that between ten and twelve a. m. he had occasion to look out the front window toward Figueroa Street and did not recall seeing any cars immediately in front of the entrance to the apartment. Appellant also contends that the neighbor boy testified that the man who ran out of the building did not enter a car. However, here again appellant misreads the record. The boy testified that he lost sight of the man who ran out of the building when the man "just reached the sidewalk". Thus it is apparent that by the boy's own testimony he could not tell whether the man who ran from the building entered a car which was parked at the curb of the street.

Mrs. Williams first testified that her assailant wore a light brown suit, while in the apartment, which was similar to a suit (Exhibit 6) which was taken from the appellant's home and was identical in pattern and color although she could not be positive that they were the same. Later she testified that she had made a mistake in her previous testimony and that her assailant had worn a medium to dark brown pair of gabardine slacks which did not match his coat. While the claimed variances or inconsistent statements, and the contradictions referred to undoubtedly afforded opportunity for an argument to the jury against the reliability of the testimony given by the witnesses, we see in them nothing from which a reviewing court could justly conclude that their entire testimony is *per se* unbelievable, and that it was, therefore, the jury's duty to wholly disregard it. Mrs. Williams also testified that the man who attacked her wore a plastic raincoat through which she could see "some". A raincoat taken from appellant's home and introduced into evidence, according to the testimony of Mrs. Williams, is identical to the one she saw on her attacker.

[7] Appellant next attacks the sufficiency of the evidence on the ground that he established an alibi. The evidence which he presented on this issue consisted of the records of the company by which he was employed, indicating that he had been credited with eight hours of work on April 1, 1958, and that his supervisor had approved the record showing credit for this working day. However, it was shown that at about 8:30 a. m., on the day in question, appellant asked his supervisor if the former might not take some time off that day to attend to some business, and the supervisor gave his consent. Appellant urges that it would have been impossible for him to be absent from his work for over an hour and a half and not have his absence observed by his supervisor. But, as pointed out by respondent, "This argument is unsound for several reasons. First of all, the evidence indicates that he need only have been missing from work for about an hour or slightly more. He entered the apartment at about 11:00 a. m. and left about twelve noon. Inasmuch as his supervisor had given him permission to take some time off it is highly unlikely that he would be missed for such a short period of time. Furthermore, the record shows that on the morning of April 1, he had a change of duties—he was to take charge of a new production line in the next week and on April 1 was merely to observe the new line and learn anything that might help in his management. Thus it is apparent that he had no duties which required his presence at the plant other than mere observation of this production line." This conflicting testimony also merely presented a question of fact for determination by the jury who resolved it against appellant.

[8] Appellant next urges that the deputy district attorney was guilty of prejudicial misconduct in withholding from the jury facts favorable to him. He asserts that the report of the doctor who took the vaginal smear of Mrs. Williams was withheld, but the record reflects that a certified copy thereof was offered and received in evidence as People's Exhibit 11. The record does not bear out appellant's contention that when the doctor commenced to read the report he was stopped by the prosecutor. Appellant's claim that he was prejudiced when the deputy district attorney would not consent to allowing Dr. Hellman, attached to the Los Angeles Central Receiving Hospital to examine appellant's genitalia is not borne out by the record.

In this regard it appears that on the morning of the assault, Mrs. Williams was taken to the receiving hospital where Dr. Hellman took from her person a vaginal smear. The doctor was in court as a witness called by the prosecution. When Dr. Hellman was sworn to testify, appellant's counsel asked permission for himself and the deputy district attorney to approach the bench where the following proceedings were had outside the hearing of the jury:

"Mr. Bodley (Appellant's counsel): Sir, inasmuch as there is testimony as to the unusually small size of the attacker, I would like to ask that we enter into a stipulation that the defendant at this time be examined by the doctor from the County Hospital presently on the stand with reference to whether the size of his private parts is unusually small.

"The Court: Well, of course, that is a matter for counsel to determine, whether or not you are going to introduce evidence to that effect, and the method and manner of doing it. It is undoubtedly admissible.

"Mr. Esnard (Deputy District Attorney): I would think so.

"Mr. Bodley: Would you see any objection to allowing this medical doctor to examine him?

"The Court: I wouldn't see any objection to allowing any medical doctor to examine him. That is a matter for you to determine.

"Mr. Bodley: The defendant is willing to submit himself to examination.

"Mr. Esnard: I would be glad to have him do that. I would not consent to letting this doctor do it. It would be perfectly agreeable with me for you to have it done.

"The Court: It is not a matter for the Court. I can't appoint a doctor for that purpose. You will have to make your own arrangements for his compensation, the doctor's compensation as a witness.

"Mr. Bodley: Yes, your Honor.

"The Court: I want it understood that I have no objection to it. As a matter of fact, I think it is perhaps the thing for you to do. If I were in your place I would want to do it.

"Mr. Bodley: Thank you.

"The Court: As far as you are concerned, Mr. Esnard, I don't see that you can object to any legally authorized medical doctor, but you don't want to enter into a stipulation for a particular doctor?

"Mr. Esnard: I would want to have somebody that I feel at least the Court has been familiar with and has been used by the courts.

"The Court: You don't know whether doctors have a standard of measure for a thing like that?

"Mr. Esnard: That may be.

"The Court: I think it is something for you to investigate as an attorney for the defense in this matter, Mr. Bodley, in determining what to present in your evidence on the defense.

"Mr. Bodley: Yes, your Honor.

"The Court: It certainly is agreeable, desirable, in view of her very positive statement.

"Mr. Bodley: Do you feel if I bring a competent medical man that there would be any objection because he is not a court-appointed doctor?

"The Court: Oh, of course not. It is a matter of his compensation that I am concerned with. I have no authority under the status of the case as it now stands to appoint the doctor. That is a matter for the defense to defray themselves.

"Mr. Bodley: Yes, your Honor."

Since it appears that appellant abandoned the idea of using Dr. Hellman without making any request of him to make such an examination, and instead engaged Dr. George Agzarian to make such examination, the results of which were testified to by the latter, we perceive no prejudice to the substantial rights of appellant.

[9, 10] As a further ground for reversal, appellant contends that the prosecutor withheld evidence of a "Vehicle Impound Inventory", which he says is "the common practice of the Los Angeles Police Department to make out * * * on any impounded vehicle." A certified copy of this report is attached to appellant's opening brief. Officer Thomas testified that the appellant's automobile was impounded on April 16, 1958, whereas report shows the vehicle was impounded April 17, 1958 and that no property was removed from the automobile and held as evidence. It is appellant's contention that this report would have tended to impeach Officer Thomas because, "It would have clearly shown that Officer Thomas did not impound the defendant's automobile on April 16, 1958, as he testified, but on April 17, 1958

as is recorded on this report. It would have clearly shown that Officer Thomas did not find a ball of string in that automobile as he testified. As it is recorded on this report that no evidence was taken from this automobile. This constitutes reversable error in that the prosecuting attorney withheld evidence, favorable to the defendant, from the jury". This argument is unavailing because the report was not signed by Officer Thomas but by Officer Reid. Therefore, impeachment through inconsistent statements would not have been possible. Furthermore, appellant makes no showing that the deputy district attorney had any knowledge of the existence of this report. Surely the prosecutor could not be charged with misconduct for withholding evidence of which he knew nothing. Only where the prosecution knowingly and deliberately suppresses evidence favorable to the accused is a deprivation of due process and denial of a fair trial established (Pyle v. State of Kansas, 317 U.S. 213, 216, 63 S.Ct. 177, 87 L.Ed. 214).

[11, 12] As a further ground for reversal, appellant insists that he was denied a fair and impartial trial because he was not taken before a magistrate within the time prescribed by law. He asserts that he was taken into custody on April 16, 1958, and was not taken before a magistrate until April 22, 1958. Appellant asserts that, "This delay in taking the defendant before a magistrate and charging him, deprived the defendant, for six days, of precise knowledge of the crime he was supposed to have committed. This gravely jeopardized the defendant's chances of establishing his precise whereabouts on the day the crime was committed. The fact that sexteen days had already elapsed, when the defendant was arrested, left the defendant's chances of establishing his whereabouts precisely on April 1, 1958 uncertain. The additional six days delay, in taking the defendant before a magistrate, made it impossible for the defendant to establish his whereabouts precisely on April 1, 1958." Under the facts advanced by appellant we shall consider that his contention refers to a violation of Section 825 of the Penal Code which provides in part that, "The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays * * *". There is no support or even mention in the record of appellant's claim that he was held for six days before being taken before a magistrate, and no complaint of any such delay was made in the trial court. Such a complaint may not be urged for the first time on appeal (People v. Watts, 126 Cal.App.2d 659, 662, 272 P.2d 814; People v. McCrasky, 149 Cal.App.2d 630, 637, 309 P.2d 115). As was said by this court in People v. McCrasky, supra, 149 Cal.App.2d at page 637, 309 P.2d at page 119: "Moreover, the violation of appellant's rights because of failure to observe the provisions of Penal Code, § 825, does not require a reversal unless there is a showing that such wrongful conduct resulted in an unfair trial. There is no such showing here. We are not here confronted with a case wherein an accused during the interim between his arrest and the claimed delay in bringing him before a magistrate, made any confessions, or that during such period anything occurred which militated against appellant at his trial. In these circumstances the violation of his constitutional and statutory rights immediately after his arrest cannot be said to have affected the outcome of his trial (citing cases)." The foregoing language is peculiarly applicable to the case at bar, wherein, the claimed illegal detention did not so "* * * fatally (infect) the regularity of the appellant's trial and his conviction as to violate the fundamental aspects of fairness and result in a miscarriage of justice" (People v. Guarino, 132 Cal.App.2d 554, 557, 558, 282 P.2d 538, 540). In the case now engaging our attention nowhere does it appear that appellant was not allowed to see an attorney during his alleged illegal detention nor does it appear that any incriminating statements which were used at his trial were made by him during this period.

[13] Appellant's contention that he was denied a fair trial for the reason that evidence which was illegally seized was admitted into evidence is without merit. Since appellant at the trial, made no objections to the introduction into evidence of the ball of twine found in his automobile, photographs of the vehicle, the registration slip for the same, the knife and loose-leaf notebook found in his locker, he waived his right to claim that the evidence was improperly received because it had been illegally obtained in contravention of the rule announced in People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, 50 A.L.R.2d 513. See Robison v. Superior Court, 49 Cal.2d 186, 187, 316 P.2d 1; People v. Williams, 148 Cal. App.2d 525, 532, 307 P.2d 48, and cases cited therein.

Equally devoid of merit is appellant's contention that the trial judge "committed grave error in ordering the defense to limit final arguments to one hour" while "no such limit was placed on the District Attorney". The record does not reveal any such limitation, nor that any request was made by appellant's counsel for additional time within which to present argument to the jury, and there is nothing to show that all of the facts of the case were not fully and adequately brought to the attention of the jury, and nothing exists to indicate that any longer argument than was made would have been likely to change the result (People v. Wellman, 141 Cal.App.2d 101, 106, 107, 296 P.2d 82). Other contentions that the trial judge allowed the deputy district attorney to "prompt and feed answers to the People's witness under cross-examination"; that the trial judge allowed, "the District Attorney to argue rulings of the Court without admonition or censure" and "refused this same privilege to the defendant's counsel and did admonish defense counsel when an attempt was made to argue a ruling of the Court", are not supported by the record, no objection was urged at the trial and the contention lacks substance here.

[14, 15] Appellant further contends that, "The trial judge erred in allowing testimony by Officer Thomas that imputed of another crime." He refers to testimony to the effect that the prosecutrix had picked him "out of twenty mugs", manifestly referring to the identification of appellant by Mrs. Williams from some twenty pictures shown her. Appellant contends that since he was one of the persons shown in the twenty pictures, it was pointed out to the jury that he was a felon. However, at the trial appellant made no objection in any form, nor did he make a motion to strike the claimed improper testimony in either instance. This complaint cannot be urged for the first time on appeal (People v. Lawrence, 143 Cal. 148, 156, 76 P. 893, 68 L.R.A. 193; People v. Glass, 127 Cal.App.2d 751, 753, 274 P.2d 430). The other testimony which appellant asserts tended to impute other crimes to him was testimony by Officer Thomas that appellant was "under investigation on another matter". This complaint is totally devoid of merit because the record reveals that the challenged testimony was given under the following circumstances:

"Q. By Mr. Bodley: This suit was introduced May 1st. Did you have occasion after May 1st, 1958, to go back to the Blankenship house and search it again?

"The Court: Objection overruled.

"The Witness: I did not, but I know what you are talking about.

"Q. By Mr. Bodley: What am I talking about? A. Mr. Blankenship was under investigation on another matter, and some other officer went to the house and I went with him just to show him the house." It is immediately apparent that the statement complained of was made in response to a question propounded by appellant's own counsel, and it is clear that he invited the statement and made no objection to it or motion to strike the same.

It is next contended by appellant that the trial court erred in refusing to give the following instruction requested by him:

"A witness false in one part of his testimony is to be distrusted in others; that is to say, you may reject the whole testimony of a witness who wilfully has testified falsely as to a material fact, unless, from all the evidence, you shall believe that the probability of truth favors his testimony in other particulars."

The court, however, did instruct the jury that:

"A witness wilfully false in one material part of his or her testimony is to be distrusted in others. The jury may reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point. (If you are convinced that a witness has stated what was untrue as to a material point, not as a result of mistake or inadvertence, but wilfully and with the design to deceive, then you may treat all of his or her testimony with distrust and suspicion, and reject all unless you shall be convinced that he or she has in other particulars sworn to the truth)."

[16, 17] Since the instruction given correctly stated the law and substantially covered the issues presented by the proffered instruction, the refusal to give the latter is not error (People v. Denton, 78 Cal.App.2d 540, 552, 178 P.2d 524; People v. Kennedy, 21 Cal.App.2d 185, 201, 202, 69 P.2d 224).

[18] Appellant also predicates error upon the refusal of the court to give the following instruction on evidence susceptible to two different constructions:

"If the evidence in this case (as to any particular count) is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of defendant's innocence, and reject that which points to his guilt.

"You will notice that this rule applies only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt."

The proposed instruction correctly states the law and should be given whenever proof of some essential fact is necessary to sustain a verdict against an accused, and the proof of such fact *depends upon circumstantial* evidence. However, where, as here, the prosecution relies for conviction upon direct evidence, *the circumstantial evidence, if any, being merely incidental to and corroborative of the direct evidence, an instruction on the law of circumstantial evidence need not be given* (People v. Coontz, 119 Cal.App.2d 276, 281, 259 P.2d 694; People v. Lonnen, 139 Cal. 634, 637, 73 P. 586; People v. Wood, 129 Cal.App.2d 823, 826, 827, 277 P.2d 832). In the case at bar, the testimony of the prosecutrix was direct and was evidently the basis for conviction. While circumstantial evidence was introduced to show that appellant was the person who attacked Mrs. Williams, such evidence was merely incidental to and corroborative of Mrs. Williams' unequivocal identification of appellant on three different occasions. In harmony with the decisions above cited, it appears to be a reasonable conclusion that the court did not err in refusing the proffered instruction.

[19] Finally, appellant seemingly contends that the trial court should have commented upon certain phases of the testimony of the complaining witness. While it is true that the trial court is invested with the privilege of commenting on the evidence pursuant to the provisions of Article 6, Section 19 of our State Constitution, no duty is imposed upon the court so to do (People v. Ottey, 5 Cal.2d 714, 728, 56 P.2d 193; People v. Briley, 9 Cal.App.2d 84, 87, 48 P.2d 734; People v. Friend, 50 Cal.2d 570, 576, 327 P.2d 97).

We have carefully and painstakingly scrutinized the record and have failed to find any legal reason for disturbing the verdict.

The judgment and the order denying defendant's motion for a new trial are, and each is therefore affirmed.

FOURT and LILLIE, JJ., concur.

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171 Cal.App.2d 267

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Johnnie Lewis WILLIAMS, Defendant and Appellant.

Cr. 6576.

District Court of Appeal, Second District, Division 1, California.

June 11, 1959.

Defendant was convicted, on his plea of guilty, of the felony of taking an automobile without the owner's consent. The Superior Court of Los Angeles County, J. Howard Ziemann, J., rendered judgment and defendant appealed. The District Court of Appeal, Fourt, J., held that where, at arraignment, defendant was represented by a competent attorney, and there was nothing to indicate that he was not properly arraigned, and one week thereafter, with counsel present, he pleaded guilty to count charging felony in stealing automobile, defendant could not, for first time on appeal from judgment of conviction entered on his plea of guilty, successfully contend that he did not realize he had pleaded guilty to a felony, but, in view of statutory presumption that official duty has been regularly performed, reviewing court was required to assume that he knew he was charged with committing a felony.

Affirmed.

1. Criminal Law 🔑1144(4)

Where, at arraignment, defendant was represented by a competent attorney, and there was nothing to indicate that he was not properly arraigned, and one week thereafter, with counsel present, he pleaded guilty to count charging felony in stealing automobile, defendant could not, for first time on appeal from judgment of conviction entered on his plea of guilty, successfully contend that he did not realize he had pleaded guilty to a felony, but, in view of statutory presumption that official duty has been regularly performed, reviewing court was required to assume that he knew he was charged with committing a felony. West's Ann.Code Civ.Proc. § 1963, subd. 15; West's Ann.Vehicle Code, § 503; West's Ann.Pen.Code, §§ 952, 988.

2. Automobiles 🔑351

Information setting forth that defendant was accused by district attorney of violation of section of Vehicle Code which makes it a felony to take automobile without owner's consent in that he did, on a certain date in a stated city, willfully, unlawfully and feloniously drive and take an automobile belonging to a designated person, without his consent, sufficiently charged offense of violating cited section of Vehicle Code. West's Ann.Vehicle Code, § 503; West's Ann.Pen.Code, § 952.

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A. Feldman, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., John A. Vander Lans, Deputy Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal from a judgment of conviction of the crime of violation of section 503, Vehicle Code.

In an information filed in Los Angeles county, the defendant was charged in counts I and II with burglary; in count III he was charged with the crime of violation of section 503, Vehicle Code, a felony, in that he did on September 22, 1958, in Los Angeles county, drive and take an automobile, then the property of William J. James, without the consent of, and with the intent to deprive the said owner; count IV charged the defendant with an escape from custody.

The public defender was appointed to represent the defendant, and on October 10, 1958, the defendant was arraigned in open court and the matter continued to October 17, 1958, for further proceedings. On October 17, 1958, the defendant, in open court with his counsel present, pleaded guilty to counts III and IV. A probation officer's report was ordered and further proceedings and disposition of counts I and II were continued to November 7, 1958. On November 7, 1958, the defendant was in court with his counsel, and at such time his application for probation was denied, count IV was dismissed in the interests of justice, and the defendant was sentenced to the state prison. Counts I and II were then dismissed.

The appellant now asserts that the record discloses confusion as to just what the defendant did plead guilty to, and that count III of the information does not state facts sufficient to constitute a public offense.

[1] We have read the record and we find no confusion therein as to the pleading of the defendant. The defendant was represented by a competent attorney at the arraignment on October 10, 1958, and there is nothing to indicate that he was not properly arraigned in accordance with the provisions of section 988 of the Penal Code. Official duty is presumed to have been regularly performed under the circumstances (Code Civ.Proc. § 1963, subd. 15). On October 17, 1958, one week after the arraignment, the defendant, with his counsel present, pleaded guilty to counts III and IV. The defendant, as heretofore indicated, was represented by an attorney at all times, and no proof at all having been made to dispel the presumption of regularity, the defendant cannot now be heard to say for the first time that he did not understand that he was pleading guilty to a felony. Under the circumstances we must assume that he knew he was charged with committing a felony and that he pleaded guilty thereto in open court. People v. Henderson, 121 Cal.App.2d 298, 299–300, 262 P.2d 871.

[2] There is no merit to the appellant's second contention to the effect that the information does not state facts sufficient to constitute an offense under Vehicle Code, § 503. The information set forth, among other things, the following:

> "* * * Johnnie Lewis Williams is accused by the District Attorney of and for the County of Los Angeles, State of California, by this information, of the crime of *violation of section 503*, Vehicle Code, a felony, committed as follows:

That the said

> "Johnnie Lewis Williams
>
> on or about the 22nd day of September, 1958, at and in the County of Los Angeles, State of California, did willfully, unlawfully and feloniously drive and take a certain vehicle, to wit, an automobile, then and there the personal property of William J. James without the consent of and with intent to deprive the said owner. William J. James".

Vehicle Code, § 503 reads in part as follows:

> "Any person who drives or takes a vehicle not his own, without the consent of the owner thereof, and with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle, whether with or without intent to steal the same, or any person who is a party or accessory to or an accomplice in any such driving or unauthorized taking or stealing is guilty of a felony, * * *."

Penal Code, § 952 provides:

> "In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement

> that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another."

This court, speaking through Mr. Presiding Justice White, said in People v. Barry, 153 Cal.App.2d 193, at page 202, 314 P.2d 531, at page 536:

> "A further answer may be made to appellant's attack upon the sufficiency of the information by the oft repeated statement that the purpose of an indictment or information is simply to inform the accused of the charge which he must meet at the trial (Penal Code, § 952). In People v. Curtis, 36 Cal.App.2d 306, 317, 98 P.2d 228, 233, this court stated: 'As was said in People v. Beesly, 119 Cal.App. 82, 6 P.2d 114, 115, 970: "There, in a nutshell, is stated the principle of our present simplified form of pleading a criminal offense—the accused is entitled to notice of the offense of which he is charged but not to the particular circumstances thereof, * * *." Where this information came solely from the indictment, as at common law, more particularity was required, but under our system, the law now provides, as part of the accusatory procedure, that in every criminal case the accused is entitled to a transcript of the testimony given before the grand jury or the committing magistrate, as the case may be. * * *'"

See, also, People v. Randazzo, 48 Cal.2d 484, at page 489, 310 P.2d 413, 417, where it is said:

> "An information is sufficient if it charges the defendant with the commission of a public offense in words sufficient to give him notice of the offense of which he is accused. People v. Roberts, 40 Cal.2d 483, 486–487, 254 P.2d 501; Pen.Code, § 952. Only the essential elements of the offense need be charged. (Citing case.) Notice of the particular manner, means, place or circumstances of the offense is given, not by detailed pleading, but by the transcript of the evidence before the committing magistrate. (Citing case.)"

A reading of the charges convinces us that the defendant was sufficiently informed of the offense and the circumstances to enable him to plead. Further, he did not demur, and he made no contention in the lower court that he did not understand the charged offense or that he could not intelligently plead thereon.

The judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur.

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171 Cal.App.2d 228

Thomas R. FORD, Petitioner,

v.

SUPERIOR COURT OF the State of CALIFORNIA IN AND FOR the COUNTY OF LOS ANGELES, Respondent,

Joy A. Ford, Real Party in Interest.

Civ. 23810.

District Court of Appeal, Second District, Division 1, California.

June 9, 1959.

Rehearing Denied July 6, 1959.

Hearing Denied Aug. 5, 1959.

Proceeding on a petition by husband for a writ of prohibition to enjoin the superior court from further proceedings in action commenced by him against his former wife wherein he sought to have it adjudged that he was and his former wife was not a fit and proper person to have custody of their minor child, and wherein he sought an award of the exclusive custody of the child. The District Court of Appeal, Nourse, J. pro tempore, held that the action was not an action which either party could cause to be dismissed without consent of the court, but when the complaint in such action was filed, the child for whose benefit the action was commenced was brought under the protection of the court and was in effect a party to the action, and the husband, as the plaintiff representing the child was in the same position as a guardian ad litem and was without power to dismiss the action without the consent of the court, notwithstanding fact that at time husband requested a dismissal wife had not by answer, counterclaim or cross-complaint sought affirmative relief.

Alternative writ discharged, and peremptory writ denied.

1. Dismissal and Nonsuit ⚷20

An action by a husband against his former wife seeking, among other things, an award of the exclusive custody of child of the parties was not an action which either party could cause to be dismissed without consent of the court, but when the complaint in such action was filed, the child for whose benefit the action was commenced was brought under the protection of the court and was in effect a party to the action, and the husband, as the plaintiff representing the child, was in the same position as a guardian ad litem and was without power to dismiss the action without the consent of the court, notwithstanding fact that at time husband requested a dismissal wife had not by answer, counterclaim or cross complaint sought affirmative relief. West's Ann.Code Civ. Proc. § 581, subd. 1.

2. Dismissal and Nonsuit ⚷20
Estoppel ⚷91(1)

In view of fact that an action for an award of custody of a minor child of the parties is not one which could be dismissed without the consent of the court, wife could not be estopped by her action in moving to tax costs from asserting the rights of the minor, nor could the minor be estopped or her rights affected by the action of either party. West's Ann.Code Civ.Proc. §§ 581, subd. 1, 1032(b).

3. Dismissal and Nonsuit ⚷32

A court could not be deemed to have in effect consented to dismissal of an action by entry of an order taxing costs where the court by the same order reserved to defendant the right to move to vacate the dismissal, a motion it could not have granted if it had consented to the dismissal.

Lester M. Fleischner, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Assistant County Counsel, and Edward A. Nugent, Deputy County Counsel, Los Angeles, for respondent.

Aaronson & Shapero, Beverly Hills, for real party in interest.

NOURSE, Justice pro tem.

Petitioner seeks a writ of prohibition to enjoin the respondent court from further proceedings in an action commenced by him against Joy A. Ford, his former wife, wherein he sought to have it adjudged that he was, and Joy was not, a fit and proper person to have custody of their minor child Jerre and prayed that he be awarded exclusive care, custody and control of said child.

The relevant facts are: Plaintiff and Joy married in December of 1947. There was one issue of the marriage, a child Jerre, who was born on October 22, 1955. In August 1958, Joy obtained a final decree of divorce from petitioner here in the state of Nevada. By said decree she was awarded custody, care and control of Jerre. In December of 1958, in the state of South Carolina, a written agreement was signed by the parties which by its terms purported to place the custody of Jerre in petitioner, Joy waiving and relinquishing all right to the custody of the child as given her under the Nevade decree. After this agreement was signed petitioner brought the child to Los Angeles and on January 5, 1959, commenced the subject action. At the time of the commencement of that action petitioner, the child and Joy were domiciled in Los Angeles.

On January 29, 1959, Joy filed a demurrer to the complaint and a motion to strike from the complaint and a motion for an order requiring petitioner to pay attorney's fees and costs to Joy in order that she might defend the action. On that day petitioner left the state taking Jerre with him and since said time he and the child have resided in Australia.

On February 2, a request for the entry of a dismissal of the action was filed. This request was dated January 29, 1959, and signed by petitioner and his counsel. Thereafter counsel for Joy filed a memorandum of costs and disbursements included in which was a demand for attorney's fees pursuant to section 137.3 of the Civil Code. Petitioner moved to tax costs and upon this motion being heard costs were taxed in the sum of $16.50 "without prejudice to defendant seeking to set aside the dismissal." Joy then moved the court to vacate the dismissal which had been entered by the clerk at the request of petitioner. This motion was granted and Joy filed an answer to the complaint and a cross-complaint by which she seeks to establish the Nevada decree as a domestic judgment and seeks custody of Jerre.

Petitioner contends that he had the absolute right under paragraph 1 of section 581 of the Code of Civil Procedure to dismiss the action and that the respondent court was without jurisdiction to vacate the dismissal which had been entered by the clerk at his request.

If the subject action is one which falls within the purview of section 581(1) of the Code of Civil Procedure petitioner's contention must be sustained inasmuch as at the time the request for dismissal was filed the defendant had not by answer, counterclaim or cross-complaint sought affirmative relief. Simpson v. Superior Court, 68 Cal.App.2d 821, 158 P.2d 46; Cook v. Stewart McKee & Co., 68 Cal.App. 2d 758, 157 P.2d 868.

[1] In our opinion, however, this action is not one which either party could cause to be dismissed without the consent of the court. The action is not one for which there is any statutory provision but is one which invokes the inherent power of the court. Titcomb v. Superior Court, 220 Cal. 34, at page 40, 29 P.2d 206, at page 209. The controlling factor in the action is not the rights of the parties seeking custody but is the welfare of the child. Titcomb v. Superior Court, supra, 220 Cal. at pages 40, 41 and 44, 29 P.2d at pages 209, 210 and 211. When the complaint was filed, the child for whose benefit the action was commenced was brought under the protection of the court and was in effect a party to the action and the petitioner as the plaintiff in the action representing the child was in the same position as a guardian ad litem and was without power to dismiss the action without the consent of the court. Whitten v. Dabney, 171 Cal. 621, at pages 631–632, 154 P. 312, at pages 316–317 and cases there cited; Collard v. McCormick, 162 Ga. 116, 132 S.E. 757; Ex parte Welsh, 93 N.J. 303, 116 A. 23.

[2] Petitioner asserts that by moving to tax costs the defendant acknowledged that the action had been dismissed inasmuch as costs may only be allowed under section 1032(b) of the Code of Civil Procedure after a dismissal. We see no merit in this contention for as we have pointed out, neither party could without the consent of the court dismiss the action and the defendant Joy cannot be estopped by her action in moving to tax costs from asserting the rights of the minor nor could the minor be estopped or her rights affected by the action of either party.

[3] Petitioner further asserts that when the court made its order taxing costs it

in effect consented to the dismissal of the action. Petitioner, however, loses sight of the fact that by the same order the court reserved to the defendant and consequently to the minor the rights to move to vacate the dismissal, a motion it could not grant if it had consented to the dismissal.

The alternative writ heretofore issued is discharged and the peremptory writ is denied.

WHITE, P. J., and FOURT, J., concur.

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171 Cal.App.2d 279

PEOPLE of the State of California, Plaintiff and Respondent,

v.

William G. BERNSTEIN, Defendant and Appellant.

Cr. 1260.

District Court of Appeal, Fourth District, California.

June 11, 1959.

Physician was convicted of statutory rape of his patient. The Superior Court, Fresno County, Philip Conley, J., entered judgment of conviction and order denying motion for new trial, and physician appealed. The District Court of Appeal, Griffin, P. J., held that evidence consisting of notes made from and recordings of telephone conversations between physician and patient, who had made accusatory statements in the conversations, were properly submitted to jury.

Judgment and order affirmed.

1. Criminal Law 🔑407(1)

In prosecution of physician for statutory rape of patient, evidence consisting of notes made from and recordings of telephone conversations between physician and patient, who had made accusatory statements in the conversations, were properly submitted to jury. West's Ann.Pen.Code, § 261, subd. 1.

2. Criminal Law 🔑351(1)

Conduct of one charged with crime is admissible if it shows a consciousness of guilt.

3. Criminal Law 🔑409

Evidence of defendant's admissions should be viewed with caution, and a conviction cannot be predicated solely upon such evidence.

4. Criminal Law 🔑741(3)

Where, in prosecution for statutory rape of patient, accused physician did not dispute accuracy of telephone conversations between himself and patient, who had made accusations in the conversations, but explained that patient seemed upset and that he did not contradict her because he was trying to pacify her, physician's explanation of the affair created a conflict in the evidence and a jury question. West's Ann. Pen.Code, § 261, subd. 1.

5. Rape 🔑48(1)

Evidence of fact that a prosecutrix has made an early complaint is admissible in a subsequent rape prosecution solely for purpose of corroborating her testimony. West's Ann.Pen.Code, § 261, subd. 1.

6. Criminal Law 🔑1169(1)

Statement made by patient to her girl friend that she had had an affair with physician about two weeks previously probably did not amount to a complaint, in the technical sense, that the patient had been violated by the physician, but, in subsequent prosecution of physician for statutory rape, admission of such evidence for purpose of corroborating patient's testimony, even if erroneous, and even if objection to such testimony was timely and sufficient, was not prejudicial, particularly where defense counsel attempted to show that patient's testimony might have been fabricated for purpose of winning favor with officials who had custody of her after the conversation with the girl friend. West's Ann.Pen.Code, § 261, subd. 1.

7. Criminal Law ⚷829(16)

In prosecution of physician for statutory rape of patient, refusal to give physician's proffered instruction, which was on question of credibility of patient, and which was lengthy and contained nothing more than physician's version and evaluation of facts as they might bear on credibility of patient's testimony, was not prejudicial error in view of other instructions given. West's Ann.Pen.Code, § 261, subd. 1.

8. Criminal Law ⚷811(5)

Instructions which single out credibility of a single witness and charge jury with reference thereto should not be given.

◆

Leo R. Friedman, San Francisco, and Charles R. Perry, Fresno, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and Philip C. Griffin, Deputy Atty. Gen., for respondent.

GRIFFIN, Presiding Justice.

A jury rendered a verdict finding defendant-appellant guilty of statutory rape on November 25, 1957, in violation of section 261, subdivision 1, of the Penal Code. He was sentenced to six months in the county jail in accordance with the recommendation of the jury.

Madeline, the prosecutrix, 16 years of age at the time the offense charged was committed, was an unmarried high school student when she first met defendant professionally in his office on June 10, 1957. He was a licensed physician who limited his practice to psychiatry and neurology, conducted his practice in an office in Fresno, where he employed a nurse, who also acted as his receptionist and secretary. At the first interview Madeline's mother disclosed to defendant that her daughter had been suspended from school after having had sexual intercourse with several boys at a party. She also told him that her daughter was intractable, unhappy, lied frequently to get out of trouble, and that she had been unconscious for 24 hours following an automobile accident on one occasion.

Defendant, for $20 per call, undertook to administer psychiatric treatment to Madeline in a series of interviews scheduled for Mondays, initially, at 3:30 p. m. and later at 4:30 p. m. Normally, the conferences began later than the scheduled time and lasted from an hour and a half to two and a half hours. At first the conferences would end at about 5 or 6 p. m. at which time the nurse would still be in the office, but after about four months a new nurse was hired and she never was present at the termination of Madeline's treatments.

The conferences were held in the defendant's private office which contained a couch as well as the customary desk and chairs. Only defendant and Madeline were present and the door was always closed. At first the conferences consisted of conversations conducted across the desk concerning Madeline's past life. One afternoon as Madeline began to leave she was crying and defendant put his arm around her and kissed her forehead. After this time the conferences began with conversations across defendant's desk. Then, after half an hour or forty-five minutes had elapsed, defendant would close the blinds and they would move to the couch and kiss and fondle each other. On one occasion defendant removed his shirt and T-shirt saying it was hot. Finally, on November 25, 1957, the affair culminated in defendant's having sexual intercourse with Madeline, and this action is the basis of the conviction. Thereafter she called her mother who took her home. About two or three weeks later she told Joan, a friend, about the affair, who apparently told her parents and the treatments were stopped. The authorities were later notified. On February 11, 1958, the prosecutrix telephoned defendant from Juvenile Hall. With her consent, Policewoman McCracken made written notes of what she heard. Excerpts from the conversation include the following statements:

> "Madeline: Dr. Bernstein, this is Madeline * * * I don't know what to do. My folks know that you and

I had sexual intercourse and they are having a fit.

"Defendant: Don't worry. There's nothing to indicate anything. Where are you calling from?

"Madeline: I am calling from home. * * * I don't know how they found out.

"Defendant: Don't worry, they haven't found out anything yet. * *

"Madeline: * * * What am I going to do? * * *

"Defendant: Come on down to my office. If it gets too bad ask them to bring you down with them. I am not worried. There is nothing they can prove."

Two days later a similar call was made and recorded on tape by means of an induction coil. This tape recording was admitted into evidence over objection and played before the jury. Excerpts from the conversation are:

"Madeline: Dr. Bernstein?

"Defendant: Yes.

"Madeline: Listen, I am in really a jam * * * Why did you tell my dad that we did have sexual relations?

"Defendant: I didn't.

"Madeline: He said that you admitted everything.

"Defendant: I did not.

"Madeline: That's what he told me.

"Defendant: Sorry. I told you I wouldn't * * *

"Madeline: Yes, I know, but nevertheless I haven't admitted anything.

"Defendant: He told me that you admitted everything.

"Madeline: He told you that I admitted everything?

"Defendant: That's what he told me.

"Madeline: * * * I don't know what to do * * *

"Defendant: Well, sit tight.

"Madeline: * * * He (father) wants to take me down to the D.A.'s office and tell them everything.

"Defendant: I know. Boy, that would really fix things, wouldn't it?

"Madeline: What can I do? * *

"Defendant: * * * If you do that, then you're really in a jam.

"Madeline: Why?

"Defendant: Then probation, and as far as I am concerned it would make a Hell of a stink in the papers.

"Madeline: Yes, but you are trying to get away from the fact that it actually happened and we can't—what can we do? It happened, you know that and I know that, but how are we going to keep everybody else from knowing it?

"Defendant: Nobody knows.

"Madeline: Yes, I know, but we do and what can we * * *

"Defendant: Nobody else knows it and as long as you can sit tight * *

"Madeline: * * * I can't do a * * * thing around my own house.

"Defendant: Well, I'll tell you one thing, if you think talking about it to the D.A. will make it any better, if you think you've got Hell now you should wait until you try that."

The District Attorney offered a recording of a third telephone conversation between the defendant and Madeline's father, but an objection by the defense that this conversation contained no admissions by the defendant was sustained by the trial court.

On cross-examination Madeline admitted that she had previously had intercourse with several boys; that she was in Juvenile Hall when the telephone conversations were made and at the time of the preliminary examination; that she had discussed the case with an assistant district attorney four to six times while in Juvenile Hall; that when she was first placed in Juvenile Hall she denied having intercourse with the defendant; and that later she admitted that she had had intercourse with him. She admitted that it was her habit to lie if she could get out of trouble by so doing, and that she found living in Juvenile Hall unpleasant.

Defendant denied entirely the testimony given by Madeline about amatory activity between them, stating that his conduct toward her was always proper and of a professional nature and involved no physical contact on the couch or elsewhere. He did not dispute the accuracy of the telephone conversations but explained she seemed upset and he tried to pacify her and for that reason did not contradict her.

[1] The first question to be considered on this appeal is whether the court properly admitted into evidence a conversation between the complaining witness and defendant. Defendant contends this conversation did not contain admissions on his part, but on the contrary contained denials of accusatory statements. The evidence was properly submitted to the jury for its consideration. See People v. Davis, 43 Cal. 2d 661, 662, 276 P.2d 801, where it was held (quoting from syllabus [7]):

> "When response to accusatory statement consists of evasion, equivocation or silence, it is for court in first instance to determine whether import of statement is such that it would furnish foundation for proof of conduct, and it is then for jury to decide whether, under circumstances shown, statement called for disclaimer, whether accused replied to it, and whether, if he did not do so, such failure showed criminal intent or consciousness of guilt."

[2–4] Conduct of a person charged with a crime is admissible when it shows a consciousness of guilt. 42 Cal.Jur.2d p. 280, sec. 91. The jury was properly instructed that evidence of admissions should be viewed with caution, and that a conviction could not be predicated solely upon such evidence. Defendant's explanation of the affair created only a conflict in the evidence which was a question of fact for the jury to determine. People v. Davis, 43 Cal.2d 661, 276 P.2d 801; People v. Simmons, 28 Cal.2d 699, 172 P.2d 18, and cases cited.

[5] Defendant next contends that the trial court erred in allowing Madeline to testify on her examination in chief that she had discussed with a friend the incident of November 25, 1957, claiming that this evidence was hearsay and self-serving. The prosecutrix testified she did not tell her parents about this affair but that about two weeks later, while defendant was still treating her, she told her girl friend about it. Apparently no objection to this testimony was made until inquiry was made as to the name of her girl friend. Objection was then made, as being immaterial and calling for hearsay. It was overruled and the name was given. A motion to strike the previous questions and answers on the grounds of being incompetent, irrelevant and immaterial, and because such conversation did not amount to a complaint, was denied. No further testimony was allowed concerning the nature or contents of the discussion or complaint. Defendant claims prejudicial error in this ruling, citing People v. O'Donnell, 11 Cal. 2d 666, 81 P.2d 939, 941, quoting from People v. Perkins, 8 Cal.2d 502, 66 P.2d 631, which said that to be within the rule of *res gestae* "the declaration must be the 'natural and spontaneous outgrowth of the act or assault', and not a mere narration of a past transaction". See also People v. Wilmot, 139 Cal. 103, 105, 72 P. 838; People v. Adams, 14 Cal.2d 154, 158, 93 P.2d 146; and People v. Huston, 21 Cal.2d 690, 134 P.2d 758. The fact that a prosecutrix makes an early complaint is admitted solely for the purpose of corroborating her testimony. People v. Finkel, 70 Cal.App.2d 508, 161 P.2d 298; People v. Hubbell, 54 Cal.App.2d 49, 128 P.2d 579; Fricke, California Criminal Evidence, p. 54.

[6] The statement made by the prosecutrix to the girl friend would probably not amount to a complaint (in a technical sense) that she had been violated. Assuming the objection to this testimony was

timely and sufficient, we do not feel that the admission of it, as limited, even if erroneous, was prejudicial under the facts related, particularly where defendant's counsel, on cross-examination of the prosecuting witness and others, attempted to show that her testimony might have been fabricated in an effort to win favor with the officials in whose custody she was held. The conversation with the girl friend before the mother contacted the officers and before the prosecutrix had any conversation with them might be material.

In People v. Walsh, 47 Cal.2d 36, 301 P.2d 247, it was held that where the opposition has assailed the testimony of a witness as being of recent fabrication, an exception to the hearsay rule allows the admission of evidence of statements or of conduct prior to the claimed fabrication and consistent with the testimony of the witness at the trial, not to prove the facts of the case, but as tending to show that the witness has not been controlled by motives of interest and that he has not fabricated something for the purpose of the case. See also People v. Kynette, 15 Cal.2d 731, 753, 104 P.2d 794.

[7, 8] Next, it is argued that the trial court erred in refusing to give defendant's proffered instruction on the question of the credibility of the prosecution witness. It was lengthy and contains nothing more than defendant's version and evaluation of the facts as they might bear on the credibility of her testimony. It is the general rule that instructions which single out the credibility of a single witness and charge the jury with particular reference thereto should not be given. People v. Wescott, 99 Cal.App.2d 711, 716, 222 P.2d 256; People v. Roth, 137 Cal.App. 592, 606, 31 P.2d 813. The trial judge did give general instructions as to the credibility and impeachment of witnesses and admonished the jury that a charge such as that made against the defendant in this case is one which, generally speaking, is easily made, and once made, is difficult to disprove, and that "the law requires that you examine the testimony of the prosecution witness with caution." From our examination of the entire record and the other instructions given favorable to the defendant, his rights were amply stated and protected in the court's general charge to the jury and no prejudicial error appears. People v. Corey, 8 Cal.App. 720, 97 P. 907; People v. Huston, 21 Cal.2d 690, 134 P.2d 758; 42 Cal.Jur.2d p. 288 [Rape] sec. 98.

Judgment and order denying a new trial affirmed.

MUSSELL, J., concurs.

171 Cal.App.2d 271

Walter Thomas PALMER, Laura Nancy Palmer, a minor, by and through her guardian ad litem, Walter Thomas Palmer, Plaintiffs and Appellants,

v.

Herbert AGID and William Ernest Grimes, Defendants,

Herbert Agid, Respondent.

Civ. 23296.

District Court of Appeal, Second District, Division 3, California.

June 11, 1959.

Actions, consolidated for trial, by automobile guest passenger's husband and minor daughter, by and through husband as daughter's guardian ad litem, against host motorist and truck operator for passenger's wrongful death in intersectional collision between automobile and truck and by truck operator against host motorist for damages sustained in the collision. Following dismissal as to truck operator of action brought by husband and daughter, verdict against host motorist in action by husband and daughter, and verdict against host motorist in action by truck operator, the Superior Court, Los Angeles County, A. A. Scott, J., granted host motorist's motions for judgment notwithstanding verdict and for new trial in action brought by husband and daughter and entered judgment on verdict for truck operator in other action, and husband and daughter appealed from the judgment notwithstanding verdict. The District Court of Appeal, Parker Wood, J., held that evidence, which revealed host motorist's alleged drinking of intoxicating liquor, driving into intersection at 60 miles an hour, against red traffic light, in 35-mile-per-hour speed zone and his alleged disregard of approaching traffic was sufficient to raise for jury question whether host motorist's conduct constituted willful misconduct within guest statute, and that the two verdicts were not inconsistent.

Judgment notwithstanding verdict reversed.

1. Judgment ⚷199(3.10)

Motion for judgment notwithstanding verdict may be granted only when, disregarding all conflicting evidence, viewing evidence in light most favorable to movant, and indulging in all reasonable inferences which may be drawn from evidence in favor of movant, there is no substantial evidence to support the verdict.

2. Judgment ⚷199(3.9)

Motion for judgment notwithstanding verdict is in nature of a demurrer to the evidence and is governed by rules applicable upon motion for nonsuit or a directed verdict.

3. Judgment ⚷199(3)

Fact that, under evidence presented, court might be justified in granting a new trial would not necessarily justify granting of motion for judgment notwithstanding verdict.

4. Judgment ⚷199(3.3)

In ruling on motion for judgment notwithstanding verdict, court was not authorized to determine weight of evidence or credibility of witnesses.

5. Automobiles ⚷245(87)

In action by automobile guest passenger's husband and minor daughter against host motorist and another motorist for passenger's wrongful death in intersectional collision between host motorist's automobile and other motorist's truck, evidence, which revealed host motorist's alleged drinking of intoxicating liquor, driving into intersection at 60 miles an hour, against red traffic light, in 35-mile-per-hour speed zone, and his disregard of approaching traffic, was sufficient to raise for jury question whether host motorist's conduct constituted willful misconduct within guest statute. West's Ann.Vehicle Code, §§ 403, 510.

6. Automobiles ⚷247

In actions, consolidated for trial, by automobile guest passenger's husband and minor daughter against host motorist and truck operator for passenger's wrongful death in intersectional collision between automobile and truck and by truck operator against host motorist for damages arising from the same collision, verdict for truck operator, in action brought by truck operator, determining that there was negligence on part of host motorist with respect to operator, did not signify that host motorist's driving was not willful misconduct with respect to automobile guest passenger, and therefore such verdict was not inconsistent with verdict for husband and daughter in action brought by them. West's Ann. Vehicle Code, § 403.

7. New Trial ⚷163(2)

Where, in wrongful death action in which defendant's motions for judgment notwithstanding verdict for plaintiffs and for new trial were granted, and plaintiffs appealed from judgment notwithstanding verdict but not from order granting new trial, order granting new trial became effective only upon reversal by District Court of Appeal of judgment notwithstanding the verdict. West's Ann.Code Civ.Proc. § 629.

◆

Alexander H. Schullman and Boris Raynes, Los Angeles, for appellants.

Jarrett & Morgan and Wm. Marshall Morgan, Los Angeles, for respondent.

PARKER WOOD, Justice.

Action for damages for wrongful death of Mrs. Helen Palmer resulting from the collision of a Volkswagen automobile (ranch-wagon type) and a Ford panel truck at an intersection of two streets in Los Angeles. Decedent was riding as a guest in the Volkswagen which was driven by defendant Herbert Agid. Plaintiffs are the husband and the daughter of decedent. The Ford truck was driven by defendant Ernest Grimes. After all the evidence had been submitted, plaintiffs dismissed the action as to defendant Grimes. In a jury trial, the verdict was for $20,000 against defendant Agid. Agid's motion for judgment notwithstanding the verdict was granted, and his motion for a new trial was granted. Plaintiffs appeal from the judgment notwithstanding the verdict. (Plaintiffs did not appeal from the order granting the motion for a new trial.)

After the action by the Palmers was commenced, Grimes commenced an action against Agid for damages resulting from the collision. The two actions were consolidated for trial. The verdict in the Grimes action was in favor of Grimes, and judgment was entered thereon. No appeal was taken from that judgment.

Appellants (husband and daughter of Mrs. Palmer) contend that the evidence was sufficient to support the verdict in their favor, and therefore the court erred in granting the motion of defendant Agid for judgment notwithstanding the verdict.

The collision occurred at the intersection of Olympic Boulevard and Veteran Avenue. Olympic, which is 86 feet wide and is paved, extends easterly and westerly. In the center of that boulevard there is a double white line. On each side of that line there are three marked traffic lanes—three lanes for eastbound traffic and three lanes for westbound traffic. Each lane is approximately 12 feet wide. Veteran Avenue, which is 30 feet wide and is paved, extends northerly and southerly and is divided into two lanes by a single white line—one lane for northbound traffic and one lane for southbound traffic. The white line is 12 feet from the west curb, and 18 feet from the east curb, of Veteran. At the time of the accident there was an official traffic control signal (red, yellow, and green lights) at each of the four corners of the intersection. Speed restriction signs were posted on Olympic and on Veteran in the area. Subject to the provisions of the basic speed law (Vehicle Code, § 510), the prima facie speed limit was 35 miles an hour on Olympic and 25 miles an hour on Veteran.

On April 8, 1956, about 6 p. m., Grimes was driving his Ford panel truck in a southerly direction on Veteran, and defendant Agid was driving his Volkswagen in a westerly direction on Olympic. Mrs. Helen Palmer was riding as a guest in Agid's Volkswagen. The vehicles collided in the intersection. The point of impact was about 25 feet south of the north boundary of the intersection and about 5 feet east of the west boundary of the intersection. After the impact, the truck spun around and stopped near the point of impact. After the impact, the Volkswagen proceeded in a southwesterly direction and went over the south curb of Olympic at a place about 90 feet from the point of impact, knocked a fence down, and stopped against a garage which was approximately 120 feet southwest of the point of impact. Mrs. Palmer was thrown out of the right door of the automobile, at a place approximately 60 feet southwest of the point of impact. She sustained injuries which resulted in her death.

Robert Smith, a witness called by plaintiffs, testified that on April 8, 1956, about 6 p. m., he was driving his automobile in a southerly direction on Veteran; the Ford truck, which was driven by Grimes, was traveling ahead of him, and he (witness) estimated that the truck was traveling 25 miles an hour; when he (witness) was about three-fourths of a block north of the intersection of Veteran and Olympic, he observed that the signal light at the intersection was green for traffic on Veteran; at that time the truck had "just about" reached the intersection; the truck struck the middle of the right side of the Volkswagen; at the time of the collision the signal light was green for traffic on Veteran; he (witness) saw the Volkswagen for a fraction of a second before the collision; he did not see it long enough to form an opinion as to its speed.

Rosemary Fritz, a witness called by plaintiffs, testified that on said April 8 she was driving her automobile in a northerly direction on Veteran; when she was about 100 feet south of the intersection of Olympic and Veteran, she observed the Ford truck which was entering the intersection; at that time the signal light was green for traffic on Veteran; thereafter she saw the Volkswagen going west on Olympic; it was 5 to 8 feet east of the Ford when she first saw it; it was traveling "about 60 or a little more miles an hour"; the front of the Volkswagen hit the front of the truck; at the time of the collision the signal light was green for traffic on Veteran.

Mr. Grimes testified that, as he entered the intersection, his Ford truck was in the west lane on Veteran and was traveling between 15 and 20 miles an hour; at that time, the signal light was green for traffic on Veteran; when he was half a car length within the intersection, he saw the Volkswagen which was 50 to 75 feet east of the intersection, and he estimated that it was traveling at least 60 miles an hour; the front end of the Volkswagen hit the left front side of his Ford; while he and Agid were in the ambulance, he smelled liquor on Agid's breath.

Defendant Agid testified that when he was approximately 145 feet east of the intersection of Olympic and Veteran, he observed that the signal light on the northwest corner of the intersection was green; at that time, he was traveling 35 miles an hour; soon thereafter he saw the Ford truck, which was on Veteran, between 75 and 100 feet north of the intersection; the Ford was moving slowly and it approached the intersection about the time that Agid approached the intersection; he (Agid) did not decrease his speed; he did not look at the signal light after he first saw the light (approximately 145 feet east of the intersection); at the intersection he took his foot off the accelerator; he did not attempt "to brake" his vehicle "at any time."

Agid testified further that the night before the collision he had one or two drinks at a party; he believed that the drinks were some type of bourbon and possibly some type of ginger ale; after 4 p. m., on the day of the collision, he had "one drink, possibly two," of something which "could have been bourbon."

Officer Korby, called as a witness by plaintiffs, testified that about 1½ hours after the collision, he noted a slight odor of alcohol on Agid's breath; he and Officer Christianson gave Agid a sobriety test; his (witness') conclusion was that Agid was not under the influence of alcohol. Officer Christianson, called as a witness by defendant Agid, testified that he participated in giving the sobriety test to Agid; it was his opinion that Agid was not under the influence of alcohol at the time of the test.

Section 403 of the Vehicle Code provides: "No person who as a guest accepts a ride in any vehicle upon a highway * * * nor any other person, has any right of action for civil damages against the driver of such vehicle * * * on account of personal injury to or the death of such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or wilful misconduct of said driver."

Appellants argue that the evidence was sufficient to prove that the death of Mrs. Palmer resulted from the wilful misconduct and the intoxication of Agid.

[1] A motion for judgment notwithstanding the verdict may be granted only when, disregarding all conflicting evidence, and viewing the evidence in the light most

favorable to the moving party, and indulging in all reasonable inferences that may be drawn from the evidence in favor of the moving party, there is no substantial evidence to support the verdict. See Neel v. Mannings, Inc., 19 Cal.2d 647, 650, 122 P.2d 576; Hargrave v. Acme Tool & Tester Co., 145 Cal.App.2d 469, 472, 302 P.2d 592; Free v. Furr, 140 Cal.App.2d 378, 381, 295 P.2d 134.

[2–4] A motion for judgment notwithstanding the verdict, which is in the nature of a demurrer to the evidence, is governed by rules which are applicable upon a motion for a nonsuit or a directed verdict. Free v. Furr, 140 Cal.App.2d 378, 381, 295 P.2d 134. Even though a court, under the evidence presented in a case, might be justified in granting a new trial, it would not necessarily be justified, under the same evidence, in granting a motion for judgment notwithstanding the verdict. Ibid. In the present case, as above stated, the court granted defendant's motion for a new trial. In ruling upon a motion for judgment notwithstanding the verdict, a court is not authorized to determine the weight of the evidence or the credibility of the witnesses. Free v. Furr, supra, 140 Cal.App.2d at page 381, 295 P.2d at page 136.

In Allen v. Robinson, 85 Cal.App.2d 617, 193 P.2d 498, wherein the plaintiffs were guests in an automobile, there was evidence that at times when the automobile was being driven at the rate of 45 or 50 or 60 miles an hour, one of the plaintiffs requested the driver (defendant) to slow down; the requests were disregarded; there was a boulevard stop sign at the intersection where the accident occurred; the driver did not apply the brakes or stop before entering the intersection; he entered the intersection at the rate of 35 miles an hour. In that case the verdict and judgment were for the plaintiffs, and the judgment was affirmed on appeal. It was held therein that the evidence supported a conclusion that the conduct of the driver was wilful misconduct. It was said therein, 85 Cal.App.2d at page 620, 193 P.2d at page 500, (in quoting from another case): "'Willful misconduct,' within the meaning of this [guest] statute, may then be defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something that should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result." It was also said therein, 85 Cal.App.2d at page 621, 193 P.2d at page 500 (in quoting from another case): "Willful misconduct depends upon the facts of a particular case and necessarily involves deliberate, intentional or *wanton conduct* in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, that danger is likely to result therefrom."

[5] Under the evidence in the present case, the jury could reasonably have found that within two hours immediately preceding the collision the defendant had two drinks of intoxicating liquor; the speed limit on Olympic was 35 miles an hour and that defendant was traveling 60 miles an hour; when he was 145 feet east of the intersection he saw a traffic signal at the intersection; during the time he was traveling the 145 feet to the intersection, he did not look at the traffic signal; he saw the Ford truck approaching the intersection, but he did not decrease his speed; when he entered the intersection, the traffic signal was green for traffic on Veteran; he drove into the intersection at the rate of 60 miles an hour in disregard of the red signal light which was a signal for him to stop before entering the intersection; he did not apply his brakes at any time; after the collision, his automobile went over the south curb of Olympic, knocked a fence down, and stopped against a garage 120 feet from the place of the collision. The jury could reasonably have found that such conduct on the part of defendant was intentional and with knowledge and appreciation of the fact that danger would likely result therefrom. In view of such combination of circumstances, which included drinking intoxi-

cating liquor, driving into the intersection at 60 miles an hour against the red signal, and disregarding nearby approaching traffic, it cannot be said as a matter of law that such driving was not wilful misconduct. There was substantial evidence to support a finding that the conduct of defendant was wilful misconduct. The court erred in granting the motion for judgment notwithstanding the verdict.

[6] Defendant Agid asserts that the verdict for plaintiffs is inconsistent with the verdict for Grimes in that the verdict for plaintiffs "characterizes" the conduct of Agid as wilful misconduct, and the verdict for Grimes characterizes the conduct of Agid as negligence. The two actions were consolidated for trial but the issues in the actions remained separate and different issues. The issue in the Palmer action was whether Agid's driving constituted wilful misconduct with respect to the guest who was in his vehicle. The issue in the Grimes action was whether Agid's driving constituted negligence with respect to a person who was driving another vehicle. The verdict in the Grimes action determining that there was negligence on the part of Agid with respect to the driver of the other vehicle did not signify that Agid's driving was not wilful misconduct with respect to the guest in Agid's vehicle. The verdict in each action was a determination of the issue in that particular action and did not affect the validity of the verdict or judgment in the other action.

In view of the above conclusion regarding wilful misconduct, it is not necessary to determine other contentions on appeal.

[7] As above stated, plaintiffs herein did not appeal from the order granting defendant's motion for a new trial. Section 629 of the Code of Civil Procedure provides, in part, that if the court grants a motion for judgment notwithstanding the verdict and also grants a motion for a new trial, the order granting a new trial shall be effective only if the order granting the motion for judgment notwithstanding the verdict is reversed and the order granting a new trial is not appealed from.

The judgment (notwithstanding the verdict) is reversed.

VALLÉE, J., concurs.

SHINN, P. J., concurs in the judgment.

171 Cal.App.2d 232

F. M. SCHAFER and Helen M. Schafer,
Plaintiffs and Appellants,
v.
WHOLESALE FROZEN FOODS, INC., a corporation, Henry Hornstein, Henry E. Cornils, and R. F. Luce, Defendants and Respondents.

Civ. 18326.

District Court of Appeal, First District,
Division 2, California.
June 10, 1959.
As Modified July 7, 1959.

Action by sublessors against sublessee for rental and damages for failure to pay rent to the end of the term. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., sustained a demurrer to the complaint, and the sublessors appealed. The District Court of Appeal, Draper, J., held that allegations that sublessee had withheld payment of rent under sublease knowing that sublessors had no other funds for payment of continuing rentals falling due to master lessor thereby causing sublessors to breach their master lease and that sublessee against will of sublessors had delivered up possession of premises to master lessor by delivering premises and key thereto to master lessor did not constitute an allegation that master lease had terminated and did not render complaint subject to demurrer.

Judgment reversed with directions.

1. Pleading 🔑252(1)

If an original complaint contains allegations which render it vulnerable to general demurrer, the defect cannot be cured simply by omitting such allegation in a later pleading.

2. Pleading 🔑193(5)

In action by sublessors against sublessee for rental and damages for failure to pay rent to end of term, allegations that sublessee had withheld payment of rent under sublease knowing that sublessors had no other funds for payment of continuing rentals falling due to master lessor thereby causing sublessors to breach their master lease and that sublessee against will of sublessors had delivered up possession of premises to master lessor by delivering premises and key thereto to master lessor, did not constitute an allegation that master lease had terminated and did not render complaint subject to demurrer.

3. Judgment 🔑743(2)

In action by sublessors against sublessee for rentals and damages for failure to pay rent to end of term, determination of court in prior action that sublessees had delivered up to master lessor possession of premises by delivering to master lessor the key to premises and said premises without knowledge or consent of sublessors but that there was no sufficient basis for declaring the lease forfeited or canceled, was conclusive in present action with respect to claim by sublessee that lease had been terminated and that no rentals thereafter could accrue.

4. Declaratory Judgment 🔑318

In action by sublessors against sublessee for rentals and for damages for failure to pay rent to end of term and for declaratory relief as against master lessor who claimed that premises were damaged in excess of $2,400 during subtenancy of sublessee and their predecessor in interest under sublease, allegation by sublessors that if such damage was done sublessee was liable therefor was sufficient to allege existence of an actual controversy.

Wallace S. Myers, San Anselmo, for appellants.

Fred Leuenberger, San Francisco, Herbert Chamberlin, San Francisco, of counsel, for respondents.

DRAPER, Justice.

General demurrer to plaintiffs' second amended complaint was sustained with leave to amend. Plaintiffs elected to stand upon their pleading, judgment of dismissal was entered, and they appeal.

Appellants were lessees of a building used for storage of frozen foods. In 1952 respondent Wholesale Frozen Foods, Inc. assumed the rights and duties of the then sublessee. The individual respondents guaranteed performance of the sublease by the assignee, Wholesale. Wholesale paid no rent after May, 1953. Appellants recovered judgment for $17,600 against the present respondents for rental due under the sublease from June 1, 1953 to April 1, 1954. That judgment was affirmed. Schafer v. Wholesale Frozen Foods, Inc., 151 Cal.App.2d 96, 311 P.2d 184. Before decision upon that appeal, the present action was brought for rent accruing from May 1, 1954 to the end of the term.

The first two causes of action seek rentals, or damages for failure to pay rent, under the sublease from April 1, 1954 to the end of the term. Respondents do not question that each of these counts, considered alone, states a cause of action. They argue, however, that the original complaint in the case at bar affirmatively shows that the master lease between owners and appellants was terminated April 22, 1954, and that thus no rentals could accrue under the sublease on or after May 1, 1954.

[1] The rule is clear that if the original complaint contained allegations which rendered it vulnerable to general demurrer, the defect cannot be cured simply by omitting such allegation in a later pleading. Wennerholm v. Stanford University, 20 Cal.2d 713, 716, 128 P.2d 522, 141 A.L.R. 1358. Thus if the original complaint here

does allege termination of the master lease before the period for which rentals are now sought from the sublessee, respondents' position is sound.

[2, 3] However, we do not find that the allegations of the original complaint have the effect attributed to them by respondent. That complaint alleged that Wholesale had withheld payment of rent under the sublease, knowing that plaintiffs had no other source of funds for payment of the continuing rentals falling due to the owners, for the purpose of causing plaintiffs to breach their master lease. The original complaint then alleged that plaintiffs had been served by the owners with a notice to pay rent or quit, and that sublessee "against the will of plaintiffs, and without right, delivered up to Owners the possession of the demised premises, by delivering to Owners the key to said premises, and the said premises." In the previous litigation between the same parties concerning the same sublease, a like contention was made by the present respondents. There the trial court found that defendants "delivered the key to the master lessors * *, without the knowledge or consent of plaintiffs, and that thereafter the master lessors occupied and continued to occupy the premises" (151 Cal.App.2d 96, at page 101, 311 P.2d 184, at page 187). That finding was more favorable to present respondents than are the allegations of the original complaint here, for it found that the master lessors "occupied and continued to occupy the premises," an element lacking in the complaint before us. Nevertheless, the appellate court held that the finding did not require the conclusion that the master lease then terminated. On the contrary, it pointed to the options granted to lessor by the master lease (the same one here involved) and held that "there was no sufficient basis for declaring the lease forfeited or cancelled" (151 Cal.App.2d at page 101, 311 P.2d at page 187). This determination is conclusive here. The claimed termination of the master lease does not appear upon the face of the original complaint, and thus does not render the second amended complaint vulnerable to demurrer. This is an issue which, if raised by the answer, is to be determined by the trial court.

[4] The third count of the second amended complaint seeks declaratory relief as against the owners (not parties to this appeal) as well as respondents. It alleges that the owners claim the premises were damaged in an amount in excess of $2,400 during the subtenancy of respondents and their predecessors in interest under the sublease, and have made demand upon plaintiffs for payment of such damages; that plaintiffs assert that if damage were done, respondents are liable therefor; that respondents deny such liability. It prays for a declaration as to whether damage was done, and if so whether respondents are liable for it. Respondents contend that this pleading fails to allege the existence of an actual controversy. We cannot agree. These allegations are clearly distinguishable from the vague and wholly incomplete assertions of controversy discussed in the cases relied upon by respondent. American Mission Army v. City of Lynwood, 138 Cal.App.2d 817, 292 P.2d 533; E. M. Cotton Appliance, Inc. v. Felton Aluminum Co., 124 Cal.App.2d 546, 269 P.2d 64. This count might well be subject to special demurrer for its failure to describe, even in general terms, the damage asserted by the owners. But there was no special demurrer as to this or any other count of the complaint. The count is not vulnerable to general demurrer.

Judgment reversed, with directions to overrule the demurrer as to all three counts.

KAUFMAN, P. J., and DOOLING, J., concur.

171 Cal.App.2d 248

PEOPLE of State of California, Plaintiff and Respondent,

v.

D & D PAD COMPANY, a co-partnership, and G. Delbert Morris, and Dallas Richins, individually and as co-partners doing business under the fictitious firm name of D & D Pad Company, Defendants and Appellants.

Civ. 23157.

District Court of Appeal, Second District, Division 1, California.

June 11, 1959.

The People of the State of California brought action against partners to recover under contract, and the partners filed a counterclaim. The Superior Court of the County of Los Angeles, John Leslie Goddard, J. pro tem., entered judgment adverse to the partners, and they appealed. The District Court of Appeal, Fourt, J., held that where written production contract between partners and State Department of Education for manufacture of furniture pads by the Los Angeles Center of the California Industries for the Blind for partners specifically provided that partners were to pay actual cost of labor and materials incurred in the production of the furniture pads, and the contract made no mention of estimated costs, and there was no evidence that any guarantee was made that estimated costs would reasonably approximate the actual cost of manufacture, and partners did not contend that actual terminology of the contract was arrived at by reason of any fraud, mistake, or accident, partners could not avoid liability for actual cost of labor and materials, on ground that they were misled to their detriment by erroneous estimates of the cost of labor and materials.

Judgment affirmed.

1. States ⚿109

Where written production contract between partners and State Department of Education for manufacture of furniture pads by the Los Angeles Center of the California Industries for the Blind for partners specifically provided that partners were to pay actual cost of labor and materials incurred in production of furniture pads, and contract made no mention of estimated costs, and there was no evidence that any guarantee was made that estimated costs would reasonably approximate actual cost of manufacture, and partners did not contend that actual terminology of contract was arrived at by reason of any fraud, mistake, or accident, partners could not avoid liability for actual cost of labor and materials, on ground that they were misled to their detriment by erroneous estimates of cost of labor and materials. West's Ann.Civ.Code, §§ 1636, 1638, 1639, 1640.

2. Estoppel ⚿62(2)

Statute providing that whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act on such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it, did not estop the State from recovering from partners under production contract between partners and State Department of Education for manufacture of furniture pads by the Los Angeles Center of the California Industries for the Blind for partners, on ground that partners were misled to their detriment by erroneous estimates of cost of labor and materials involved in manufacture of furniture pads, where all parties recognized that actual production costs were not available. West's Ann.Code Civ.Proc. § 1962, subd. 3.

3. Estoppel ⚿85

A promise, which promisor should reasonably expect to induce action or forbearance of a definite and substantial character on part of the promisee, and which does induce such action or forbearance, is binding, if injustice can be avoided only by enforcement of the promise.

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Robert B. Heggen, Los Angeles, for appellants.

Stanley Mosk, Atty. Gen., Ariel C. Hilton, Dep. Atty. Gen., for respondents.

FOURT, Justice.

This is an appeal by D & D Pad Company, a co-partnership, and G. Delbert Morris, and Dallas Richins, individually and as co-partners doing business under the fictitious firm name of D & D Pad Company (hereinafter referred to as appellants), from a judgment for $15,209.54, rendered in favor of The People of the State of California for and on behalf of California Industries for the Blind, an agency of the Department of Education, which is an executive department of the State of California, on their complaint and against appellants on their counterclaim for $8,251.48 special damages and $38,000 general damages for alleged loss of net profits. Appellants gave notice that in lieu of both a reporter's and clerk's transcript, they would present their appeal wholly on a settled statement pursuant to Rule 7(b), Rules on Appeal. Rule 7(b), as recently amended, reads: "If, in lieu of both a reporter's and clerk's transcript, the appellant desires to present his appeal wholly on a settled statement, he shall serve and file a notice so stating within 10 days after filing the notice of appeal and in that event, the provisions of Rule 7(a) shall be applicable. The appellant's proposed statement shall contain *in addition to the condensed statement of the oral proceedings copies of the following:* (1) *The judgment roll or such portions thereof as are deemed material to a determination of the points on appeal,* and if there is no judgment roll, the judgment appealed from; (2) the notice of appeal; (3) the notice to the clerk of election to proceed by a settled statement; and (4) any notice of intention to move for a new trial or motion to vacate the judgment, the ruling thereon, if any, and a recital or resume of any oral proceedings thereon. The appellant's proposed statement, and the respondent's proposed amendments, may include any other papers or records which either party might have had incorporated in the clerk's transcript, under the provisions of Rule 5. Both the statement and the proposed amendments may be accompanied by a list of such exhibits admitted in evidence or rejected or affidavits as the party desires to have transmitted as originals." (Emphasis added.)

In addition to the Engrossed Narrative Statement on Appeal, the following documents are included in the record before us as the judgment roll: Complaint (to which is attached as Exhibit "A," a Production Agreement dated November 20, 1952, between State of California and Dallas Richins and G. Delbert Morris dba D & D Pad Co.); Answer and Counterclaim; Fourth Amendment of Fourth Defense to Plaintiff's Complaint and Counterclaim (to which the following documents are attached: Exhibit "B," Memorandum dated October 24, 1953 to California Industries for the Blind from R. S. Oppenheim re: Furniture Pads, Exhibit "C," letter dated September 3, 1953 to Mr. Harry W. Stuart from George A. Brown); Answer (to counterclaim); Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Notice defendants will present appeal wholly on settled statement; Stipulation (that the aforesaid papers are all of the papers, used or considered in the determination of the matter appealed from); Judge's Certificate (that transcript is a full, true and fair transcript).

In 1952 appellants Richins and Morris were insurance brokers with clients in the warehouse and moving business, which clients were in need of furniture pads of good quality and competitive price. At this time the California Industries for the Blind operated the Los Angeles Center on a budget of $100,000 per year with 150 blind employees and 35 sighted employees and engaged in the manufacture of various articles, some of which were sold as its own products and some of which were produced as contract work for various distributors. During World War II the Los Angeles Center had produced furniture pads on a single needle machine, but multiple-needle machines had made it impossible to compete.

The possibility that the Los Angeles Center might manufacture furniture pads for appellants to sell was discussed from early 1952 until a production agreement was signed by appellants and the Department of Education on November 23, 1952, which agreement was approved on December 15, 1952, by the Department of Finance.

The aforesaid production agreement required appellants to furnish certain machinery and equipment, including a multiple needle Fales machine, required to manufacture furniture pads and products, and with respect to payment, said production agreement contained the following provision:

"In consideration of the performance of this agreement the Contractor shall pay to the State during the term of this agreement, except during the 'Trial Period' if any is provided herein, for each completed unit of production the following amount: A sum computed by multiplying the number of hours of labor expended on each unit of production by the rate per hour fixed by the Manager of the Center, said hourly rates to be not less than 85¢ per hour and not more than $1.75 per hour, depending upon the skill of the workers as determined by the Manager of the Center, employed to mfg. such products; plus the piece rates on miscellaneous operations fixed by the mutual agreement of the parties, based on an hourly wage rate of 85¢ per hour; plus the actual cost of all materials used in each unit of production; plus an amount computed by multiplying the number of square ft. of space required in the mfg. of said products by 5¢ each month prorated by the number of units of production completed each month; plus 5% of the total cost of labor & materials used in each unit of production; plus 6% of cost of labor to cover vacation pay."

In the complaint it is alleged that from on or about December 1, 1952 to on or about December 1, 1953, respondent expended and paid out for labor and materials pursuant to said written agreement the sum of $13,936.50; and that pursuant to an oral agreement entered into by and between the parties hereto on or about December 2, 1952, respondent supplied labor and materials at a cost of $2,082.62 for the design and construction of a feeder machine required in the operation of the Fales machine and that appellants agreed to pay the cost of said labor and materials, but that appellants had failed and refused to pay therefor.

The Findings of Fact were specific that the total cost for materials, material overhead, labor, labor overhead and space chargeable pursuant to the above-described contract to appellants was $14,097.27, but that respondent was limited by the prayer of its complaint to the recovery of $13,934.04 therefor; and that the total cost of equipment labor and equipment labor overhead expended on behalf of appellants pursuant to the above-described oral contract was $1,275.50. The Findings of Fact were specific that appellants expended the total sum of $8,251.48 for payments on sewing machines, travelling and living expenses, trucking and shipping expenses, engineering and equipment, office expenses, labor expenses and taxes in compliance with the said written contract. It was further found not to be true that respondent breached the said written contract, and it was found not to be true that appellants sustained damages in the amount of $8,251.48 or in any amount as a direct and proximate result of the alleged breach of said contract by respondent. It was further found not to be true that appellants sustained general damages in the sum of $38,000 as a direct and proximate result of any breach of contract by respondent.

In this appeal it is contended that "the trial court erred in following the plaintiff's interpretation of the contract between the parties." Appellants contend, as would appear to be obvious, that "the venture was highly unsuccessful." Appellants then argue "The immediate cause of failure was that the pads were in too poor quality, too late in filling orders, and cost too much to produce. The necessary ingredient for success that was lacking here was a person with supervisory duty, who had the know-how to combine labor, material, and equipment together, on time, at a fair cost of production, to produce furniture pads of workmanlike quality. * * * The plaintiff did not furnish *all* labor. It did not furnish a person with supervisory authority who knew how to put equipment, labor, and material together and make a good saleable furniture pad."

Civil Code, § 1638 provides: "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."

The aforesaid production agreement contains the following provision: "The said work will be done in a good and workmanlike manner and the Contractor may *inspect the work at any stage* of manufacture and may reject same if it does not reasonably meet said specifications. * * * *The contractor may train the State employees* engaged in the work under this agreement *in any particular phase* of the work which the Production Center for the Blind and the Contractor deem desirable. Any such training shall be given in the Production Center for the Blind." (Emphasis added.)

The record before us does not indicate that any training program of any type was established by appellants as they were permitted to do under the terms of the aforesaid contract; nor does the record before us reveal that appellants even so much as suggested to anyone in authority at the Los Angeles Center that additional supervisory personnel be hired.

Appellants also argue "It is rudimentary that a seller of any product must know what his selling price is and reveal it to the prospective buyer. It is fundamental that any buyer will want to know exactly what a product will cost before he buys it. * * * Presumably the parties entered into the contract for profit, and not to help the CIB in its worthy projects without regard to what the loss to defendants would be. In other words the object was profit, not charity."

Civil Code, § 1636 provides: "A contract must be so *interpreted* as to give effect to the *mutual intention of the parties as it existed at the time of contracting*, so far as the same is ascertainable and lawful." (Emphasis added.)

Civil Code, § 1639 provides: "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this Title."

Civil Code, § 1640 provides: "When, through fraud, mistake, or accident, a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded."

[1] Appellants have not contended that the actual terminology of the contract was arrived at by reason of any fraud, mistake or accident. In essence they have contended that they were misled to their detriment by the erroneous estimates of the cost of labor and materials involved in the manufacture of the furniture pads. The contract specifically provides that appellants are to pay the actual cost of labor and materials incurred in the production of the furniture pads. The said production agreement makes no mention of the estimated costs, and there was no evidence that any guarantee was made that the estimated costs would reasonably approximate the actual costs of manufacture. Appellants could have protected themselves at the time of contracting by agreeing to purchase furniture pads manufactured as products of the Los Angeles Center at an established price rather than as contract work. Under the circumstances, it would be violative of the mutual intention of the parties as expressed in the aforesaid production agreement for us to create an ambiguity, and then to interpret the contract so as to assure a profit to appellants. This is particularly true in view of the following recital contained in the contract,

"Whereas, the execution of this agreement will provide increased employment for blind and physically handicapped individuals in the State of California:", which recital would indicate that profit was not the sole object intended to be attained by entering into said contract.

[2] Appellants next contend they "have been misled to their detriment by plaintiff in important particulars," and that the elements of estoppel are present, relying upon Code of Civil Procedure, § 1962, subd. 3, which provides as follows: "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." It has been pointed out hereinabove that all parties recognized that actual production costs were not available, and that under the terms of the production agreement appellants were required to furnish, adapt and maintain certain equipment. The record before us indicates that appellant Richins as well as representatives of respondent viewed the Fales machine prior to its purchase. The height of the machine was easily observable upon a visual inspection thereof, and there is nothing in the record to indicate that special knowledge was required to evaluate the height of the machine in relation to the ceiling of the Los Angeles Center. It would appear that the height of the machine was not considered by any of the parties until the machine was in process of being reassembled at the Los Angeles Center. Under the circumstances, the presumption set forth in Code of Civil Procedure, section 1962, subd. 3 is inapplicable.

[3] The necessary elements for promissory estoppel are succinctly set forth in Restatement of Contracts, section 90, to be: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

In our opinion the specific language of the contract, as set forth hereinabove, is controlling under the circumstances of this case; and, accordingly, the necessary elements of estoppel are lacking.

There is sufficient evidence in the record to support the findings of fact, including the findings that respondent did not breach the contract, and that appellants, and each of them, breached the said written and the said oral contracts.

The judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur.

Paul GARRETT, Plaintiff and Respondent,
v.
Will H. PERRY and Laurice Perry, Defendants,

Will H. Perry, Appellant. *
Civ. 23148.

District Court of Appeal, Second District, Division 3, California.
June 4, 1959.
Hearing Granted Aug. 3, 1959.

Purchaser's action against vendor to recover damages for fraud in sale of ranch. The Superior Court of Los Angeles County, Caryl M. Sheldon, J., entered judgment for purchasers and vendor appealed. The District Court of Appeal, Vallée, J., held under record showing that purchasers made independent investigation regarding ranch property but that vendor, having superior knowledge, reiterated that he was the only one who knew the facts and that adverse comments and opinions were not reliable, there was substantial evidence to support finding the purchasers did in fact justifiably and reasonably rely on false representations of vendor, and fact that purchasers had defaulted on notes given as part of purchase price of ranch did not preclude them from recovering damages for fraud.

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* Opinion vacated 346 P.2d 758.

Affirmed.

1. Fraud ⇨21

Generally, where one undertakes to investigate property involved or truth of representations concerning it and proceeds with investigation without hindrance, it will be considered that he went far enough with it to be satisfied with what he learned, but a buyer who undertakes to investigate for himself the matters as to which representations have been made does not in every case forfeit right to rely on representations.

2. Fraud ⇨21

Exception to rule that he who undertakes to investigate for himself the matters as to which representations have been made will be considered not to have relied on the representations, is when buyer has only a suspicion of fraud, and seller lulls buyer into a sense of security by both words and conduct, seller should not be permitted to assert that buyer has lost his rights by waiving suspicion and accepting reassurance of seller that no fraud has been perpetrated.

3. Fraud ⇨21, 50

Mere fact that one has made an independent investigation or consults with others does not necessarily show that he relied on his own judgment rather than upon representations of the other party, nor does it give rise to a presumption of law to that effect, and an independent investigation or examination of property does not preclude reliance on representations where the person making the same has a superior knowledge.

4. Fraud ⇨58(4)

In action by purchaser of ranch to recover damages for fraud, in view of fact that vendor had superior knowledge and reiterated that he was the only one who knew the facts and that adverse comments and opinions were not reliable, there was substantial evidence to support finding that purchaser did in fact justifiably and reasonably rely on the false representations of vendor.

5. Appeal and Error ⇨1010(1)

Where trial court had found in fraud action that plaintiff justifiably and reasonably relied on false representations, and District Court of Appeal could not say as a matter of law that court was compelled by evidence to find to contrary, District Court of Appeal had to accept trial court's finding.

6. Vendor and Purchaser ⇨53

An "executed contract" may be defined as one in which title has passed; and an "executory contract", as one in which title has not passed. West's Ann.Civ.Code, § 1661.

See publication Words and Phrases, for other judicial constructions and definitions of "Executed Contract" and "Executory Contract".

7. Fraud ⇨29

Where purchaser of ranch paid $1,000 down and promissory notes secured by trust deeds were given for balance of purchase price, fact that purchaser had defaulted on obligation on notes did not preclude him from recovering damages for vendor's fraud.

8. Fraud ⇨29

Action for damages for fraud is available to a purchaser in default.

9. Vendor and Purchaser ⇨33

Upon discovery of vendor's fraud purchaser need not continue performance but may properly withhold payments on a contract in an amount necessary to recoup damages which he has suffered, in other words because of vendor's fraud purchaser may avoid obligations stated in contract and excuse what otherwise would be a default.

10. Fraud ⇨31

One induced by fraud to enter into a contract has an election of remedies in that he may rescind, or may recover damages for fraud, but cannot do both.

11. Election of Remedies ⚷3(1)

Where two or more inconsistent remedies are available to an injured party, an effectual choice of one precludes a later resort to another.

12. Action ⚷27(1)

Action to recover damages for fraud in inducing a contract is an action in tort for deceit, and not an action on the contract.

13. Contracts ⚷97(2)

An action for damages for fraud affirms the contract only where there is a contract in existence to affirm.

14. Fraud ⚷36

After a fraudulent vendor has foreclosed a trust deed received and accepted as part payment of purchase price of land, the elimination of purchaser's obligation on trust deed note is immaterial to purchaser's right of action for fraud so long as there remains the tort of deceit and uncompensated damages therefrom, and defrauded purchaser does not lose his cause of action for tort because of foreclosure of trust deed.

15. Fraud ⚷36

Mortgages ⚷378

Where fraudulent vendor, receiving and accepting promissory notes secured by trust deeds for balance of purchase price, foreclosed trust deeds upon purchaser's default and caused sales to be made under powers of sale in trust deeds, purchaser's obligations on notes were discharged by operation of law since statute precluded a deficiency judgment, but although purchaser lost property by the foreclosures, tort and its obligations remained. West's Ann.Code Civ.Proc. § 580b.

16. Fraud ⚷59(1)

Statute prescribing measure of damages in fraud cases was enacted to provide a uniform rule in all cases of fraud, and it is the exclusive measure of damages. West's Ann.Civ.Code, § 3343.

17. Fraud ⚷59(3)

In determining actual value of that with which defrauded persons parted in purchase of land, notes which were given as a part of the purchase price were to be taken at their full face value even though purchasers were in default on notes. West's Ann.Civ.Code, § 3343.

18. Fraud ⚷59(1)

Under out-of-pocket loss rule applicable in fraud cases, damages are to be computed as of the date of the fraudulent transaction.

19. Appeal and Error ⚷221

Where trial court found that plaintiff had sustained certain additional damage resulting from purchase of ranch in reliance on defendant's misrepresentations and awarded him that amount, and defendant did not in trial court object to finding or seek a breakdown of the amount, defendant could not assert on appeal that finding was defective in that it failed to show what items were allowed and to what extent.

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Lawrence M. Cahill, O'Melveny & Myers, and Sidney H. Wall, Los Angeles, for appellant.

Charles Lederer, Alturas, and Lee Perkal, Beverly Hills, for respondent.

VALLÉE, Justice.

Appeal by defendant Will H. Perry, called defendant, from a judgment awarding plaintiff damages for fraud in the sale of a ranch near Alturas in a section of Modoc County known as Devil's Garden.[1]

Defendant and his wife were the owners of the ranch composed of three separate noncontiguous parcels containing some 15,000 acres. They had title from 1930. In April 1951 defendant and his wife sold and conveyed the ranch to plaintiff for $700,000, of which $100,000 was paid in cash. The balance was represented by promissory notes, payable to defendant in installments secured by three separate trust deeds executed by plaintiff, each covering one of the three parcels.

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[1] The judgment was in favor of defendant's wife.

The court found plaintiff was induced to buy the ranch by false representations of defendant. The representations found to be false were: there was no necessity for winter feeding on the ranch; in the year 1950, when only 2,000 acres had been planted in barley, the 1950 gross income was $120,000; and the ranch would accommodate, sufficiently and properly, in excess of 5,000 head of cattle the year around without the necessity of winter feeding. All the elements of fraud were found.[2] The judgment awarded plaintiff $170,000, "out-of-pocket" damage, and $30,400, additional damage arising from the transaction. Civ.Code, § 3343.

Defendant does not challenge the finding that the representations were made, or the finding that they were false. His first point is that the finding that plaintiff reasonably and justifiably relied on the representations is not supported by substantial evidence. He argues that plaintiff made an independent investigation of the property and of the truth of the misrepresentations concerning it without hindrance by defendant, and that he must be presumed to have acted in reliance on the result of his own investigation rather than on the misrepresentations made by defendant.

Defendant was well acquainted with the ranch, having operated it for some years. Plaintiff was wholly unfamiliar with the weather and climatic conditions in the vicinity of Alturas and with the business of cattle ranching. Plaintiff made three visits to the ranch before buying. The first visit was about February 22, 1951. Plaintiff and defendant rode on horseback over the ranch. There were patches of snow here and there on the higher land, not in the meadows. Part of the ranch, called Antelope, was "all wet and full of ice." A meadow in a part called Boles "was like a lake." On one part of Boles the land rose and there were trees. Defendant told plaintiff that was where the cattle went when it got extremely bad and "there was a lot of feed in there." Plaintiff asked defendant "if he did any regular feeding in there." Defendant said, "Oh, no, we never feed hay. We do feed some cottonseed cake some years as much as a sack to the head in this area. It is not really necessary but we like to do that, too, some years, to keep the cattle in better shape." On his second and third visits plaintiff and defendant again went over the ranch. The escrow was opened on April 4, 1951.

Prior to the sale, defendant gave plaintiff the names of three men who had had cattle on the ranch, the names of two neighbors, the name of an agent of an insurance company which had placed a loan on the ranch, and the name of a man who had been interested in cattle which had been on the ranch. Plaintiff talked to some of these men and to others. Some of the information he received was favorable, some unfavorable.

One Herman told plaintiff it was a "nice" ranch and that defendant had claimed no winter feeding was necessary. Smith told him his cattle had done well on the ranch and did not require winter feeding.

One Delfino told plaintiff his cattle had done "just pretty well" on the ranch, he had had between 500 and 1,000 cattle there but he guessed it would handle more than that. Plaintiff reported to defendant that Delfino had said "it was just a fair ranch," to which defendant replied that Delfino wanted to buy the ranch himself, and "he is not going to tell you it is a wonderful ranch and have you buy it out from under him." Sheftel, who had a cattle ranch in Modoc County, told plaintiff that while he had not been on defendant's ranch he had heard it was "no good" because the cattle bogged down in the wet land. Plaintiff reported Sheftel's comment to defendant.

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[2] The court found: the representations were as to material facts; they were false and known to be false by defendants; they were made with the intent to induce plaintiff to buy; they were relied on by plaintiff; plaintiff was misled and deceived and induced to act by them; in acting, plaintiff was ignorant of the falsity of the representations and reasonably believed them to be true.

Defendant said Sheftel had never lost an animal on that account.

Hoffman, who owned two ranches adjoining defendant's ranch, told plaintiff it "wasn't much good, and that at one time he had cut hay off the place, many, many years back, but Mr. Perry had let the place go to hell"; defendant had let it go downhill and he had got a grain crop there only about one year out of five because it frosted there sooner than in Alturas, that in his opinion the ranch would carry only about 800 or 900 head of cattle for four or five months. Plaintiff reported the comments of Hoffman to defendant. Defendant said, "Why, that old guy hasn't been on the ranch in just about since that time in about fifteen years, besides that, he is still mad at me because he had lost an argument." Plaintiff learned Hoffman had not been on the ranch in years. Bartovich, manager of the hotel in Alturas, told plaintiff the ranch was no good because they got a grain crop only about one year out of four; everybody had gone broke on the ranch and he did not think it would hold many cattle. Plaintiff reported the comments of Bartovich to defendant, who said he had not been on the ranch in years, which plaintiff learned was a fact.

Plaintiff talked to Matthews, the manager of a bank in Alturas, who told him nobody could farm the ranch successfully because they got no crop from four to ten years and people kept going broke. Whiting, the manager of a grain elevator in Alturas, told plaintiff he knew of only one crop having been taken off the ranch in the last several years, and that one cannot farm it when he gets only one crop every so often. Hayes, the county farm advisor in Alturas, told plaintiff he had never been on the ranch but he understood they got a grain crop there only about one year out of four or five; that he thought the frost condition at the ranch was more acute than at Alturas and Tule Lake. Plaintiff reported the statements of Matthews, Whiting, and Hayes to defendant, who said they were in no position to know about the crops because in recent years he had shipped his barley crops to Tule Lake rather than to Alturas and had sold them to Tulelake Grain Company. Defendant said Matthews, "doesn't know what he is talking about. I ship my barley up to Tule Lake every year. One year we sent it to Alturas and almost knocked their eyes out, we had a good crop, and every other year we have gone the other way"; Matthews and Whiting "don't know what they are talking about," "[t]hey haven't been on this ranch." Defendant said Whiting "doesn't know what is going on, because he runs that grain company down there." Defendant said Hayes "has not been on the ranch since [defendant] was there and he doesn't, he just doesn't know what he is talking about." Tule Lake is about 100 miles from Alturas. Defendant then took plaintiff to Tule Lake and introduced him to Shook, the manager of Tulelake Grain Company. Plaintiff told Shook he understood from people in Alturas the ranch produced a grain crop only once every four years. Shook told plaintiff he got a crop of grain from defendant every year and it was a good crop; that the previous year's crop had been sold as brewing barley for over $4 per hundredweight, "and it had gone as high as $5.00."

Ivory, a cattleman, told plaintiff he had run cattle on the ranch, they did well; he thought the ranch would carry 5,000 cattle the year around and get a good crop. Dorris, a cattleman who owned an adjoining ranch, told plaintiff the ranch was "not too good." Hillard, who had run cattle on two parcels of the ranch, told plaintiff he had had about 1,500 head on one parcel. Plaintiff told defendant one cattleman had said "the cattle bogged down in that wet land up there all the time and you lose an awful lot of cattle," to which defendant said, "Why, hell, he doesn't know what he is talking about. I have been on this ranch all this time. I don't think I have ever lost an animal from bogging down, as far as I am telling you, this is—you let him show you how he knows; I have been here; where has he been; he was on a ranch over on the other side of the County." Defendant repeatedly said to plaintiff, "I have been on this ranch for over twenty years, I know it for over thirty, why do you go around asking other people when I am the one that knows about it?"

[1–3] The general rule is "that where one undertakes to investigate the property involved or the truth of the representations concerning it and proceeds with the investigation without hindrance, it will be considered that he went far enough with it to be satisfied with what he learned." Carpenter v. Hamilton, 18 Cal.App.2d 69, 71, 62 P.2d 1397, 1399. But a buyer who undertakes to investigate for himself the matters as to which representations had been made does not in every case forfeit his right to rely on the representations. There are exceptions. One exception is that when "the buyer has only a suspicion of the fraud, and the seller who has defrauded the buyer, lulls the buyer into a sense of security by both words and conduct, the seller should not be permitted to assert that the buyer had lost his rights by waiving the suspicion and accepting the reassurance of the seller that no fraud had been perpetrated." Kalkruth v. Resort Properties, Ltd., 57 Cal.App.2d 146, 150, 134 P.2d 513, 515; Sime v. Malouf, 95 Cal.App.2d 82, 107–108, 212 P.2d 946, 213 P.2d 788. "'The mere circumstance that one makes an independent investigation or consults with others does not necessarily show that he relied on his own judgment rather than upon the representations of the other party, nor does it give rise to a presumption of law to that effect.'" Blackman v. Howes, 82 Cal.App.2d 275, 279, 185 P.2d 1019, 1021, 174 A.L.R. 1004. An independent investigation or an examination of property does not preclude reliance on representations where the person making the representations has a superior knowledge. Bagdasarian v. Gragnon, 31 Cal.2d 744, 748, 192 P.2d 935.

[4, 5] In view of the fact that defendant had superior knowledge, that he iterated and reiterated he was the only one who knew the facts and that the adverse comments and opinions were not reliable, the trial judge could reasonably conclude that plaintiff justifiably believed the adverse comments were made by men who did not know the facts, that the favorable comments were made by men who did know the facts, and that plaintiff did in fact justifiably and reasonably rely on the false representations.[3] We cannot say, as a matter of law, that the court was compelled by the evidence to find that plaintiff did not justifiably and reasonably rely on the false representations, and we must therefore accept its finding. Cf. Bagdasarian v. Gragnon, 31 Cal.2d 744, 749, 192 P.2d 935.

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[3] The court found: "That it is true that prior to April 4, 1951, plaintiff was wholly unfamiliar with the weather and climatic conditions in the vicinity of the City of Alturas and with the business of cattle ranching, and that when plaintiff did make certain inquiries as to certain aspects of the ranch and the representations thereof from surrounding townspeople, the defendant, Will H. Perry, not only denied any differences or confusions which might have come up as a result of said inquiry, but further dismissed the effect of said inquiry by informing the plaintiff that no persons other than the defendant had any true knowledge of conditions of said ranch nor of any of the prior or present capacities of said ranch and that further inquiries which differed from that of the defendant's representations would not be valid or true information. That the defendant, Will H. Perry, represented to the plaintiff that for many years he personally operated and conducted and managed said ranch properties and was fully familiar with all of the properties and the weather and climatic conditions and the crop yield and production history and with the carrying capacity of cattle of said ranch, and for those reasons no one other than the defendant, Will H. Perry, would have any true and proper information relative to the grain and cattle capacity features of said ranch; that the defendant, Will H. Perry, represented to the plaintiff that he had been the owner and upon said ranch for some twenty years and knew all of its qualities and capacities and that asking or inquiring of others in the area would bear and yield no worthy information since no one other than said defendant had knowledge or experience sufficient to give any real and valid opinion."

Defendant caused two of the trust deeds securing the promissory notes, given as a part of the purchase price, to be foreclosed prior to the institution of this action. Notice of default on the third trust deed had been given prior thereto and defendant caused it to be foreclosed shortly thereafter. Defendant contends the action is based on an election by plaintiff to affirm the contract of purchase and that it cannot be maintained where the contract is no longer in force but has been wiped out of existence by foreclosure of the trust deeds securing the notes.

Defendant's point is premised on the erroneous theory "that the contract of sale and purchase had not been fully executed and was no longer in existence" when the case went to trial. He says "in order to elect to 'affirm the contract' and sue for damages under the 'out of pocket' rule, the plaintiff vendee must be in either of two positions: (1) he must have taken and paid for the property so that the contract is fully executed or (2) if the contract is still executory, the plaintiff must be in a position where he can be required to take and pay for the property with a reduction in the price equal to the fraud damages allowed."

The contract was that plaintiff pay defendant $100,000 and deliver to him three promissory notes for the balance of $600,000 secured by trust deeds, and that on such payment and delivery defendant would convey title to plaintiff. When plaintiff paid the $100,000 and delivered the notes and trust deeds and defendant conveyed title, the contract of purchase and sale was fully executed. Plaintiff's only obligation was then on the notes.

[6] "An executed contract is one, the object of which is fully performed." Civ. Code, § 1661. An executed contract may be defined as one in which title has passed; and an executory contract, as one in which title has not passed. Lam v. White, 204 Ky. 557, 264 S.W. 1113, 1115.

In Re Estate of Dwyer, 159 Cal. 664, 115 P. 235, Mrs. Dwyer, in March 1905, three months prior to her death, contracted in writing to sell a parcel of realty, called the Broadway property, to Carr for $100,000, she to make a conveyance thereof to Carr on or before May 13, 1905, on the latter's making certain cash payments and executing notes and a mortgage for the balance of the purchase price. Prior to April 27, 1905, Carr tendered Mrs. Dwyer the money, notes, and mortgage and demanded a conveyance of the property which Mrs. Dwyer refused to make. Holding that the contract was fully executed, the court stated (159 Cal. at pages 675, 676, 115 P. at page 240):

> "The contract of sale between Carr and testatrix was not executory merely at her death, but in equitable contemplation, as far as ownership of the land in Carr and the right of Mrs. Dwyer to the purchase price only are concerned, the contract had become an executed one some time before her death.
>
> "When a contract for sale of real property binding on the parties is executed, an equitable conversion is worked; the purchaser of the land is deemed the equitable owner thereof, and the seller is considered the owner of the purchase price. The equitable conversion thus deemed to exist from the time a valid contract of sale is entered into may or may not be absolute. Whether it is, or not, will depend upon whether the terms of the contract of sale are subsequently complied with. If there is no default in that respect, but, on the contrary (and dealing now with the contract involved here), the purchaser performs all the conditions precedent which under the contract entitle him to a conveyance on a given day, he will be deemed on that day to be the owner of the land and the seller to be the owner of the purchase money. * * * [I]t necessarily follows that Mrs. Dwyer had sold all her interest in the Broadway property on the thirteenth day of May, 1905, and her only right was to the balance of the purchase price in cash and the notes

> and mortgages. She had no interest in the Broadway property after that date. That interest had, by the performance of the contract on his part and under the doctrine of relation, completely vested in Carr."

The facts in Cincinnati, H. & D. R. Co. v. McKeen, 7 Cir., 64 F. 36, at page 45, as stated by the court, were these:

> "McKeen agreed to sell and deliver to Ives 11,160 shares of the capital stock of the Terre Haute & Indianapolis Railroad Company and 4,446 shares of the capital stock of the Terre Haute & Logansport Railroad Company, certificates for the latter shares and for 8,560 of the 11,160 shares to be delivered to Ives on the 4th of June, 1887, and certificates for the remaining 2,600 shares of the stock of the Terre Haute & Indianapolis Railroad Company to be delivered 30 days from that date. All these things were done by McKeen within the time limited by the written agreement.
>
> "In consideration of McKeen's agreement to sell and deliver these shares of the stock of both the Indiana corporations, Ives, on June 1, 1887, paid to McKeen $250,000 in cash, and agreed to pay to him on the 4th of June, 1887, the additional sum of $639,500, and to execute a note dated on that day for $669,150, payable six months after date, and bearing 6 per cent. interest, and providing for the sale and purchase of the above certificates of stock in the form, and upon the terms, usually adopted in cases of notes secured by collaterals, and to assign and transfer those certificates to McKeen as collateral security for the payment of the above note. All these things were done by Ives within the time limited by the contract."

The court held (at page 46):

> "It would seem, then, that, within the meaning of the general rule to which we have adverted, the contract between the parties was fully executed on the 4th day of June, 1887. In Sturges v. Crowninshield, 4 Wheat. 122, 197, Chief Justice Marshall said that 'a contract is an agreement in which a party undertakes to do, or not to do, a particular thing.' And in Fletcher v. Peck, 6 Cranch 87, 136, [3 L.Ed. 162], he said that 'an executory contract is one in which a party binds himself to do, or not to do, a particular thing;' and 'a contract executed is one in which the object of [the] contract is performed.' Each particular thing specified in the agreement of June 1, 1887, to be done by the respective parties was done on the 4th day of June, 1887; so that a suit instituted after that day to compel its specific performance could have been dismissed upon the sole ground that nothing remained to be done which its provisions required at the hands of either party. If neither party could have maintained a suit of that character, it is not perceived upon what ground the contract between them could be characterized as executory in respect to any of its provisions. It cannot be deemed to have been executory because of the nonpayment of the note for $669,150 prior to the commencement of this suit. The written agreement of June 1, 1887, so far as it related to the balance of the price of the stock sold to Ives, after crediting the cash payments of $250,000 and $639,500, required only the execution and delivery of his note for a specified amount, containing certain provisions, and to be secured by the stock to be delivered to McKeen as collateral."

Eatwell v. Beck, 41 Cal.2d 128, 257 P.2d 643, was an action to recover damages resulting from alleged false representations in the sale of a motel. The purchase price was $43,000. The plaintiffs paid $7,000 cash and the balance by assuming two encumbrances on which payments totaling $275 monthly were required; defendants Cummings were the holders of one of such encumbrances, on which the unpaid balance was some $22,225. After the action was filed the plaintiffs lost the property by foreclosure. Notwithstanding the fact that the property had been lost by foreclosure, it was held the plaintiffs would be entitled to allege and prove their "out-of-pocket" damage.

[7–9] The fact that plaintiff defaulted on his obligations on the notes does not preclude him from recovering damages for the fraud. It is well established that an action for damages for fraud is available to a vendee in default. Bagdasarian v. Gragnon, 31 Cal.2d 744, 192 P.2d 935; Pembrook v. Houston, 41 Cal.App. 54, 181 P. 828. On "the discovery of the vendor's fraud, the vendee need not continue performance but may properly withhold payments under the contract in an amount necessary to recoup the damages which he has suffered. In other words, because of the vendor's fraud, he may avoid the obligation stated by the contract and excuse what would otherwise be a default." Kent v. Clark, 20 Cal.2d 779, 783, 128 P.2d 868, 871, 142 A.L.R. 576. Williston says: "The fact that the defrauded party has broken the contract before discovery of the fraud will not deprive him of his right to damages for the fraud in inducing him to enter into it, although the contract has been terminated by the fraudulent party on account of the breach; nor will it prevent the exercise of his power of avoidance if the requisite restoration of the former status is possible," citing Bancroft v. Woodward, 183 Cal. 99, 190 P. 445, and Lubarsky v. Chavis, 99 Cal.App. 610, 279 P. 205. 5 Williston on Contracts, 4276, § 1526. See Annotation: 13 A.L.R.2d 1248.

Defendant asserts Dunphy v. Guaranty Bldg., etc., Ass'n, 11 Cal.App.2d 419, 53 P.2d 1036, is directly in point. In Dunphy the plaintiffs bought a lot, paid $700 down, and assumed an encumbrance. They executed another note and trust deed, and the first one was canceled. They made installment payments on the note and then defaulted, whereupon the trust deed was foreclosed and the property conveyed to a third party. The plaintiffs sued to quiet title, for damages for fraud, and for moneys had and received. The trial court granted a judgment of nonsuit which was affirmed. On review the court stated (11 Cal.App.2d at page 422, 53 P.2d at page 1038): "[T]he plaintiffs did not present sufficient evidence to authorize a judgment in their favor for damages. They did not rescind." This language alone would indicate that since the plaintiffs had elected to sue for damages they chose to enforce their right of redress for the fraud but failed in their proof. The court, however, went on to say that the plaintiffs did not live up to the terms of their contract, were in default for many installments due and payable on the note, and under such circumstances they were not entitled to sue for damages. Defendant concedes that in the light of other cases (Bagdasarian v. Gragnon, 31 Cal.2d 744, 192 P.2d 935) the language of the court may be too broad in its implication that the plaintiffs were not entitled to sue for damages simply because they were in default; but they argue that the decision was correct in light of the fact that the contract was no longer in existence.

The court in Dunphy was clearly in error in holding that the default of the vendees barred their suit for damages for fraud. It appears from the statement of the court that the evidence was insufficient to prove fraud and that the plaintiffs could not have prevailed in any case, whatever their choice of remedy. Whatever the correct view of the Dunphy case may be, the court made no statement whatever indicating that the decision was based on the fact that the trust deed had been foreclosed.

Defendant relies heavily on Olson v. Northern Pac. Ry. Co., 126 Minn. 229, 148 N.W. 67, L.R.A.1915F, 962, and West v. Walker, 181 Minn. 169, 231 N.W. 826, 74 A.L.R. 165. The Olson case had to do with an executory installment contract of sale. A Minnesota statute, M.S.A. § 559.21, provided that when a default was made in the conditions of any contract for the conveyance of real estate whereby the vendor had the right to terminate the same, he might do so by serving upon the purchaser a notice specifying the conditions in which the default had been made, and stating that such contract would terminate in 30 days after the service of such notice unless prior thereto the purchaser should comply with such conditions. The plaintiff and the defendant entered into an executory contract wherein the defendant agreed to sell to the plaintiff 320 acres of land, for which he agreed to pay $4,640, also the taxes thereafter, and to break and cultivate a portion of the land after the first year. One-tenth of the purchase price, or $464, was paid when the contract was delivered; and annually thereafter for ten years plaintiff was to pay $417 of the principal and the interest on the purchase price remaining unpaid. The plaintiff made no further payment of either principal, interest, or taxes, nor did he cultivate any part of the land. When there was past due and unpaid more than $2,000 on the contract, the defendant served on the plaintiff a statutory notice to terminate the same. The contract contained a provision that the vendee's default annulled and terminated the agreement if the vendor so elected, in which event the payments made were forfeited. The plaintiff did not by payment, or tender of the amount due, attempt to prevent the cancellation of the contract or the forfeiture of the one payment made, but instead, upon the twenty-ninth day after the service of this notice brought the action for the difference between the value of the land and the price agreed to be paid. It was held that a right of action for damages for fraud inducing the purchase of land on an executory contract did not survive the cancellation of the contract. The court stated (148 N.W. 68):

> "It cannot be that a person may enter a contract to buy property for a large sum to be thereafter paid, never make the payments agreed upon, suffer the other party to cancel the contract by reason of the default, and then sue and recover heavy damages for deceit inducing him to buy property which he never saw fit to accept or pay for. Before damages may be recovered for not receiving as good property as was bought, it must appear that the property was accepted so that there remains an obligation to pay the purchase price. Here the property is not taken, and there is now no obligation either to accept or pay for it."

In a vigorous dissent, with which we agree, it was said (148 N.W. 70, 71):

> "It is wholly inadmissible to read into the contract any right of cancellation on defendant's part for plaintiff's failure to comply with the terms thereof if tainted with fraud, so as to cut off the remedy sought, or any authority to retain plaintiff's money obtained by fraud; nor should use of the cancellation statute be allowed for such purpose. Defendant had the right, upon plaintiff's default in making deferred payments, to sever contractual relations with him, for the contract so provided; but it could not thus eliminate responsibility for its previous fraudulent conduct. * * *
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> "The result reached in the majority opinion comes largely from supposed necessity of distinguishing here between actions based on affirmance and disaffirmance. While it may be said that technically plaintiff affirmed the contract by bringing this action, he should not be deemed thereby to have affirmed the fraud, which is the essence of his complaint. * * *
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> "* * * Did plaintiff lose his money through defendant's fraud, which induced him to enter into the contract and to part with his money, or through his intervening failure to make further payments after discovering the cheat? But for the latter, followed by cancellation, there could be no doubt whatever that the loss was attributable to the former. Was he then obliged, in order to preserve the continuity of this first cause, and thus lay the foundation for this action, to continue payments and be charged with all the unfavorable inferences which, later, might be drawn from

> such conduct, if he attempted to assert his rights by action, to be met, furthermore, at the end of the period of payment, and after paying $1,440 more than he should, with the contention that his right of action, apparently valid, was then barred by limitations? No one should be compelled so to do as a condition precedent to recovery of money fraudulently obtained, no matter what the form of action may be."

Olson v. Northern Pac. Ry. Co., supra, 126 Minn. 229, 148 N.W. 67, was followed by West v. Walker, 181 Minn. 169, 231 N.W. 826. The court in West v. Walker gave no reasons for its conclusions, merely citing the Olson case as authority. Williston says that in West v. Walker "a vendor exercised a statutory right to cancel a land contract. It was held, it would seem erroneously, that the vendee could not recover damages for fraud." 5 Williston on Contracts, 4268, footnote. Also see criticism of West v. Walker and Olson v. Northern Pac. Ry. Co. in 5 Tulane L.Rev. 145, 30 Colum.L.Rev. 1205, 74 A.L.R. 173, and 120 A.L.R. 1158.

[10–12] One induced by fraud to enter into a contract has an election of remedies in that he may rescind, or may recover damages for the fraud, but cannot do both. The rule is so familiar as not to require the citation of authority. The correct meaning of the rule is that where two or more inconsistent remedies are available to an injured party, an effectual choice of one precludes a later resort to another. 18 Am.Jur. 129, § 3. An action to recover damages for fraud in inducing a contract is an action in tort for deceit, not an action on the contract. "It is a principle of universal application that a right of action for damages for a fraud arises immediately upon the consummation of the fraud, which may arise in a contract executed or executory, and which may be asserted at once upon the discovery. The action is not upon the contract, but is collateral to it, and is on the case [citation], and one induced by fraud to enter into a contract for the purchase of real estate is not required to perform on his part as a condition to maintaining his action for deceit. [Citations.] In many cases it would be unjust to hold that the party defrauded shall lose the advantage which attaches to a tort action, unless he makes further venture in a transaction into which he has been induced by fraud to enter." Paolini v. Sulprizio, 201 Cal. 683, 685, 258 P. 380, 381.

[13–15] The proposition that an action for damages for fraud affirms the contract is a false quantity in the case. That is true only where there is a contract in existence to affirm. After a fraudulent vendor has foreclosed a trust deed received and accepted as part payment of the purchase price, the elimination of the vendee's obligation on the trust deed note is immaterial so long as there remains the tort of deceit and uncompensated damage therefrom. The defrauded vendee does not lose his cause of action for the tort because of the foreclosure of the trust deed. The contract of purchase was not wiped out of existence by the foreclosures, as defendant argues. It had been wholly executed. Defendant ignores the fact that the obligations on the notes were fully satisfied on foreclosure of the trust deeds and that he received the property. When defendant caused sales to be made under the powers of sale in the trust deeds, plaintiff's obligations on the notes were discharged by operation of law since the sales and the statute precluding a deficiency judgment extinguished plaintiff's obligations on the notes. Code Civ.Proc. § 580b. Although plaintiff lost the property by the foreclosures, the tort and its obligations remained. The wrong of fraud is not breach of contract; it is tort. It is an injury entirely apart from that which follows breach of contract. The cause of action arises from the tort, committed when the contract is induced, and not at all from the contract. Plaintiff lost his money because of defendant's fraud which induced him to purchase the ranch, not because of his failure to make all the payments on the trust deed notes, which failure the court found was caused by the fraud. If we assume, as defendant argues, that by bringing this action for damages plaintiff affirmed the contract of sale, he should not thereby be deemed to have affirmed the fraud which defendant perpetrated. The wrong arose from the original transaction. If, as defendant claims, plaintiff should have paid the trust deed notes, this would mean that if he had done so with knowledge of the fraud he would have been met with the claim that he had ratified the transaction and lost his right to sue for damages.

The court found that plaintiff delivered to defendants cash and securities of the fair and reasonable value of $700,000, being the purchase price, and that in exchange plaintiff received title to the ranch of the reasonable market value of $530,000 at that time; that the difference between the value of the ranch at the time of sale and the purchase price paid, because of the false representations, was $170,000. This amount was carried into the judgment. Defendant asserts the finding that plaintiff parted with cash and securities of the fair and reasonable value of $700,000 is contrary to the evidence.

Plaintiff paid $100,000 cash at the time of the sale and had paid $59,000 on the notes before he defaulted. The argument is that the trial court, in finding that plaintiff parted with cash and securities of the value of $170,000, included the notes and trust deeds at their full face value; that because the notes were valueless at the time the action was commenced, the obligations on the notes were terminated since a deficiency judgment could not be obtained after foreclosure of a purchase money trust deed. Code Civ.Proc. § 580b. Accordingly, says defendant, the value of that which plaintiff gave up consisted only of the total amount of cash paid by him, $159,000, plus the value of the land which he lost in the foreclosures and which the court found to be $530,000; that the sum of these figures is $689,000, and the difference between that amount and $530,000, the value of the land as found, is $159,000 rather than $170,000, found as damages. He says $159,000 is the maximum which should be allowed as damages under the "out-of-pocket" rule, Civil Code, § 3343, except for the matter of additional damage. The court did not find the value of the land which plaintiff lost in the foreclosures to be $530,00, as stated by defendant. It found the value of the land as of the date of the sale to plaintiff was $530,000.[4]

[16] Section 3343, which prescribes the measure of damages in fraud cases, provides that one who has been defrauded is entitled to recover "the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received, together with any additional damage arising from the particular transaction." This rule is known as the "out-of-pocket" loss rule. It was enacted to provide a uniform rule in all cases of fraud and it is the exclusive measure of damages. Bagdasarian v. Gragnon, 31 Cal.2d 744, 192 P.2d 935.

[17] Bagdasarian v. Gragnon, supra, 31 Cal.2d 744, 192 P.2d 935, is controlling. In that case the plaintiff, in June 1944, sold a farm to the defendants for $10,000 cash, a note for $34,000 payable in installments and secured by a deed of trust on the real property, and a note for $24,000 payable on or before December 1, 1944, and secured by a crop and chattel mortgage. The defendants, after paying $14,960.15 on the $24,000 note, defaulted on the balance. The plaintiff brought the suit to foreclose the crop and chattel mortgage. The defendants cross-complained for damages, alleging fraud in inducing the sale. The trial court found for the defendants on their cross-complaint. In applying the "out-of-pocket" rule on review, the court said that $68,000 was the price paid for the real property, crops, and equipment. The $68,000 was made up of the $10,000 cash, the $34,000 note, and the $24,000 note which was in default. In reversing, the Supreme

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[4] There was no evidence that the value of the land at the time action was commenced was less than $530,000, its value, as found by the court, at the time of the sale.

Court instructed the trial court to deduct from the $68,000 the value of that which the defendants received. Thus it was expressly held that in determining the actual value of that with which the defrauded person parted, the notes which were given as part of the purchase price were to be taken at their full face value even though the buyer was in default on one of the notes.

[18] Under the "out-of-pocket" rule the damages are to be computed as of the date of the fraudulent transaction. Garstang v. Skinner, 165 Cal. 721, 726, 134 P. 329; Whitney v. Lynch, 222 Mass. 112, 113, 109 N.E. 826, 827; Gunderson v. Havana-Clyde Min. Co., 22 N.D. 329, 133 N.W. 554, 555; Smith v. Middle States Utilities Co., 224 Iowa 151, 275 N.W. 158, 162; Peters v. Stroudsburg, 348 Pa. 451, 35 A.2d 341, 343.

In Hancock v. Williams, 99 Cal.App.2d 80, 221 P.2d 129, the defendants sold the plaintiffs realty for $50,000. The plaintiffs paid $8,000 cash, assumed two trust deeds, and executed a third trust deed to the defendants. Shortly after the purchase the plaintiffs paid the second trust deed at a discount of $3,500. It was contended that $3,500 should be deducted from the damages awarded. The argument was that the plaintiffs never parted with the $3,500 and were never "out of pocket" in that amount. The court answered (99 Cal.App.2d at page 82, 221 P.2d at page 131):

> "The measure of damages set forth in this statute, referred to as the '"out-of-pocket loss" rule', is the rule in this state. [Citation.] It is also the rule that damages are to be assessed as of the date of the fraudulent transaction. [Citations.]
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> "The plaintiffs were clearly obligated to pay the full amount of the $11,500 trust deed. The mere fact that they were able to obtain a reduction in the amount of the indebtedness does not mean that the consideration paid by the plaintiff for the property was reduced by that amount. Defendants should not be permitted to be unjustly enriched after the consummation of the fraud by them."

The court found that by reason of the false representations plaintiff was unable to make the payments on the trust deeds. The fact that because of defendant's tortious conduct plaintiff was unable to make the payments will not be credited to defendant's benefit in considering the question of damages. It has been held that a vendor will not be permitted to declare a forfeiture for default where the default is directly attributable to his fraud in inducing the sale. Buckingham v. Thompson, Tex. Civ.App., 135 S.W. 652, 656.

[19] The court found plaintiff sustained $30,400 additional damage resulting from the purchase of the ranch in reliance on defendant's misrepresentations and awarded him that amount. Defendant asserts the finding is defective in that it fails to show what items were allowed and to what extent. The point may not be considered. Defendant did not, in the trial court, object to the finding or seek a breakdown of the $30,400. "The losing party should not be permitted to criticize the findings as ambiguous when he has made no objection to them, either before they were signed, or later on motion for a new trial." Alles v. Hipp, 108 Cal.App.2d 730, 733, 239 P.2d 451, 454; Perry v. Manning, 109 Cal.App.2d 557, 561, 241 P.2d 43.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

171 Cal.App.2d 371

PEOPLE of the State of California, Plaintiff and Respondent,

v.

James Franklin YANCY et al., Defendants.

James Walter White, Defendant and Appellant.

Cr. 1405.

District Court of Appeal, Fourth District, California.

June 16, 1959.

Rehearing Denied July 14, 1959.

Hearing Denied Aug. 12, 1959.

Prosecution resulting in a judgment of conviction by the Superior Court of San Diego County, Joe L. Shell, J., of assault by means of force likely to produce great bodily injury and from an order denying motion for new trial. The District Court of Appeal, Mussell, J., held that a jury question was presented as to whether evidence was sufficient to sustain conviction but a jury question was also presented under evidence as to whether acts and conduct of defendant amounted to a simple assault and it was reversible error to refuse to submit question to jury.

Judgment and order reversed.

1. Assault and Battery ⚷55

Under statute making it a crime to assault by means of force likely to produce great bodily injury, gravamen of crime is the likelihood that the force applied or attempted to be applied will result in great bodily injury and evidence of an actual blow is not necessary but it is requisite that proof be made of an attempt to beat another with a deadly weapon or other instrument not ordinarily defined as a deadly weapon, or by means of a force likely to produce great bodily injury. West's Ann. Pen.Code, § 245.

2. Assault and Battery ⚷95

Evidence presented a jury question as to defendant's guilt of assault by means of force likely to produce great bodily injury. West's Ann.Pen.Code, § 245.

3. Criminal Law ⚷814(2)

Court must instruct jury on every material question upon which there is any evidence deserving of any consideration, and fact that the evidence may not be of a character to inspire belief does not authorize refusal of an instruction based thereon.

4. Assault and Battery ⚷95

In prosecution for assault by means of force likely to produce great bodily harm, evidence was sufficient to present a jury question as to whether defendant was guilty of the lesser offense of simple assault. West's Ann.Pen.Code, §§ 240, 245.

5. Criminal Law ⚷795(1), 1173(2)

In prosecution for assault with means of force likely to produce great bodily harm, where evidence was sufficient to present a jury question as to whether defendant was guilty of lesser offense of simple assault, it was reversible error to refuse to submit to jury requested instruction that jury could find defendant guilty of lesser offense of simple assault. West's Ann.Pen. Code, §§ 240, 245.

◆

James Walter White, in pro. per. and Gostin & Katz, San Diego, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and David B. Allen, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Appellant James Walter White, James Franklin Yancy and Richard Jackson were jointly charged with the crime of assault by means of force likely to produce great bodily injury (Pen.Code, § 245). In a second count of the information they were charged with the crime of rescue in violation of Penal Code, § 4550, in that they unlawfully rescued one Leon Atkins, who was then a prisoner in the lawful custody of one Richard L. Eckert. It was also alleged that appellant had been previously convicted of a felony. Appellant pleaded not guilty to the charges and admitted the prior conviction. He was tried jointly with two other defendants and a jury returned verdicts finding Jackson not guilty on both counts, Yancy guilty of assault by means of force likely to produce great bodily injury and of the crime of rescue as charged. Appellant was found guilty as charged in count one of the information and not guilty as charged in count two. His application for probation and his motion for new trial were denied and he was sentenced to imprisonment in the state prison. He appeals from the judgment of conviction and from the order denying his motion for a new trial, claiming that the evidence was insufficient to sustain his conviction and that the court erred in refusing to give his requested instruction as to the lesser offense of simple assault.

On May 2, 1958, at about 11:00 p. m., Richard L. Eckert, a policeman in the San Diego Police Department, went to a parking lot in San Diego and was asked by a store owner to help him clear the lot of certain parked cars. The officer asked one David Atkins for his driver's license and after handing it to the officer, Atkins snatched it back and fled. The officer was unable to catch him and returned to the lot, where he noticed two fellows scuffling and one of them was using foul language. One of these (Leon Atkins) was placed under arrest for disorderly conduct and the officer put a "neck lock" on him when he tried to get away. At that time officer Williams joined Eckert and they started for the police car. A mixed crowd, most of them under the age of twenty-five years, grouped around the officers and they were therefore unable to move toward the car. Williams went to the patrol car and summoned assistance and, while he was gone, someone in the crowd said, "That is my cousin, let him go." Immediately thereafter officer Eckert was struck on the left side of his head and stunned. He was again hit and both he and Atkins, whom the officer was holding by the neck, fell down together. Eckert then felt "a couple more" blows to his head and got up with Atkins still in his grip. Atkins said, "Well, I have had enough", whereupon he was released. When Eckert turned to see who had been hitting him, he was struck again in the face and knocked down. While on the ground he felt a number of sharp blows. The crowd then scattered. When officer Williams returned from the patrol car he observed Eckert's clothes were dirty and "messed up" and that there was blood in the vicinity of his mouth. At about that time Eckert again passed out and was taken to a hospital, where he spent two days. His injuries consisted of a concussion, contusions about his head and all over his body, and the loss of five teeth.

There was testimony that defendant Yancy placed his hands on Eckert's shoulder and hit him; that Jackson kicked and beat him; and that appellant White kicked him once. However, it was not clearly established when and where this kick struck the officer, if at all. Appellant testified that he did not hit or kick any policeman. He admitted he moved in with the crowd around the officer and that the officer and Atkins fell in front of him.

[1] Appellant's contention that the evidence is insufficient to sustain his conviction is without merit. In People v. McCaffrey, 118 Cal.App.2d 611, 618, 258 P.2d 557, it is said that the gravamen of the crime defined by section 245 of the Penal Code is the likelihood that the force applied or attempted to be applied will result in great bodily injury; that to make one guilty of a violation of said section, evidence of an actual blow is not necessary; but it is requisite that proof be made of an attempt to beat another (1) with a deadly weapon or other instrument not ordinarily defined as a deadly weapon, or (2) by means or with a force likely to produce great bodily injury. In People v. Hahn, 147 Cal.App.2d 308, 311, 305 P.2d 192, it was held that the degree of force used is not as important as the manner in which it is used; that the measure to be applied to the force is whether it was likely to cause serious bodily injury; that it is not to be measured by the extent of the injuries suffered by the victim; that a conviction under the section may be had where the defendant used only his fists if the circumstances of the assault and the manner of its execution warrant the jury in finding

that the force used was likely to produce great bodily injury.

[2] The evidence in the instant case is ample to support appellant's conviction of a violation of Penal Code, § 245. However, the record shows that appellant White offered and the trial court refused to give the following instruction:

> "You may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, (or of an attempt to commit the offense,) if, in your judgment, the evidence supports such a verdict under my instructions.
>
> "To enable you to apply the foregoing instruction, if your findings of fact require you to do so, I instruct you that the offense of assault by means of force likely to produce great bodily injury, of which the defendant is charged in (Count 1) the information, necessarily include the crime(s) of assault (or simple assault.)"

Appellant argues that the court erred in refusing to give this instruction and we are in accord with this argument.

[3] In People v. Carmen, 36 Cal.2d 768, 773, 228 P.2d 281, it was held that it is elementary that the court should instruct the jury upon every material question upon which there is any evidence deserving of any consideration whatever; that the fact that the evidence may not be of a character to inspire belief does not authorize the refusal of an instruction based thereon; that that is a question within the exclusive province of the jury; that however incredible the testimony of the defendant may be he is entitled to an instruction based upon the hypothesis that it is entirely true; that it is the duty of the court to instruct the jury in regard to any included offense which the evidence tends to prove; and that where there is any evidence from which a reasonable inference may be drawn that the crime of which the defendant was convicted was of a lesser degree it is prejudicial error to withdraw from the jury the consideration of such evidence and confine the instructions to the crime charged.

In People v. Spreckels, 125 Cal.App.2d 507, 270 P.2d 513, the defendant was charged with the crime of assault by means of force likely to produce great bodily injury, a felony, and a jury found him guilty of simple assault, a lesser offense necessarily included within the crime charged. He contended on appeal that the Superior Court had no jurisdiction to convict him of a misdemeanor. In that case the defendant called the victim vile names, grabbed her by the right arm, knocked her down, removed one of her shoes or slippers and struck her with it several times. It was there held that there was ample evidence to support the verdict and judgment of conviction of simple assault; that the offense charged was one necessarily included within the offense of assault; and that an assault is an unlawful attempt coupled with a present ability to commit a violent injury upon the person of another. Pen.Code, § 240.

[4, 5] If the jury in the case at bar had found the appellant guilty of simple assault, we could not here hold as a matter of law that the evidence did not support a conviction of such offense. There is evidence in the instant case that appellant either kicked at or kicked the officer, but no direct evidence when, in relation to the first attack, or that this act caused the injuries or any of them received by the victim or that the appellant herein was aiding and abetting his codefendants. While the evidence shows that the victim received serious injuries and the jury could and did find that appellant was guilty of the offense charged, yet the question of whether his acts and conduct amounted to simple assault should have been submitted to the jury for its consideration.

In People v. McCaffrey, supra, 118 Cal.App.2d 611, at page 617, 258 P.2d 557 the court held that whether the blow of a fist or the kick of a shod foot was of such force as was likely to produce great bodily injury was a question of fact for the jury.

In the instant case the question of whether appellant's acts and conduct amounted to simple assault was likewise a question of fact for the jury and it was reversible error to refuse to submit this question to the jury under the circumstances shown by the record.

Judgment and order reversed.

GRIFFIN, P. J., and SHEPARD, J., concur.

171 Cal.App.2d 286

Floy M. MIDDLECOFF, Plaintiff, Cross-Defendant and Respondent,

v.

Robert F. MIDDLECOFF, Defendant, Cross-Complainant and Appellant.

Civ. 18071.

District Court of Appeal, First District, Division 1, California.

June 12, 1959.

Action by wife for separate maintenance, wherein husband by his guardian filed cross complaint for annulment of marriage. The husband appealed from portion of annulment decree awarding money and property to wife and from order awarding attorney's fees and costs to enable her to defend against such appeal, and from an order of the Superior Court, City and County of San Francisco, Orla St. Clair, J., awarding wife temporary alimony pending such appeals and attorney's fees and costs on second appeal, the husband appealed. The District Court of Appeal, Bray, P. J., held, inter alia, that wife was entitled to temporary alimony pending appeals by husband from decree and order in proceeding involving annulment of marriage, though portion of decree annulling marriage was not challenged.

Order affirmed.

1. Marriage 🔑62, 66

Decision of reviewing court affirming allowance of attorney's fees and costs to enable wife to defend appeal by husband from portions of annulment decree awarding wife certain realty and cash for services rendered during marriage established wife's right to attorney's fees and costs upon any appeal taken by husband in the matter, and fact that wife received attorney's fees and costs for her defense of appeal by husband from portions of annulment decree did not bar allowance of attorney's fees and costs to enable wife to defend against appeal by husband from order allowing attorney's fees and costs for defense against first appeal.

2. Marriage 🔑62

Where grounds alleged by husband for annulment of marriage indicate that marriage is at most merely voidable, during pendency of action by husband for annulment, wife is entitled to be treated as the wife and is properly awarded temporary alimony pending outcome of such litigation.

3. Marriage 🔑62, 67

Decree annulling marriage has the effect of declaring marriage a nullity ab initio, and hence permanent alimony may not be allowed where annulment decree is rendered, since all ground for a claim of support disappears upon rendition of such decree.

4. Marriage 🔑62

Trial court loses jurisdiction to grant permanent support upon rendition of a decree annulling marriage, but court's power to grant alimony pendente lite does not terminate until annulment decree becomes final.

5. Marriage 🔑66

Where husband appealed from portions of annulment decree awarding property and money to wife, though neither party challenged portion of decree annulling marriage, annulment did not thereby become final and trial court did not lose jurisdiction to award wife further temporary alimony pending appeal.

6. Marriage ⚷62

Wife has inherent right to alimony pendente lite in annulment cases, in absence of statute directly authorizing allowance of such alimony.

7. Marriage ⚷62, 66

Awards for suit money to enable wife to defend against appeal by husband from order allowing wife attorney's fees and costs to defend against appeal by husband from portion of annulment decree and award of temporary alimony pending such appeals rested in the sound discretion of trial court and could be set aside only for abuse of discretion.

8. Marriage ⚷62

Ordering husband to pay $175 per month for support of wife pending appeals by husband from portion of annulment decree awarding money and property to wife and from order allowing attorney's fees and costs to enable wife to defend against such appeal, and $1,000 attorney's fees and $300 costs to enable wife to defend against appeal from order allowing attorney's fees and costs on first appeal was not abuse of discretion.

9. Mental Health ⚷512

Where incompetent husband appealed from portion of annulment decree awarding money and property to wife and from order awarding wife attorney's fees and costs to enable her to defend against such appeal and wife was thereafter awarded temporary alimony pending such appeals and attorney's fees and costs on second appeal, husband's guardian was properly required to pay such awards for alimony pendente lite and attorney's fees and costs, not as an individual but solely in his capacity as guardian.

Tudor Gairdner, Los Angeles, for appellant.

Molly H. Minudri, San Francisco, for respondent.

BRAY, Presiding Justice.

Defendant and his guardian were ordered to pay plaintiff $175 per month support pending the determination of two appeals hereafter described, and $1,000 attorney's fees and $300 costs on the second appeal. Defendant appeals from the order.

Questions Presented.

1. Plaintiff's right to attorney's fees and costs.

2. Her right to alimony pendent lite.

3. Did the court abuse its discretion in the amounts awarded?

4. Was the order requiring the guardian to pay proper?

Record.

This is the third appeal taken by the husband in this merry-go-round of litigation. The parties were married February 25, 1939. Prior to and during the marriage and up to the present time, the husband was and is an incompetent person as declared by the superior court. Henry Hubbard Middlecoff, his brother, was appointed guardian ad litem herein. Heretofore plaintiff sued defendant for separate maintenance; the husband by his guardian ad litem answered and cross-complained for an annulment. The trial court granted the annulment and awarded plaintiff wife $7,500 as compensation for her services rendered during the marriage, title to certain real property held in joint tenancy and attorney's fees and costs. The husband appealed from the awards to the wife. (Neither party challenged the annulment.) The husband's appeal was successful. Middlecoff v. Middlecoff, 160 Cal.App.2d 22, 324 P.2d 669. While that appeal was pending, the wife, in order to defend against it, moved the trial court for fees and costs. From the order granting the same, defendant appealed. In Middlecoff v. Middlecoff, 1959, 167 Cal.App.2d 698, 335 P.2d 234, this court affirmed the order. In the meantime plaintiff applied to the trial court for alimony pending both appeals and for attorney's fees and costs on the second appeal. This appeal is from the order granting the same.[1]

1. Attorney's Fees and Costs.

[1] All the basic contentions made on this subject were made and determined against defendant on the appeal in 167 Cal.App.2d 698, 335 P.2d 234, supra. We see no reason for going over them again here, nor do we see any reason why the fact that plaintiff received attorney's fees and costs for her defense of the first appeal should bar her from receiving them to defend against the second appeal. In fact, our decision on that appeal clearly establishes her right to attorney's fees and costs upon any appeals taken by defendant in this matter.

2. Alimony Pendente Lite.

[2–6] At the time the second appeal was taken by defendant the order granting alimony pendente lite had not been made and hence was not considered on that appeal. Most of the contentions that plaintiff is not entitled to alimony pending the appeals are the same as those made concerning the award to plaintiff of attorney's fees and costs, and as stated, were decided by this court adversely to defendant. The reasoning of the court in answer thereto applies to the granting of alimony pending the appeals. As stated by defendant in his brief, during the pendency of an action by a husband to annul a marriage, and where, from the grounds alleged, it appears that the marriage is at most merely voidable, the wife is entitled to be treated as the wife and is properly awarded temporary alimony pending the outcome of the litigation (Hite v. Hite, 124 Cal. 389, 57 P. 227, 45 L.R.A. 793; Allen v. Superior Court, 133 Cal. 504, 65 P. 977; Dunphy v. Dunphy, 161 Cal. 87, 118 P. 445), but no permanent alimony may be allowed where a decree annulling the marriage is rendered, since the effect of such decree is to declare the marriage a nullity as of the date it was contracted, and in such cases all ground for a claim of support disappears. Millar v. Millar, 175 Cal. 797, 167 P. 394, L.R.A.1918B, 415. Defendant contends that as the decree of annulment here would under the above authority deprive plaintiff of the right to permanent support it automatically follows that it likewise deprives her of the right to support pending the appeal. While it is true that when a trial court grants a decree of annulment the court loses jurisdiction to grant permanent support, its power to grant alimony pendente lite does not terminate until the decree becomes *final*. The action was still pending until long after the awards were made. Defendant's contention that, as on his appeal from the decree he appealed from only those portions of the decree awarding the wife money and property and did not challenge the annulment, nor did she, the annulment became final and the court had no jurisdiction to award plaintiff any further temporary alimony, is answered by our decision in 167 Cal.App.2d 698, 335 P.2d 234, 237, supra, where we held: "By appealing from only a portion of the decree, and by not challenging the annulment, the annulment did not become final. The annulment decree was not divisible into two separate decrees, one for annulment and the other awarding the wife money and property. The money and property awards were an indivisible part of the single judgment, so that an appeal from any part of it necessarily was an appeal from the total judgment." See also Rediker v. Rediker, 35 Cal.2d 796, 798, 221 P.2d 1, 20 A.L.R.2d 1152. While there appears to be no code section directly authorizing alimony pendente lite in annulment cases, the wife's right thereto has been recognized in California as an inherent right. In Dunphy v. Dunphy, supra, 161 Cal. 87, 118 P. 445, the court at some length discussed the subject, pointing out that in

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[1] Heretofore plaintiff moved this court for a stay of proceedings on appeal until such time as defendant paid counsel fees and costs. The court granted the motion until such time as defendant paid $375 on account of counsel fees and $200 on account of costs. Thereafter, this court, on being advised that such sums had been paid, terminated the stay of proceedings.

Chief Justice Beatty's concurring opinion in Hite v. Hite, supra, 124 Cal. 389, 57 P. 227, 45 L.R.A. 793, he said concerning an annulment action brought by a husband (161 Cal. at page 90, 118 P. at page 446): "* * * the granting of alimony *pendente lite* would be proper, because a formal marriage is alleged, and will remain a lawful and established marriage, in the absence of affirmative proof by him of the existence of some fact or facts which will invalidate it." The court, quoting from Higgins v. Sharp, 164 N.Y. 4, 8, 58 N.E. 9, after referring to the fact that it is generally held in jurisdictions which do not provide for alimony pendente lite in annulment cases, but do have statutes providing for it in divorce cases, and that alimony will nevertheless be granted in annulment cases, said (161 Cal. at pages 90–91, 118 P. at page 447): "'The general jurisdiction conferred by the statute to entertain such actions carries with it, by implication, every incidental power necessary for its proper exercise. When a statute gives the court jurisdiction over a class of actions, it is not necessary that all the powers of the court, or all the details of the procedure and practice, should be specially enumerated. For the purpose of administering justice in such cases the court may * * * exercise such incidental powers as are usual or necessary in such cases. The power to allow alimony and counsel fees to the wife, in order to enable her to live pending the action, and to present her defense, if she has one, must be regarded as incidental and necessary in all matrimonial actions. Without such power the rights of the woman, in many cases, could not be adequately protected. It seems to us, therefore, that actions to annul a marriage are governed, with respect to alimony and counsel fees, by the same principles as all other actions for divorce. When the court was vested with jurisdiction in such cases the incidental power to guard and protect the rights of the wife, which had always been regarded as a part of the jurisdiction, necessarily followed and attached upon the plainest principles of reason and justice.' [Citations.]" The court said further (161 Cal. at page 92, 118 P. at page 447): "The same considerations which make such power, pending appeal from the judgment of the trial court, essential to the adequate protection of the wife, in an ordinary action for divorce, are present in an action by the husband for annulment of the marriage; and the reasons given by the courts for holding that the power exists in the annulment action, independent of express statutory provision, warrant the exercise of the power, as long as it is essential to enable the wife to make such defense in the annulment action as she may have, including necessarily such rights as are given her by the law to have the action of the trial court reviewed on appeal. The right to make such an allowance to the wife pending appeal has been upheld in some of the cases already cited, and, as already said, the right to make the allowance before judgment once being established, we can see no sound reason for denying the power, so far as it may be essential to the wife's prosecution of the appeal given her by law from such judgment. For all the purposes of the annulment action, so long as the action is pending, to use the language of Brinkley v. Brinkley, 50 N.Y. [184,] 186, 10 Am.Rep. 460, 'the relation actually exists upon which the right to alimony depends.'"

In Rudnick v. Rudnick, 131 Cal.App.2d 227, 240, 280 P.2d 96, the court apparently approved an allowance of support to the wife pending an appeal from a decree of annulment. In Sefton v. Sefton, 45 Cal.2d 872, at page 875, 291 P.2d 439, at page 441, an action to enforce alimony provisions of a property settlement agreement, the court stated that the wife in an annulment action may be awarded temporary alimony.

There is nothing in Allen v. Superior Court, supra, 133 Cal. 504, 65 P. 977, to the contrary of the rule we have asserted. There the trial court in an annulment action, brought by the husband, made an order allowing her alimony and suit money. Later, upon a citation of the husband for failure to comply with the order, the trial court found that the failure to pay was due to the husband's inability to pay and the proceeding was dismissed. However, the court made an order staying all proceedings in the action to annul the marriage until the husband complied with the order to pay both counsel fees and costs. On a petition for writ of mandate to compel the superior court to proceed to trial, the Supreme Court said (133 Cal. at page 505, 65 P. at page 978): "It is conceded that he [the husband] is unable to pay anything, and such being the case, he should not be debarred from a trial until he has provided for his wife's support." It then held that the stay was proper as to suit money. Nowhere in the opinion is any question raised as to the right of the trial court in an annulment proceeding to provide alimony for the wife. The only question was whether the trial court could stay proceedings where the husband was unable to pay the order made.

3. Amounts.

[7] As we pointed out in 167 Cal.App.2d 698, 335 P.2d 234, supra, awards for suit money rest in the sound discretion of the trial court and may be set aside only for an abuse of discretion. There we held that an award to the wife of $1,500 attorney's fees and $300 costs for the original appeal did not constitute an abuse of discretion by the trial court. Awards for temporary alimony are likewise in the discretion of the trial court.

[8] What we said in 167 Cal.App.2d 698, 335 P.2d 234, 239, supra, applies here: "The evidence shows that the husband either has in possession or has access to substantial financial resources, and that the wife is in necessitous circumstances. Obviously, the award here attacked was a reasonable one."

It should be pointed out that plaintiff's attorney on this appeal is not only protecting the award of attorney's fees but the award of temporary alimony as well.

4. Payment By Guardian.

[9] Defendant's contention in this respect was answered in 167 Cal.App.2d at page 706, 335 P.2d at page 239, supra: "The husband also objects to the fact that the trial court in its order here under attack directed not only the husband but also his guardian to pay the fees and costs awarded. The award was not directed against the guardian as an individual but solely against him in his capacity as guardian. Such an award was proper. * * *. Thus, the court committed no error in this respect."

The order is affirmed.

FRED B. WOOD and TOBRINER, JJ., concur.

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171 Cal.App.2d 178

PEOPLE of the State of California, Plaintiff and Respondent,
v.
Frank McMURRAY, Defendant and Appellant.
Cr. 6520.

District Court of Appeal, Second District, Division 3, California.
June 8, 1959.
Hearing Denied Aug. 5, 1959.

Defendant was convicted in the Superior Court of Los Angeles County, Mark Brandler, J., of illegally possessing heroin, and he appealed. The District Court of Appeal, Vallée, J., held that if objection to admission of evidence is legally well taken it should be sustained and, if not, it should be overruled, and that basing ruling as to inadmissibility of evidence on fact that defendant had right of appeal and that People did not have such right was highly improper and erroneous; but held that since evidence was inadmissible, error in basing ruling, in part, on such ground, would not require reversal.

Affirmed.

1. Witnesses 🔑216

Disclosure is required (1) where informer participated in crime with which defendant is charged, (2) where he took no part in crime but was eyewitness, (3) where informer's communication was only justification for action of police and informer did nothing more than give police information leading to arrest made without warrant and alleged to have been unlawful, and (4) where, in view of evidence, informer would be material witness on issue of guilt and nondisclosure of his identity would deprive defendant of fair trial; but where arrest is valid apart from information received from informer, latter's identity need not be revealed.

2. Witnesses ⚷216

It is not necessary to reveal identity of informer who merely pointed finger of suspicion at defendant, whose arrest was based on reasonable cause other than information received from informer.

3. Arrest ⚷63(4)

A peace officer may make an arrest without a warrant when he has reasonable cause for believing person arrested to have committed felony. West's Ann.Pen.Code, § 836.

4. Arrest ⚷63(4)

An arrest without a warrant is not unreasonable if officer has reasonable cause to believe person is carrying contraband; and "reasonable cause" is suspicion founded on circumstances sufficiently strong to warrant reasonable man in belief that charge is true. West's Ann.Pen.Code, § 836.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable Cause".

5. Arrest ⚷63(4)

Reasonable cause to justify arrest may consist of information obtained from others and is not limited to evidence that would be admissible at trial of issue of guilt.

6. Arrest ⚷63(4)

When person who is approached by officer engages in furtive conduct, officer may well be justified in apprehending him in view of officer's prior information and his knowledge of person's background.

7. Arrest ⚷63(4)

Under circumstances disclosed, in prosecution for illegally possessing heroin, officer had reasonable cause to believe that defendant was committing public offense, and arrest without warrant was not unreasonable. West's Ann.Pen.Code, § 836.

8. Criminal Law ⚷695½, 1168(1)

If objection to admission of evidence is legally well taken it should be sustained and, if not, it should be overruled; and basing ruling as to inadmissibility of evidence on fact that defendant had right of appeal and that people did not have such right was highly improper and erroneous; but where evidence was inadmissible, error in placing ruling, in part, on that ground, would not require reversal.

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Wm. H. Neblett, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

In a nonjury trial defendant was convicted of possessing heroin. Health & Saf. Code, § 11500. He was sentenced to state prison. He appeals from the judgment and the order denying his motion for a new trial. In support of his appeal he makes and variously repeats a number of contentions which, on analysis, come down to two: that the court erred to his prejudice in not compelling disclosure of the identity of an informer, and that his arrest was unlawful and consequently the evidence is insufficient to sustain the judgment.

Officer Burkland of the Los Angeles Police Department, attached to the narcotics division, had known defendant (not personally) for several years prior to the arrest. Defendant owned a rooming house at 615 Stanford Avenue in Los Angeles. Burkland had "put forth" many hours trying to catch defendant in possession of narcotics. He had been told by several informers that defendant was "a rather large dope peddler" and that he was dealing in dope from the Stanford Avenue address. On many, many occasions within two years before the arrest, from the street and from a vantage point in some of the hotels in the vicinity he had observed addicts approach defendant, an apparent exchange of something would take place, defendant would disappear from view, come out, the addict would receive something, and leave. On one occasion when Burkland approached an addict the latter swallowed what appeared to be a white paper bindle. Persons known to Burkland as addicts and informers who had contacted defendant at the Stanford Avenue address had told Burkland that defendant "was dealing in narcotics from this location, that he was peddling to various addicts that came to this location, and that usually the transaction went on quite fast, and they would, after paying him the money, pick their narcotics up and leave by either the front or the back." Burkland testified:

"Q. Did you ever try to effect an arrest? A. I did, sir.

"Q. On the information of these informers? A. I have.

"Q. Did you ever try to arrest McMurray? A. I tried it on several occasions. As a matter of fact, we thought we had some buys on him, but it later proved to be, as I recall it—it fell into the purview or the Lawrence decision, and we were not able to use it. * * *

"Q. You indicated that on some occasion you sought to effect an arrest of the defendant but due to the Lawrence situation, you did not. What were the circumstances, sir, of that? A. As I recall, to the best of my recollection, it was an informant buy. We didn't use the case because it would tend to reveal the identity of the informant.

"Q. As a result of that did you secure some type of narcotic from the informant? A. As I recall, yes, we did.

"Q. Do you recall what kind it was? A. I believe it was heroin."

The rooming house was torn down in the latter part of 1957 or early 1958.

About 6:30 or 7 p. m. on April 9, 1958, an informer who went to Burkland's office at the latter's request told Burkland, Lieutenant Colwell, and Sergeant Guindon that defendant was a peddler of narcotics, usually peddling in half ounce and ounce quantities; that defendant usually made his deliveries in the late afternoon or early evening on Fourth Avenue between Twenty-fifth Street and Adams Boulevard in Los Angeles; that defendant usually dressed in khakis and a black cap. The informer also told Burkland defendant was to make a delivery to him (the informer) of half an ounce of heroin on Fourth Avenue north of Adams; that he would make a telephone call. At that time defendant lived at 2135 Fifth Avenue, Los Angeles.

Burkland gathered together a group of six other officers, including Colwell, Guindon, and Officer Leeds, briefed them with all the information he had about defendant, and proceeded with them to the area given by the informer. Leeds had heard that defendant was a large narcotic dealer, that he lived at 2135 Fifth Avenue, and that he usually made his deals in that general area. About a mile before reaching the area, the informer telephoned purportedly to defendant from a public telephone. Burkland did not see what number the informer dialed; he listened to what the informer said. The informer asked for "half a chicken or half a rabbit or something like that." Burkland could not recall whether the informer used any names. All he could hear was the informer's voice. The informer did not go farther with the officers; he was not at the scene of the arrest. Burkland had no other information about defendant's making deliveries on Fourth Avenue other than what the informer gave him. He had received information from the informer before but had not made an arrest from it. The information he had received in the past had been checked and found to be accurate.

When the officers reached the area designated by the informer, they staked out. Officer Leeds concealed himself in the front yard of the second house from the corner about 75 to 100 yards south of Twenty-fifth Street on the west side of Fourth Avenue. Leeds observed defendant when he (defendant) was at the corner under a light. He recognized defendant from the physical description he had been given at the police station by Burkland and the way he understood he was to be dressed. He had also seen a photograph of defendant. Defendant walked down the street. After defendant passed by, Leeds ran across the grass to the sidewalk. As he did so, defendant turned around. Leeds ran toward him, got about five feet from him and hollered, "Police officers." Defendant was facing Leeds when the latter said "Police officers." Leeds had his "ID" badge and card and a flashlight in his hand. Defendant turned around, started to run, and threw away an object. Leeds had his flashlight on the object "when it left his [defendant's] hand before it touched the ground." As defendant started to run, Leeds grabbed him, and said "You're under arrest." The other officers then appeared. The object defendant threw away came to rest under a parked automobile. There was nothing else in the vicinity of the object. It contained heroin.

On the way to the police station Burkland showed defendant the object and asked him if that was all the heroin he had. Defendant said, "Yes, that's all there is." Burkland asked him if he had any more at the house. Defendant said, "No, you've got it all." Defendant made the same statements to Burkland at the police station. The officers did not have a warrant for defendant's arrest or a search warrant.

Defendant denied he had heroin in his possession, denied he threw the object, and denied he received the alleged telephone call.

At the time the People were presenting Burkland's testimony for the purpose of showing reasonable cause for the arrest, defendant, on cross-examination, asked Burkland the name of the informer. The officer claimed the privilege (Code Civ. Proc. § 1881(5) and the court sustained the objection. Defendant made it clear to the trial court and to the district attorney that he was relying on the refusal to identify the informer to establish the illegality of the arrest. See Coy v. Superior Court, 51 Cal. 2d 471, 334 P.2d 569; Priestly v. Superior Court, 50 Cal.2d 812, 819, 330 P.2d 39; People v. Robinson, 166 Cal.App.2d 416, 333 P.2d 120; People v. Chatman, 166 Cal. App.2d 627, 333 P.2d 374.

[1, 2] Disclosure is required where the informer participated in the crime with which the defendant is charged; where he took no part in the crime but was an eyewitness; where the informer's communication was the only justification for the action of the police and the informer did nothing more than give the police information leading to an arrest made without a warrant and alleged to have been unlawful; where, in view of the evidence, the informer would be a material witness on the issue of guilt and nondisclosure of his identity would deprive the defendant of a fair trial. On the other hand, where the arrest is valid apart from the information received from the informer, the latter's identity need not be revealed. Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39; People v. Williams, 51 Cal.2d 355, 333 P.2d 19. In other words, it is not necessary to reveal the identity of an informer who merely points the finger of suspicion at a defendant and an arrest follows which is based on reasonable cause other than the information received from the informer. People v. Amado, 167 Cal.App.2d 345, 334 P.2d 254; People v. Smith, 166 Cal.App.2d 302, 333 P.2d 208.

In the case at hand the informer did not participate in the crime. He was not an eyewitness. He was not present at the arrest and took no part other than to furnish information to the police and purportedly telephone to defendant. His communication was not the only justification for the action of the police. He did nothing more than give the police information which, together with the other information the police had, led to defendant's arrest. The identity of the informer was not necessary to establish reasonable cause for the arrest. There was sufficient evidence apart from the informer's communication to the police and his telephone call. There is nothing in the record to indicate the informer would have been a material witness on the issue of guilt—whether defendant was in possession of heroin at the time of the arrest. And there is nothing in the record to indicate that any information might have been elicited from the informer which would be relevant or helpful to the defense of defendant. Cf. People v. Amado, 167 Cal.App.2d 345, 334 P.2d 254.

The People did not rely on the telephone call made by the informer to show justification for the arrest. The evidence with respect to the telephone call was elicited from Burkland on cross-examination. Thus, People v. McShann, 50 Cal.2d 802, 330 P.2d 33, relied on by defendant, is without application. In McShann the court stated (50 Cal.2d at pages 809, 810, 330 P.2d at page 37):

> "The prosecution could have relied solely on the testimony of the officers as to defendant's possession of heroin and as to his admissions without reference to the telephone call. They chose instead also to introduce evidence of the telephone call, which substantiated the testimony of Officers Goodrum and Reppas and discredited defendant's. * * *
>
> "Although the informer in the present case was not an eyewitness to the crime, as John Doe was in the Roviaro case, the prosecution's own election to introduce evidence of the telephone conversation made it imperative that it disclose the identity of the informer, for he alone could amplify or contradict the testimony of the officers."

[3–5] A peace officer may make an arrest without a warrant when he has reasonable cause for believing the person arrested to have committed a felony. Pen.Code, § 836; People v. Smith, 50 Cal.2d 149, 151, 323 P.2d 435. An arrest without a warrant is not unreasonable if the officer has reasonable cause to believe a person is carrying contraband. People v. Gale, 46 Cal.2d 253, 255, 294 P.2d 13. Reasonable cause is a suspicion founded on circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true. People v. Brite, 9 Cal.2d 666, 687, 72 P.2d 122. Reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would be admissible at the trial of the issue of guilt. Willson v. Superior Court, 46 Cal.2d 291, 294, 294 P.2d 36.

Over a period of two years Burkland had witnessed transactions between narcotic addicts and informers on the one hand and defendant on the other, from which a reasonable inference could be drawn that defendant was trafficking in narcotics. When Burkland approached one of the persons who had made an exchange with defendant, the person swallowed what appeared to be a white paper bindle. During the same period, addicts and informers had told Burkland defendant was a peddler of narcotics. On one occasion an actual "buy" of narcotics had been made from defendant through an informer, but to avoid identifying the informer the matter was not brought to court. Burkland communicated to the other officers, including Leeds, all the information he had gathered about defendant. Leeds had heard that defendant was a large narcotics dealer, that he lived at the address where he in fact lived, and that he usually made his deals in that general area.

[6, 7] When Leeds was going across the grass toward defendant, the latter turned around facing Leeds. When Leeds hollered "Police officers," defendant threw an object away and started to run. When a person who is approached by an officer

engages in furtive conduct the officer may well be justified in apprehending him in view of the officer's prior information and his knowledge of the person's background. People v. Cantley, 163 Cal.App.2d 762, 767, 329 P.2d 993; People v. Amado, 167 Cal. App.2d 345, 334 P.2d 254; People v. White, 167 Cal.App.2d 794, 334 P.2d 963; People v. Steinberg, 148 Cal.App.2d 855, 858–861, 307 P.2d 634. The facts known to the police apart from the information received from the informer the night of the arrest were enough to create a suspicion founded on circumstances sufficiently strong to warrant a reasonable man in the belief that the charge was true. People v. Gorg, 157 Cal. App.2d 515, 520, 321 P.2d 143. Officer Leeds had reasonable cause to believe defendant was committing a public offense and the arrest was not unreasonable. See People v. Richardson, 51 Cal.2d 445, 334 P.2d 573.

[8] During the argument with respect to disclosure of the identity of the informer the court made this statement: "The Court: There is another thing too and that is this, that as a trial Court that this Court would adopt a certain policy. In the event that there was some case which either held squarely, or from which it might be inferred that under facts such as we have here, that the informant was participating, then certainly the Court would be governed by that decision. However, if there are no cases directly in point, this Court doesn't feel that the People should be precluded from the privilege of at least putting on their case, and in the event of a decision adverse to the defendant, the defendant's rights would be fully protected on appeal, while the People would be in no position whatsoever to avail themselves of any error on the part of the Court on this legal question should the Court be wrong. That is a factor that the Court would also take into consideration in ruling on this legal question. Do you follow me?" Defendant asserts prejudicial error. Basing a ruling on the admissibility of evidence on the fact that the defendant had a right of appeal and that the People did not have such right was highly improper and erroneous. If an objection to the admission of evidence is legally well taken it should be sustained; if it is not legally well taken it should be overruled. However, since the court correctly ruled that identity of the informer was not required, there was no prejudice.

It is manifest from what we have said that the judgment is amply supported by the evidence.

The judgment and the order denying a new trial are affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

Hearing denied; PETERS, J., dissenting.

171 Cal.App.2d 86

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert John McNULTY and Roderick J. Scoble, Defendants.

Roderick J. Scoble, Defendant and Appellant.

Cr. 6534.

District Court of Appeal, Second District, Division 1, California.

June 3, 1959.

Defendants were convicted of selling marijuana in violation of statute. The Superior Court, Los Angeles County, Albert E. Wheatcroft, J., rendered judgment, and one of the defendants appealed. The District Court of Appeal, Lillie, J., held that the conviction was supported by substantial evidence sufficient to connect appellant with sale, though another delivered the marijuana to buyer.

Judgment affirmed.

1. Criminal Law 🔑1144(13)

In determining whether evidence was sufficient to support conviction, reviewing court must view the evidence in light most favorable to the state.

2. Criminal Law ⚷1159(2, 4)

In criminal case, the weight of the evidence and credibility of witnesses are matters exclusively for the trier of fact.

3. Criminal Law ⚷1144(13)

The existence of every fact which the trier of fact could have reasonably deduced from the evidence is assumed on appeal in favor of judgment.

4. Poisons ⚷9

Conviction for selling marijuana was supported by substantial evidence sufficient to connect defendant with sale, though another delivered the marijuana to buyer. West's Ann.Health & Safety Code, § 11500; West's Ann.Civ.Code, § 1721 et seq.

◆

Gladys Towles Root and Eugene V. McPherson, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Marvin Part, Deputy Atty. Gen., for respondent.

LILLIE, Justice.

Defendants Roderick J. Scobie and Robert John McNulty were charged by way of indictment with selling marijuana in violation of Section 11500, Health & Safety Code. Having waived their right to a trial by jury, the matter was submitted to the court on the transcript of the testimony given before the Grand Jury, subject to the right to offer additional evidence. Both were found guilty. The trial court denied defendant Scobie's motion for a new trial and application for probation, and sentenced him to the state prison. From the judgment he appeals.

The sole issue before this court is the sufficiency of the evidence to support the judgment. Appellant more particularly argues that it is insufficient to show his connection with the sale of the narcotic.

[1] Viewing the evidence in a light most favorable to the respondent, which we are bound to do, the following appears in the record before us. William Hassell, a police officer, had previously known appellant and several times had spoken to him about buying marijuana, on which occasions appellant denied having any of his own. The officer also had known the codefendant (hereinafter referred to as Bob) and had seen appellant several times in his company. On March 17, 1958, at approximately 8 p. m., Officer Hassell went to the Belmont Bar where he met Bob and talked to him until around 8:30 when appellant appeared. He asked appellant about securing some marijuana for him. The latter told the officer he could "score" for him, but would have to use his (the officer's) car, to which Hassell responded: "No. Why can't I take you over to the place and I'll wait outside for you." The officer then gave appellant two $1 bills whereupon the latter called out to Bob, "You take him down to score on 14th Street." Bob motioned he would do so and appellant gave him the two $1 bills. Officer Hassell then drove Bob to 14th and Santee Streets where he parked and waited in his car while Bob went into the premises. Five minutes later he returned to the car and Hassell drove him back to the bar. While riding, Bob took out four brown paper-wrapped cigarettes from his right forearm, held there by a rubber band, and gave them to the police officer. Hassell dropped Bob off at the Belmont Bar and returned to the Police Building to make a report and book the evidence. The cigarettes were examined and found to contain marijuana.

After his arrest, appellant talked to Officer Salagi and when confronted with Hassell, who related what occurred, appellant denied knowing him stating that he sold him nothing. Later in the Interrogation Room, appellant said that Hassell's face was familiar but "he doesn't remember," and asked if he could make a "deal." Salagi told him he could not. On his way out, appellant asked where he was going and when the officer told him he was going to jail, appellant again stated "can't we make a deal?" The officer answered "No," and appellant then said, "You got me. I did it. I needed the money. Could we make a deal?"

At the trial the appellant testified that he was at the Belmont Bar on the evening and at the time in question to pick up his girl who worked there; that up to then he had never met Bob, although he had seen him around and, in fact, did not even know his name; that he saw Bob and Hassell, known to him as "Billy," outside and had seen and spoken four or five times with Billy prior to this evening; that while Billy was talking to Bob he went inside the bar and that was the last time he saw Billy; that he received no money from the officer, did not tell anyone to give him anything at 14th and Santee Streets and knew no one at that address; and that he had never used or sold narcotics. The appellant further testified that he did not recognize Hassell when confronted with him because he (appellant) is an alcoholic; and that he had just finished serving a sentence after pleading guilty to possession of benzedrine. On cross-examination he told the court that he was a bartender but could not get into the Union because of his record of arrests, mostly on suspicion, and that he had known Officer Hassell about 20 minutes and had never talked to him before.

Robert (Bob) John McNulty, codefendant, testified that the first time he saw Hassell was inside the Belmont Bar where he (Hassell) asked defendant Scobie if he could "score" some marijuana, to which defendant said "no." Then Hassell asked him (Bob) the same question to which he answered "I don't know," and then said "I'll see what I can do." He and the officer then drove to 14th and Santee Streets where the latter gave him $2. He went upstairs, could get no marijuana, gave the $2 back to Hassell and returned to the Belmont Bar. When asked why he went to the 14th Street address, he answered "Well, sir, I had heard from various sources that was a spot."

In support of his argument that the evidence is insufficient to connect him with the sale in question, appellant cites a series of civil cases defining the term "sale." Referring particularly to the Uniform Sales Act, Civil Code, § 1721 et seq., appellant contends that to constitute a sale "there must be a transfer of an interest in property for a price in money," citing Milana v. Credit Discount Co., 27 Cal.2d 335, 163 P.2d 869, 165 A.L.R. 621, that "it is essential that the thing to be sold must be transferred from seller to buyer." On the theory that the record discloses no evidence he ever handled the marijuana or was in any way connected with it, appellant argues there could be no sale through him. A similar position was advanced and rejected in the case of People v. Valencia, 156 Cal.App.2d 337, 319 P.2d 377. Valencia gave appellant therein money the police officer had previously handed him, and they all went to the home of appellant's mother where appellant, he and an operator went into the premises, leaving the officer outside. Shortly thereafter, the operator returned alone and handed the officer the narcotic. Appellant argued that there was no evidence establishing that he was the person who delivered the narcotic to the operator who later gave it to the officer. The court held that the logical inference from all of the circumstances was that appellant sold the narcotics to the officer using the operator as the medium of delivery, and said at page 340 of 156 Cal.App.2d, at page 378 of 319 P.2d: "Since we must assume in favor of the verdict the existence of every fact which the trier of fact could have reasonably deduced from the evidence (People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778), it is clear that the trial court's discretion based upon the facts in this case may not be disturbed and this is so even though some of the evidence is circumstantial (People v. Newland, supra, 15 Cal.2d at page 681, 104 P.2d at page 779)." Applicable also to the case at bar is People v. Taylor, 52 Cal.2d ——, 338 P.2d 377, at page 378, wherein the Supreme Court stated: "It is not necessary that the buyer deal directly with the seller. The fact that the parties deal with each other through a third party is sufficient to sustain a conviction. (Cf. People v. Bradford, 130 Cal. App.2d 606, 608(5), 279 P.2d 561.)"

The record before us reveals that Officer Hassell had previously spoken to appellant about buying marijuana, had seen him and his codefendant together on several occasions, had been told by appellant on the evening in question he could "score" for him, and had given the latter two $1 bills. When told by the officer that appellant could not use his car but that he would drive him to the location, appellant gave the codefendant the money and told him to take the officer to "score" on 14th Street, which he did. From this evidence alone arises the reasonable inference that either Bob was the go-between for appellant who was the seller, or both defendants were working as coparticipants in the sale for a supplier of narcotics operating out of the premises at 14th and Santee Streets. People v. Taylor, 52 Cal.2d ——, 338 P.2d 377. In any event, it is obvious from the evidence and all reasonable deductions therefrom that appellant actually sold the marijuana to the police officer, using Bob as the medium of delivery. This inference is made even stronger by appellant's statements to Officer Salagi after his arrest, first denying knowledge of Hassell, and then asking that he be permitted "to make a deal," after admitting "I did it." At this point, reference is made to appellant's contention that there was confusion concerning his discussion with Salagi, claiming the "deal" referred to related to his arrest on a charge of possession of benzedrine. It was for the trier of the fact to determine whether the officer's testimony that the offenses were segregated in the conversation was true. To it the trial judge gave full credence.

[2-4] Of interest is appellant's own testimony which placed him at the Belmont Bar at the same time as that related by the officer; and although he denied participating in the sale, appellant gave inconsistent statements concerning his prior acquaintance with Hassell, saying first that he saw or spoke to him four or five times prior to the evening in question, and then later, that he had only known Hassell for about 20 minutes and had never before spoken to him. Codefendant McNulty contradicted appellant's story. He said he met Hassell inside the bar. Appellant testified they were standing outside. He stated Hassell asked appellant if he could "score." Appellant said he just passed Hassell on his way into the bar and this was the last time he ever saw him. The trial judge obviously believed the officer's testimony and rejected that of the two defendants, the latter on the ground there were "large inconsistencies in the stories told by the defendants." Tested by the time-honored rules that the weight of the evidence and credibility of the witnesses are matters exclusively for the trier of fact (People v. Gonzalves, 158 Cal.App.2d 98, 322 P.2d 255) and that the existence of every fact which the trier could have reasonably deduced from the evidence is assumed on appeal in favor of the judgment (People v. Newland, 15 Cal.2d 678, 104 P.2d 778), the record reveals more than ample substantial evidence to support appellant's conviction on the charge of sale.

Appellant's reliance on People v. Richardson, 152 Cal.App.2d 310, 313 P.2d 651, and People v. Barnett, 118 Cal.App.2d 336, 257 P.2d 1041, is misplaced. Neither of these cases aids him for they are readily distinguishable on their facts. In the Richardson case, supra, an operator gave defendant $10, but there was no evidence of any kind from which it could be inferred that defendant supplied the heroin to the operator. Without any other inculpatory evidence, in the absence of any incriminatory statements by the defendant and in view of an error made by the operator in marking the identifying package containing the heroin, the court held that the evidence was insufficient to sustain a conviction of sale. In the Barnett case, supra, the officer gave marked bills to an informer, saw him get into a car driven by defendant, followed them, and one and one-half hours later was handed heroin by the informer. When arrested, the marked bills were found in defendant's possession. The court held that mere possession of the marked money did not prove sale. As in the Richardson case, supra, defendant made no incriminating statements. These two cases, on their facts, are entirely dissimilar to the one at bar in which not only is it apparent from the evidence that appellant sold the marijuana to the police officer using his codefendant as a medium of delivery, but actually implicated himself by admitting, after his arrest, he "did it" and by asking the officer to "make a deal" with him.

For the foregoing reasons, the judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

171 Cal.App.2d 293

James J. LOCKHART, Plaintiff and Appellant,

v.

Angelo James RINI and Federal Refrigerated Transportation Company, Defendants and Respondents.

Civ. 23283.

District Court of Appeal, Second District, Division 1, California.

June 12, 1959.

Personal injury action by panel truck operator against operator and owner of tractor semitrailer which collided with panel truck. The Superior Court of Los Angeles County, Walter R. Evans, J., rendered judgment on verdict for defendants, and denied motion for new trial, and plaintiff appealed. The District Court of Appeal, White, P. J., held that error in giving instruction on unavoidable accident was prejudicial.

Judgment reversed and cause remanded for new trial. Purported appeal from order denying new trial dismissed.

1. Trial 🔑252(8)

In panel truck operator's personal injury action against operator and owner of tractor semitrailer which collided with panel truck, in absence of evidence of element of unavoidable accident, instruction relating thereto was error.

2. Appeal and Error 🔑1170(1)

Rule that appellate tribunal has the power to review conflicting evidence for the purpose of ascertaining whether or not error at the trial resulted in "miscarriage of justice" within constitutional provision prohibiting new trial in the absence of miscarriage of justice applies in civil as well as in criminal cases. West's Ann. Const. art. 6, § 4½; West's Ann.Code Civ. Proc. § 475.

3. Appeal and Error 🔑1170(1)

Constitutional provision prohibiting new trial in absence of miscarriage of justice and statute in effect prohibiting reversal for error, ruling, instruction or defect unless prejudicial were not intended to mean that merely because evidence may legally be able to stand up under weight of verdict, such is sufficient reason in all cases for refusing to set aside a verdict. West's Ann.Const. art. 6, § 4½; West's Ann.Code Civ.Proc. § 475; West's Ann. Vehicle Code, § 530(b).

4. Trial 🔑18

The law jealously guards right of every litigant to fair and impartial trial, and is vitally concerned that verdict shall be arrived at by orderly legal procedure in which substantial rights belonging to all parties shall be respected.

5. Appeal and Error 🔑1170(9)

In panel truck operator's personal injury action against operator and owner of tractor semitrailer which collided with panel truck, error in giving of instruction on unavoidable accident was prejudicial.

West's Ann.Const. art. 6, § 4½; West's Ann.Code Civ.Proc. § 475; West's Ann. Vehicle Code, § 530(b).

6. Automobiles ⟹246(8)

In panel truck operator's personal injury action against operator and owner of tractor semitrailer which collided with approaching panel truck, instruction in terms of an intersection was misleading and confusing where no intersection was involved. West's Ann.Vehicle Code, §§ 530(b), 608.6.

7. Appeal and Error ⟹110

There is no allowable appeal from an order denying a new trial.

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Paul P. Selvin, Los Angeles, Sam Schermer, Studio City, for appellant.

Hunter & Liljestrom, by Kenneth H. Clausen, and Gerald V. Barron, Los Angeles, for respondents.

WHITE, Presiding Justice.

This action was instituted to recover damages for personal injuries sustained by plaintiff in a collision between the latter's motor vehicle in which he was riding and one owned by defendant transportation company, and operated by their employee, defendant Rini. The cause was tried before a jury which returned a verdict for defendants. Motion for a new trial was denied. From the judgment and the order denying his motion for a new trial plaintiff prosecutes this appeal.

Although plaintiff does not raise or argue the question of the sufficiency of the evidence to support the verdict nevertheless, because his contention that errors in the instructions require a reversal, and defendants' claim that the evidence "overwhelmingly establishes that negligence on plaintiff's part was the proximate cause of the accident", it becomes necessary to narrate the evidence in some detail.

The record reveals that defendant transportation company owned the tractor and semi-trailer which was being operated by its employee, defendant Rini. It had an overall length of 60 feet, with a gross weight of 34 tons. The semi-trailer had a van-type body and was used to haul beer from the Schlitz brewery, near where the accident occurred. Plaintiff owned and was driving a 1948 Chevrolet panel truck, which is about the size of an ordinary passenger sedan. The two vehicles collided on Woodman Avenue, in the Van Nuys area of Los Angeles, on May 11, 1956, at about 6:30 a. m. The accident happened at a point where Woodman Avenue curves. From the point of the accident and looking south, Woodman Avenue runs north and south; and from the point of the accident and looking east, Woodman Avenue runs east and west. In the vicinity of the brewery where the accident occurred Woodman Avenue is a cement two-lane highway. Each lane is ten feet wide. There is a paved black-top shoulder, approximately 4 or 5 feet wide on each side of the avenue, and at the time of the accident there was a double unbroken white line in the center of Woodman Avenue dividing the two lanes. The curve above referred to is of approximately 90 degrees. At the pre-trial hearing on the instant case it was stipulated that at the time of the accident, "* * * the plaintiff was rounding a curve on Woodman Avenue, which approximates 90 degrees, and that he *was on the right-hand side of the road*". (Emphasis added.) As to respondent Rini, it was agreed "* * * that he *was driving said truck in a northerly direction* on Woodman Avenue and *drove a portion of said Diesel truck on the side of Woodman Avenue for southbound traffic*". (Emphasis added.) *South* of the curve is a road marked with "Exit Only" and "Do Not Enter" signs. It is conceded that the marked and permitted entrance to the brewery grounds is a road which enters Woodman Avenue *north* of the curve, and on that portion of the public highway which runs in an east-west direction.

Plaintiff testified he was rounding the above mentioned curve at an estimated speed of 20 to 30 miles per hour, but because of the curve he could not see defendants' vehicle until he was within 10 feet or so of it. When his deposition was taken plaintiff testified the distance was 6 or 8 feet. He testified: "I seen the truck as it just started across this double line". He testified that at that time his speed was about 25 or 30 miles per hour. In answer to a question, "And then what did the truck do after you saw it in that position; keep on traveling straight ahead, or —", plaintiff testified, "Well, we was both so close there wasn't anything we could do. We just hit. That is all there was to it."

Defendant Rini testified that on the night of May 9, he left Van Nuys on a round trip to San Francisco; was transporting beer to that city and was returning with a load of "empties" on the morning of the accident, May 11. While defendant Rini testified he felt "wide awake", he admitted that during the interval between his departure from Van Nuys with the load of beer between 5:00 and 7:00 p. m. on May 9, until the time of the accident on the morning of May 11, he had only five hours of sleep in the cab of his truck, though, "I might have stopped and slept a few more hours. I can't recall whether I did, or not". He testified that a few blocks before reaching the place of the accident, he put the truck's signal arm out to indicate a left turn. Defendant Rini was then asked:

"Q. And, now, did you make a left turn at this place where the accident was? A. No; I stated that I went in the exit.

"Q. You just went straight ahead? A. That's right.

"Q. But you still had the left turn signal? A. That's right."

Defendant Rini further testified that when he first observed plaintiff's vehicle, "It was at least between a hundred and a hundred and fifty feet" ahead of him.

Defendant Rini further testified:

"Q. You were going straight into the exit? Now, what did you do when you saw Mr. Lockhart coming around the curve? A. Well, I thought I had time to get through there, and I was changing gears at the time, and all of a sudden, he was right on me, and when I spotted him, I tried to turn, but it didn't help.

"Q. At the time you first saw him, was there room for him to go in front of you, if you had stopped then? A. Might have.

"Q. But you thought you could get that 60-foot truck across in front of him? A. Yes.

"Q. Now, were you pretty sleepy? A. Well, I don't know whether I was, or not. I had been up all night, I would say, probably with a couple hours sleep prior to it, four or five hours, that I had made the statement.

"Q. In other words, it had been 36 hours, at least, since you had been in a bed? A. Yes, sir.

"Q. And you intended to drive directly into that exit driveway? A. Yes, sir."

Defendant Rini further admitted that in a conversation with a police officer at the scene of the accident and shortly thereafter when he told the officer, "I was going north on Woodman Avenue, and as I approached the curve just north of Valerio Street, I was in traffic lane in the right-hand portion of the road. I was traveling in the extreme right next to the curb. I was over at this point because I was going to make a left turn into a private driveway into the Schlitz Brewery. As I came up to the curve in the roadway, I slowed down and saw this car coming south on Woodman, and it was about one-half way through the turn in the roadway, and all of a sudden, it seemed to me as if it was coming right toward me. The only thing I could think of doing was swerving to my left into the driveway to try and avoid the other car. I guess I didn't make the right decision, because just as I got onto the other side of the street, in the southbound lane, the other car struck the right front of my truck. The impact, of course, shoved the other car around to the right, and I continued on and stopped in the private driveway. I am not sure whether or not the other car was on the wrong side of the street, but I think the point of impact was at this approximate location, indicating a point 4 feet east of the west curb, the west concrete edge of Woodman Avenue. Then I was not going to turn into the private driveway which runs north and south, paralleling Woodman Avenue. I was going to go up and around the curve and turn into the driveway which runs east and west going into the Schlitz Brewery. I only turned into this other driveway, because it seemed to me that the other car was going to run into me, so I was just turning to avoid it."

When asked, "Now, which is the truth, what you have said now, or what you said then?" defendant Rini replied, "What I say now", and in answer to the interrogatory, "Why did you make that statement to the officer?", the witness replied, "I have no explanation for that, sir."

As his first ground for reversal, appellant urges that the court committed prejudicial error in giving to the jury an instruction on "Unavoidable and inevitable accident."

At the request of respondents, the court instructed the jury that,

"The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action, was negligent.

* * * * * *

"In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence.

* * * * * *

"Even if such an accident could have been avoided by the use of greater foresight, caution or skill than was required in the circumstances in the exercise of ordinary care, still, no one may be held liable for injuries resulting from it.

* * * * * *

"Bear in mind, however, that if the (either) (any) defendant failed to exercise ordinary care, and if that failure was a proximate cause of the accident in question, then, whether or not such conduct was the sole cause, the accident was not unavoidable, and the defense of unavoidability may not be maintained."

In considering the propriety of giving the same instructions on "Unavoidable and Inevitable Accident", as was given in the case now engaging our attention, our Supreme Court, in the case of Butigan v. Yellow Cab Co., 49 Cal.2d 652, 660, 320 P.2d 500, 505, said:

"The instruction is not only unnecessary, but it is also confusing. When the jurors are told that 'in law we recognize what is termed an unavoidable or inevitable accident' they may get the impression that unavoidability is an issue to be decided and that, if proved, it constitutes a separate ground of nonliability of the defendant. Thus they may be misled as to the proper manner of determining liability, that is, solely on the basis of negligence and proximate causation. The rules concerning negligence and proximate causation which must be explained to the jury are in themselves complicated and difficult to understand. The further complication resulting from the unnecessary concept of unavoidability or inevitability and its problematic relation to negligence and proximate cause can lead only to misunderstanding. * * *

"The giving of a confusing or misleading instruction is, of course, error, and we are of the view that, in the absence of a special situation of the type discussed above (not here pertinent), the use of an unavoidable accident instruction should be disapproved."

The court then went on to say (49 Cal.2d at pages 660, 661, 320 P.2d at page 505): "The determination whether, in a specific instance, the probable effect of the instruction has been to mislead the jury and whether the error has been prejudicial so as to require reversal depends on all the circumstances of the case, including the evidence and the other instructions given. No precise formula can be drawn."

[1] While the giving of this instruction was supported by the existing deci-

sions when this trial took place, under the decision in Butigan, we must hold that it was error to give it because there was no element of unavoidable accident established by any evidence which would justify giving it under the Butigan decision.

The question now presented is whether the error was prejudicial.

Respondents rely heavily on Section 4½ of Article VI of our State Constitution and Section 475 of the Code of Civil Procedure. The code section just cited which adopts the constitutional mandate, reads in part as follows:

"* * * No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, *instruction,* or defect, unless it shall appear from the record that such error, ruling, *instruction,* or defect was *prejudicial,* and also that by reason of such error, ruling, *instruction,* or defect, the said party complaining or appealing *sustained and suffered substantial injury,* and that a *different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error* is prejudicial, or that injury was done *if error is shown."* (Emphasis added.)

[2] It must be conceded as contended by respondents that an appellate tribunal has the power to review conflicting evidence for the purpose of ascertaining whether or not an error, as stated in the constitutional provision, has resulted in a "miscarriage of justice" (Vallejo & N. R. Co. v. Reed Orchard Co., 169 Cal. 545, 553, 554, 147 P. 238, 243). The rule in this regard is applicable to both civil and criminal cases.

[3, 4] Respondent strongly urges the conclusiveness of the evidence to establish the fact that the proximate cause of the accident here in question was appellant's manifest negligence by reason of his obvious inattention and that the jury so found. However, we are not in accord with respondent's reasoning that the saving grace of Section 4½ of Article VI of the Constitution and Section 475 of the Code of Civil Procedure should come to the rescue of this verdict. We do not understand the aforesaid constitutional and statutory mandate as intended to mean that merely because the evidence may legally be able to stand up under the weight of the verdict, that is sufficient reason in all cases for refusing to set aside a verdict. There is creditable authority for the statement that the phrase "miscarriage of justice" as used in the constitutional provision is applicable to cases where the verdict has resulted from some form of trial in which the essential rights of the plaintiff or defendant were disregarded or denied. The law jealously guards the right of every litigant to a fair and impartial trial, and is vitally concerned that the verdict shall be arrived at by an orderly legal procedure in which the substantial rights belonging to all parties shall be respected.

[5] We have narrated above in detail, the evidentiary features of this case and it would unduly prolong this opinion to restate them here. Suffice it to say that there was evidence that respondent Rini was familiar with the area and the highway wherein he had made many deliveries. That he crossed over the center white lines into a lane reserved for oncoming traffic, for the purpose of entering a driveway plainly marked "Exit Only" and "Do Not Enter". Respondent Rini was driving a truck and trailer 60-feet long at a speed of only between two to five miles per hour. There was a curve ahead of him and the testimony indicates that appellant rounded the curve at a speed of twenty to thirty miles an hour, and there was testimony that because of the curve appellant could not see respondent Rini's vehicle until, according to appellant, "* * * we was both so close there wasn't anything we could do. We just hit." Furthermore, a reading of the statements made by respondent Rini to the police officer and hereinbefore set forth suggests the reasonable conclusion that the jury may well have regarded from portions of such statement that the accident was an "unavoidable occurrence".

From an examination of the entire cause, including the evidence, we are satisfied as hereinbefore stated, that no evidence of unavoidable accident was established by the evidence which would justify the giving of the challenged instructions under the Butigan decision, supra, and that it is reasonably probable that a result more favorable to appellant would have been reached in the absence of the error complained of (People v. Watson, 46 Cal.2d 818, 836, 837, 299 P.2d 243). The foregoing conclusion at which we have arrived is strengthened by the fact that the court instructed the jury that, "The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action, was negligent". This instruction is a questionable one in any case, and certainly does not fit a factual situation such as is involved in the case at bar. It could well have intensified the error committed in giving the instruction on "Unavoidable and Inevitable Accident". See Phillips v. Noble, 50 Cal.2d 163, 168, 323 P.2d 385.

[6] Finally, appellant predicates error in the giving of another instruction. The record reveals that the court instructed the jury that pursuant to the provisions of Vehicle Code, § 530, subd. (b): "No vehicle shall at any time be driven to the left side of the roadway under the following conditions:

"1. When approaching the crest of a grade or upon a curve in the highway where the driver's view is obstructed within such distance as to create a hazard in the event another vehicle might approach from the opposite direction."

This was followed by an instruction requested by respondents, and reading:

"You may ask yourself the question: When has a vehicle approached so close to an intersection as to constitute an immediate hazard to another vehicle within the intersection, headed in the opposite direction and intending to make a left turn therein? The answer is that the former vehicle is that close whenever, if a reasonably prudent person were in the position of the driver intending to make the left turn, he would apprehend the probability of colliding with the approaching vehicle were he then to attempt such a turn."

Following this instruction, the court stated: "You will recall that I mentioned 'intersection' here. You, of course, remember the testimony in this case, and there is no intersection involved, but this is a guide by which to determine, and I believe it fits, as to whether there was an immediate hazard at the time of crossing the white lines."

It is true, as contended by appellant, that the instruction given was in terms of an intersection, though the trial judge himself stated, "There is no intersection involved". The instruction at best was confusing and misleading, and a reading of Vehicle Code, § 608.6, which is in terms of "a roadway * * * marked with traffic lanes" would have furnished a better "guide" (to use the language of the trial judge), for the jury. Since, as we have indicated above, the judgment must be reversed, and it is unlikely that the error will be repeated upon a new trial, it becomes unnecessary to pass upon the question of whether the instruction as given was prejudicial further than to say that it did not minimize the error committed in giving the instruction on "Unavoidable and Inevitable Accident".

[7] Since there is no allowable appeal from the order denying a new trial, the purported appeal therefrom is dismissed. The judgment is reversed and the cause remanded for a new trial.

FOURT and LILLIE, JJ., concur.

171 Cal.App.2d 261

PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Herman BLOEMSMA, Earl Carter Tripp and
Donald Marion Andersen, Defendants,
Earl Carter Tripp and Donald Marion
Andersen, Appellants.
Cr. 6542.

District Court of Appeal, Second District,
Division 1, California.
June 11, 1959.
Rehearing Denied June 29, 1959.

Prosecution for assault of a barmaid, who allegedly was struck from across the bar, and another person. From adverse judgment of the Superior Court, Los Angeles County, Ralph K. Pierson, J., two of the defendants appealed. The District Court of Appeal, Fourt, J., held that court did not err in refusing to delay proceedings to enable defendants to complete a "mock-up bar" to show that person striking barmaid could not have done so from across the bar, or in refusing to reopen case to allow introduction of model of bar when there was no explanation why defendants could not have been completely prepared at time of start of trial and they had ample time from date of plea of not guilty to date of trial within which to have prepared such a "mock-up bar".

Judgment affirmed.

1. Criminal Law 🔑649(2), 686(1)

In prosecution for assault of a barmaid, who allegedly was struck from across the bar, and another person, court did not err in refusing to delay proceedings to enable defendants to complete a "mock-up bar" to show that person striking barmaid could not have done so from across the bar or in refusing to reopen case to allow introduction of model of bar when there was no explanation why defendants could not have been completely prepared at time of start of trial and they had ample time from date of plea of not guilty to date of trial within which to have prepared such a "mock-up bar".

2. Criminal Law 🔑586, 649(1)

Granting or refusing of an adjournment or continuance of a criminal trial rests in sound discretion of trial court.

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Richard A. Haley, Hollywood, for appellants.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Jack K. Weber, Deputy Atty. Gen., for respondent.

FOURT, Justice.

Each appellant in this case has appealed from a judgment wherein each defendant was found guilty of assault.

In an information filed in Los Angeles county on July 25, 1958, Herman Bloemsma, Earl Carter Tripp and Donald Marion Andersen were charged with violating section 245, Penal Code (assault by means of force likely to produce great bodily harm). In count I of the information each defendant was charged with assaulting Delmo K. Sheeley, and in count II each defendant was charged with assaulting Bea Patterson. On July 30, 1958, each defendant was arraigned and pleaded not guilty as to each count. Trial was set for, and did commence before a jury on September 2, 1958, and held through September 4, 1958.

The jury returned the following verdicts:

(1) Herman Bloemsma was found guilty as charged as to (count I) Sheeley, and not guilty as to (count II) Patterson.

(2) Tripp was found guilty of misdemeanor assault (a lesser included offense) against Sheeley, but not against Patterson.

(3) Andersen was found guilty of misdemeanor assault (a lesser included offense) against Sheeley and Patterson.

On the court's own motion, after a motion for a new trial by Andersen, the charge with reference to Sheeley (count I) was dismissed as to Andersen.

An application for probation was made by each of the defendants. On October 8, 1958, probation was granted to Tripp for three years, on condition that he spend the first one month in the county jail. Andersen received three years' probation on condition that he spend the first two months in the county jail. The appeal is from the judgment, and we will consider it as though it were from the order granting probation, in each instance. Bloemsma did not appeal. In short, Tripp stands convicted for an assault (misdemeanor) against Sheeley, and Andersen stands convicted for an assault (misdemeanor) against Patterson.

[1] On June 4, 1958, at about 11:30 o'clock p.m., Sheeley, a Long Beach police officer, had stopped at Camm's, a bar operation on Lakewood Boulevard, and was seated on the first seat next to the door, drinking from a 7-Up bottle. The bar in the place of business is L-shaped, and was 3 feet 7½ inches high, and 3 feet 3 and ½ inches wide. When Sheeley arrived at the establishment, he was the only person seated at the bar; however, Bea Patterson, the waitress (who was the former wife of Sheeley) and two men were playing shuffleboard.

At or about such time, Andersen entered the place of business alone and ordered three beers from Bea Patterson. Andersen said, in effect, that two friends were with him and that they would join him very shortly. Andersen was seated around the corner of the bar about six to eight feet from Sheeley. Bloemsma and Tripp entered the place of business and seated themselves at the bar on the same side where Andersen was seated, and between Andersen and Sheeley.

Miss Patterson then observed "who they were and proceeded to take the drinks away from them." She stated to the three defendants, "that they knew they weren't supposed to be in there and that they knew better, and she stated that they couldn't drink while she was on duty," that they were intoxicated and she would not serve them, and "they were 86." She then took back the beer which she had previously placed upon the bar and poured it down the drain. Andersen vigorously protested and used vile, vulgar and profane language in speaking to Bea Patterson about the matter. She advised Andersen that she had no authority to return any money, and that he would have to see the manager. Andersen was dissatisfied with any such an arrangement, and stated that he was going to get his money back from her, and also at the same time, questioned her parentage. Sheeley saw Andersen "make a pass at her," "[s]winging his arm at her." Sheeley then got up from where he was seated and went over to Andersen and told him to watch his language, and showed the three men his police badge. Bloemsma told Andersen to "Knock it off," and said in effect that it would be cheaper to be quiet, that he, Andersen, had been drinking and that he would be booked for drunk if he was not careful. Sheeley returned to the seat he had theretofore occupied and each of the defendants sat down at the bar; the latter three discussed Sheeley, and he heard one of the defendants say that he was a "* * * damn cop, * * * off duty, and he has no authority." Andersen was largely concerned about, and complained of the removal of the beer, and Bloemsma was encouraging his companions to leave "before the sheriffs arrived."

The defendants then stood up to leave the establishment, when one of the defendants said something to Sheeley. Bea Patterson indicated to Sheeley that he should pay no attention to them, and then Andersen leaned over the bar, told her to keep her mouth shut, clenched his fist and struck her.

Bea Patterson stated that Andersen hit her on the left side of her face with his fist; that at such time she was standing behind the bar and he was across the bar from her; that the blow caused swelling and discoloration on her face and resulted in the chipping of two teeth.

At about the same time as Bea Patterson was being struck, Tripp struck Sheeley below the chin and on the throat. Bloemsma hit Sheeley on the face just below the eye with a 7-Up bottle, breaking and crushing the facial area. A doctor described the injury as "[t]he entire face, * * * was crushed down, * * * on this side like it was split * * *."

The defendants introduced into evidence many photographs taken on August 15, 1958, of the inside of the establishment and the bar. These pictures showed, among other things, some exacting measurements of the width of the bar, the distance from the top of the bar to the floor, and a railing at the base of the bar about 6 inches wide and 12 inches from the floor.

The prosecution's case was presented in chief on September 2nd. At 9:45 o'clock a.m., on September 3rd, the defendants commenced the presentation of evidence in their behalf. During the latter part of the morning session, the record recites that counsel for the defendants approached the bench and said to the judge:

> "Mr. Haley: If the Court please, *yesterday* we attempted to have a mock-up of this bar built with exact dimensions, with the intention in mind of *bring* it here and showing that Anderson couldn't possibly have reached over there. That is completed, but *it isn't here.*" (Emphasis added.)

The judge indicated that he was not going to wait under the circumstances, and counsel for the defendants then said:

> "By way of offer of proof we would like to show that the section we have built, although not delivered at this time, being twenty-five minutes to twelve, that we could prove and would prove that in any position here testified to Anderson could not possibly have reached any person, Miss Bea Patterson or anybody else, across that bar with even his finger tips extended let alone his closed fist."

The judge replied:

> "May I point out these pictures were taken on August the 15th, and I don't see how any such exhibit would show anything that isn't shown by the pictures so far as the measurements are concerned, and *there is no reason why this other exhibit couldn't have been prepared at the same time;* so the Court will proceed." (Emphasis added.)

The defendants then rested their case.

The prosecution immediately started its rebuttal and proceeded with such until the noon recess. Court adjourned to 1:45 o'clock p.m., and rebuttal witnesses continued to testify after the noon recess. The prosecution then rested its case. Counsel for the defendants approached the bench and said:

> "We do at this time have a completed cross section of this bar with actual measurements with one exception, and that is the quarter inch round that is around the top of the bar, but otherwise the section is actually the measurements of the bar. We have one of the bar stools which is a duplicate of every other bar stool in the cafe. We ask at this time that we be allowed to reopen our case and place that cross section in evidence and exhibit the fact that Mr. Andersen could not strike anybody from that position."

The judge replied in effect that the pictures depicted all that counsel had spoken of, that he could not see how the replica could do any good, and further indicated that there was no good reason why the matters in question could not have been presented before, and therefore denied the motion to reopen the case. Counsel for the defendants then wanted to put into evidence the measurements of the "mock-up sections of the bar." The court pointed out that the defendants had already introduced into evidence purported accurate measurements of the bar which were not questioned, and the judge said:

> "This is just another example where at the very last moment something is brought into evidence that could have been produced here at the time of trial. You had known for more than thirty days that this matter was coming on

for trial at the time that it did. You sent out and got your photographer. There is no reason this replica couldn't have been made, and the bar stool could have been subpoenaed here even during the course of the trial."

The judge stated further that counsel could not use the mock bar as a demonstration to the jury, in that it was not in evidence. The defendants again rested their case.

Appellants contend that it was error for the court not to delay the proceedings, and that it was also error to deny the motion to reopen the case and allow the introduction of the model of the bar and stools into evidence.

[2] Counsel for appellants concedes and states the rule to be that "the granting or refusing of an adjournment or continuance of a criminal trial rests in the sound discretion of the trial court." However, counsel insists that the judge abused his discretion in this case. We think there is no merit to the assertion.

No explanation was ever attempted as to why, in the exercise of due diligence, the appellants could not have been completely prepared at the time of the start of the trial, and had available a "mock bar," had they been so minded. The appellants knew of any claimed inability on the part of Andersen to reach the barmaid by reason of the construction of the bar long before the trial convened. A preliminary hearing was apparently held and undoubtedly the evidence in that proceeding was to the effect that the barmaid was struck as heretofore indicated. In any event, the appellants had ample time from the date of their plea of not guilty to the date of the trial within which to have prepared their desired evidence, and apparently they saw fit not to do so but elected to wait until it was too late. This is not the situation where an attorney is taken by surprise because of some unusual course of events—it was not something entirely unforeseen and new which developed in the course of the trial. Appellants simply procrastinated in having the "mock bar" constructed and we think the trial judge was entirely within his power in refusing to grant the continuance and in refusing to re-open the case, under the circumstances. See People v. Beal, 108 Cal.App.2d 200, 205–206, 239 P.2d 84; People v. Jordan, 72 Cal.App. 406, 408, 237 P. 757; People v. Markos, 146 Cal.App.2d 82, 86, 303 P.2d 363; People v. Ponchette, 30 Cal.App. 399, 400–401, 158 P. 338; People v. Morhar, 78 Cal.App. 380, 386, 248 P. 975; 12 Cal.Jur.2d 148–151, 159, 163.

The judgment as to appellant Tripp is affirmed.

The judgment as to appellant Andersen is affirmed.

WHITE, P. J., and LILLIE, J., concur.

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171 Cal.App.2d 125

Pearl Jeannette PARKER, Plaintiff and Appellant,

v.

Lawrence T. SOLOMON and Stanley Solomon, Co-Executors of the Will of Ed Krist, also known as Edward Krist, Deceased, Defendants and Respondents.

Civ. 23498.

District Court of Appeal, Second District,
Division 2, California.
June 4, 1959.

Action by daughter against executors seeking quasi-specific performance of alleged oral agreement by terms of which her father promised to transfer to her one-half of his estate either during his lifetime or at his death. From adverse judgment and order of the Superior Court, Los Angeles County, John F. Aiso, J., the daughter appealed. The District Court of

Appeal, Herndon, J., held that alleged oral agreement between daughter and father under which father allegedly promised to transfer to daughter one-half of his estate either during his lifetime or at his death for which she was to refrain from asserting any claim against him and to remain out of his life, could not be fully performed on part of either party prior to father's death, and agreement was within inhibition of statute of frauds and daughter was not entitled to quasi-specific performance of agreement.

Judgment and order affirmed.

1. Specific Performance 🔑39

Alleged oral agreement between daughter and father under which father allegedly promised to transfer to daughter one-half of his estate either during his lifetime or at his death for which she was to refrain from asserting any claim against him and to remain out of his life, could not be fully performed on part of either party prior to father's death and agreement was within inhibition of statute of frauds and daughter was not entitled to quasi-specific performance of the agreement. West's Ann.Civ.Code, § 1624, subd. 6; West's Ann.Code Civ.Proc. § 1973, subd. 6.

2. Frauds, Statute of 🔑149
Specific Performance 🔑114(1)

Complaint filed by daughter against executors of estate of father, who allegedly made an oral agreement by terms of which he was to transfer to her one-half of his estate either during his lifetime or at his death in return for her promise to refrain from asserting any claim against him and to remain out of his life, was insufficient to invoke doctrine of estoppel or entitle daughter to quasi-specific performance of agreement which was within statute of frauds, either on ground of unconscionable injury or unjust enrichment if agreement was not enforced. West's Ann.Civ.Code, § 1624, subd. 6; West's Ann.Code Civ.Proc. § 1973, subd. 6.

3. Frauds, Statute of 🔑144

Doctrine of estoppel to assert statute of frauds has been applied by courts to prevent fraud that would result from refusal to enforce oral contracts in certain circumstances.

4. Specific Performance 🔑119

To enforce an oral contract to bequeath or devise property by quasi-specific performance, it must be shown that contract is definite and certain, the consideration adequate, the character of services is such that a money payment would not furnish adequate compensation to the plaintiff and that there is such a change in plaintiff's condition and relations in reliance on contract that a refusal to complete contract would be a fraud upon plaintiff. West's Ann.Civ.Code, § 1624, subd. 6; West's Ann. Code Civ.Proc. § 1973, subd. 6.

5. Frauds, Statute of 🔑149

An allegation of misrepresentations going to the requirements of statute of frauds is not a prerequisite to a finding of an estoppel to assert the statute, but there must be an allegation of conduct by party against whom estoppel is asserted which would make it inequitable for him to rely on statute as a defense.

6. Frauds, Statute of 🔑144

Mere making of an oral agreement which is within statute of frauds is not in and of itself sufficient to estop promisor from raising the statute as a defense, and there must be additional extraordinary conduct or circumstances to justify a refusal to apply the statute. West's Ann.Civ.Code, § 1624, subd. 6; West's Ann.Code Civ. Proc. § 1973, subd. 6.

7. Frauds, Statute of 🔑144

Neither a mere omission to put a contract in writing nor such omission coupled with performance is alone sufficient to create an estoppel to assert the statute of frauds. West's Ann.Civ.Code, § 1624, subd. 6; West's Ann.Code Civ.Proc. § 1973, subd. 6.

8. Frauds, Statute of ⚷138(1, 4)

Under alleged oral agreement by terms of which father promised to transfer to daughter one-half of his estate either during his lifetime or at his death in return for her promise to refrain from asserting any claim against him and to remain out of his life, if daughter rendered services or furnished some consideration which could be evaluated in terms of money, her remedy, if any, would be in quantum meruit and not in an action on the alleged oral contract, which was within statute of frauds.

9. Frauds, Statute of ⚷138(4)

Where services have been rendered under a contract which is unenforceable because within purview of statute of frauds, an action generally will lie upon a common count.

10. Executors and Administrators ⚷431(2)

The filing of a proper creditor's claim is an indispensable prerequisite to the maintenance of an action against executors for the reasonable value of services allegedly rendered to decedent.

11. Executors and Administrators ⚷251

Cause of action in quantum meruit brought by daughter claiming $750,000, or one-half value of her father's estate, for services allegedly rendered father by performing work, labor and services for father consisting of supporting, educating and maintaining herself and her mother without aid of father and remaining away from father's home and social and business life and not disclosing to his friends and business associates that she was his daughter, did not state a claim for reasonable value of services rendered and cause of action was subject to general demurrer.

12. Pleading ⚷252(1)

Facts once alleged in a verified pleading and rendering it vulnerable to demurrer cannot be withdrawn from consideration by court merely by omitting such facts from an amended pleading without explanation.

13. Frauds, Statute of ⚷150(3)

A general demurrer may be interposed when complaint shows on its face that agreement sued on is within statute of frauds and does not comply with its requirements.

14. Pleading ⚷205(2)

A common count ordinarily is not subject to general demurrer, but it is proper to sustain a general demurrer to a common count separately pleaded in a complaint where recovery sought on common count is obviously based on same set of facts specifically pleaded in the count which fails to state a cause of action.

15. Pleading ⚷205(2)

If a deficiency in first count of a complaint consists of fact that it pleads a contract which is unenforceable because it is not in writing, a general demurrer will not lie to a common count in which plaintiff seeks recovery of reasonable value of services rendered under the otherwise valid contract.

◆

James Neville, Los Angeles, for appellant.

Belcher, Henzie & Fargo, and Willis & MacCracken, Frank B. Belcher, Los Angeles, Leo J. Biegenzahn, Modesto, for respondents.

HERNDON, Justice.

Plaintiff appeals from a judgment which followed an order sustaining a general demurrer to her fourth amended complaint without leave to amend. By said complaint plaintiff sought quasi-specific performance of an alleged oral agreement by the terms of which her father promised to transfer to her one-half of his estate, either during his lifetime or at his death. The father died testate on June 9, 1956, leaving an estate alleged to be of the value of $1,500,000. His will recites that he had no children but it contains a specific bequest in favor of plaintiff in the amount of $1,000. The co-executors of decedent's will are the named defendants. Plaintiff alleges that her creditor's claim, a copy of which is incorporated into the complaint, was presented and rejected, and that the action is brought to establish the claim pursuant to the provisions of Probate Code section 714.

The essential allegations of the fourth amended complaint, which the trial court found vulnerable to the test of the general demurrer, are as follows: that plaintiff is the legitimate daughter of decedent and one Clara Purvin, and was born in New Orleans on October 23, 1915; that decedent deserted plaintiff and her mother at Waco, Texas, some three years after plaintiff's birth, and from that time until 1940 neither plaintiff nor her mother was able to locate the decedent; that during this period prior to 1940 she received no funds or support from her father, was forced to leave school at the age of 14 in order to support and maintain herself and to help care for her mother, and that she suffers from a congenital venereal disease communicated to plaintiff's mother by decedent, and, as a result, suffered blindness and other physical impairments.

The complaint further alleges that in 1940 plaintiff finally located and communicated with decedent, who then resided in California, and from that date until his death plaintiff corresponded with him and saw and spoke to him in New York City on many occasions; that about 1944, in New York City, plaintiff informed decedent that she wanted to move to Los Angeles and at the same time she demanded that decedent compensate her for his neglect and his failure to support her as a child; that decedent then told plaintiff that he did not want her to move to Los Angeles as it would embarrass him in his social and business activities.

[1] The oral agreement made upon this occasion is alleged in the following terms:

"That at said time and place decedent further orally promised and agreed that, while he was not able to provide for plaintiff at said time, if plaintiff would refrain from pressing her said claims and would not move to Los Angeles, decedent would provide for plaintiff and transfer assets to plaintiff from decedent's estate in an amount commensurate with plaintiff's rights as an only living child. That at said time and place plaintiff was informed and believed and said decedent led plaintiff to believe and told plaintiff that plaintiff's rights as an only living child would entitle plaintiff to one-half of decedent's said property and estate. That at said time decedent was a man of considerable wealth and prominence in and about the community of Southern California. Decedent further orally promised and agreed that he would so provide and transfer said amounts either during decedent's lifetime or at decedent's death, but that in any event plaintiff should not be concerned or worried about her acquisition of said rights and property.

"That in consideration of and in reliance upon the promises of said decedent as aforesaid, plaintiff promised and agreed to refrain from assertion of her claims against decedent by reason of his desertion and nonsupport and to remain out of her father's life and that in accordance with plaintiff's promise, and in reliance upon decedent's said promise and agreement, plaintiff did refrain from assertion of her said claims and rights and did remain out of her father's life; that plaintiff continued to receive letters from him and to visit and communicate with him at his request in and about New York City. That upon such occasions said decedent frequently repeated his promises that he would take care of plaintiff if she would not disclose her relationship to him and remain away from his home and business in Los Angeles or further press him to perform his agreements to make up for her poverty stricken youth and physical condition."

The second cause of action is in *quantum meruit* for services allegedy rendered decedent. It simply alleges "[t]hat plaintiff performed work, labor and services for the decedent during his lifetime, all at the special instance and request of the said decedent. That the reasonable value of the said services is Seven Hundred Fifty Thousand Dollars ($750,000.00) no part of which has been paid, although payment has been duly demanded."

The body of the creditor's claim filed in decedent's estate and incorporated into the amended complaint reads as follows:

"$750 000	Decedent's breach of contract to bequeath claimant that share of his estate to which a daughter and only child is entitled under California law when her father dies intestate.
"$750 000	Consideration provided to decedent by claimant pursuant to agreement to bequeath her that share of his estate to which a daughter and only child is entitled under California law when her father dies intestate (alternative). The amounts stated herein are subject to amendment when the amount of decedent's estate is known."

By their demurrer defendants invoked, as against the first alleged cause of action, that clause of the statute of frauds which declares invalid "[a]n agreement which by its terms is not to be performed during the lifetime of the promisor, or an agreement to devise or bequeath any property, or to make any provision for any person by will" unless the same or some note or memorandum thereof be in writing and subscribed by the party to be charged or his agent. (Civ.Code, § 1624, subd. 6, and Code Civ. Proc., § 1973, subd. 6.)

Plaintiff's basic contention on this appeal is that the agreement which she has pleaded is not within the inhibition of the statute of frauds because the alleged promise of decedent is in the alternative, *i. e.,* he promised to transfer the property to plaintiff either during his lifetime or at his death.

We conclude that the trial court was entirely correct in holding the pleaded agreement to be within the provisions of subdivision 6 of the statute of frauds. In Hagan v. McNary, 170 Cal. 141, 143, 148 P. 937, L.R.A.1915E, 562, the plaintiff alleged that the decedent Kupper promised to pay plaintiff the sum of $7,000 if she would furnish him with a permanent home during the term of his natural life, and that in reliance upon this promise plaintiff furnished Kupper such a home to the time of his death. When Kupper's administrator rejected her creditor's claim, plaintiff commenced her action to establish it. The trial court rendered judgment against plaintiff, holding that the agreement was within the above quoted provision of the statute of frauds. In affirming the judgment, the Supreme Court commented that plaintiff's promise (to perform certain acts for the lifetime of the decedent) "* * * could not be completed so long as breath remained in his [decedent's] body. The *plaintiff's* part of the agreement became completely executed upon his death, *and not until then.*" (Emphasis added.)

In Smith v. Bliss, 44 Cal.App.2d 171, 112 P.2d 30, plaintiff sought to recover from a decedent's estate upon an oral contract for personal services allegedly rendered to the decedent. Plaintiff alleged among other things, that Mrs. Coffin, the decedent, promised to compensate for plaintiff's valuable services by creating joint bank accounts or by making provision for plaintiff in her will, and that the amount which plaintiff would thus receive would be equal to gifts which Mrs. Coffin would make in like manner to one Irene Martin. The trial court sustained without leave to amend a demurrer to plaintiff's complaint. In affirming the ensuing judgment, the appellate court held that the alleged oral agreement was invalid under the statute of frauds, declaring 44 Cal. App.2d at page 175, 112 P.2d at page 32: "The foregoing is clearly an attempt to plead a contract of employment. By its express terms the contract was to continue from the date it was made in 1932 down to the date of the death of Mrs. Coffin. The amount of the compensation depended on the amount of the accounts in favor of Irene Martin. Until the date of Mrs. Coffin's death that amount could not be known Hence the amount to be put in a joint bank account in favor of the plaintiff, or the amount to insert in a will, could not be known. Obviously said contract could not be performed during the lifetime of the promisor (Mrs. Coffin). It was therefore clearly within the statute of frauds. Code Civ.Proc., sec. 1973, subd. 6; Hagan v. McNary, 170 Cal. 141, 148 P. 937, L.R.A.1915E, 652."

Likewise in the case at bar it is clear that the agreement pleaded could not have been fully performed on *plaintiff's* part prior to her father's death, since her promise was to refrain from asserting any claim against him "and to remain out of his life". And it is equally clear that the amount which plaintiff claims under the agreement (one-half the value of his estate) could not be ascertained until after his death.

Roy v. Salisbury, 21 Cal.2d 176, 130 P.2d 706, is the only decision cited by plaintiff in support of her contention that the instant agreement is not within the statute. The cited case is distinguishable. In that case the decedent had purchased a dog from plaintiff, a kennel owner, and thereafter the parties had orally agreed that if the buyer was unable to care for the dog, or should die, the plaintiff would board the dog at an agreed monthly figure. In affirming a judgment for plaintiff on the contract, the Supreme Court held the oral agreement without the terms of the statute because it was possible that the agreement would be fully performed during the lifetime of decedent. If decedent had become ill and was therefore unable to care for the dog, the plaintiff might commence performance of his part of the agreement. Then, if the dog were to die before its master, plaintiff's obligations under the contract would be completed and the owner would be obliged to pay the balance of the boarding fee. Thus the oral agreement was not merely a provision for the care of the dog after the death of the owner, but could be fully performed by both parties during the decedent's lifetime. It is clear that the agreement pleaded in the case at bar could not be fully performed on plaintiff's part prior to her father's death, since her promise was to refrain from asserting any claim against him "and to remain out of his life".

[2] Plaintiff has not cited such cases as Monarco v. Lo Greco, 35 Cal.2d 621, 220 P.2d 737, and her briefs contain no argument that she has stated sufficient facts to invoke the doctrine of estoppel or to entitle her to quasi-specific performance of an oral agreement within the statute of frauds. That the amended complaint does not state facts sufficient to invoke these equitable doctrines is made clear by reference to Smith v. Smith, 126 Cal.App.2d 194, 272 P.2d 118; Chahon v. Schneider, 117 Cal.App.2d 334, 256 P.2d 54; Palmer v. Phillips, 123 Cal.App.2d 291, 266 P.2d 850; Bonnear v. Bank of America, 84 Cal.App.2d 107, 190 P.2d 307; and see Ruinello v. Murray, 36 Cal.2d 687, 227 P.2d 251.

[3] As stated in Monarco v. Lo Greco, supra, 35 Cal.2d 621, 623–624, 220 P.2d 737, 739, "The doctrine of estoppel to assert the statute of frauds has been consistently applied by the courts of this state to prevent fraud that would result from refusal to enforce oral contracts in certain circumstances. Such fraud may inhere in the unconscionable injury that would result from denying enforcement of the contract after one party has been induced by the other seriously to change his position in reliance on the contract [Citations], or in the unjust enrichment that would result if a party who has received the benefits of the other's performance were allowed to rely upon the statute. [Citations.] In many cases both elements are present. Thus not only may one party have so seriously changed his position in reliance upon, or in performance of, the contract that he would suffer an unconscionable injury if it were not enforced, but the other may have reaped the benefits of the contract so that he would be unjustly enriched if he could escape its obligations."

[4] However, as stated in Smith v. Smith, supra, 126 Cal.App.2d 194, 197, 272 P.2d 118, 120; "To enforce an oral con-

tract to bequeath or devise property in equity by quasi-specific performance, it must be shown that the contract is definite and certain, the consideration adequate * * * that the character of the services is such that a money payment would not furnish adequate compensation to the plaintiff, that there is such a change in the plaintiff's condition and relations in reliance on the contract that a refusal to complete the contract would be a fraud upon him * * *"

[5–7] An examination of the amended complaint in the light of the applicable decisions discloses that plaintiff has failed to allege either "an unconscionable injury" or "unjust enrichment" which would result from denying enforcement of the alleged oral contract. Cf. Monarco v. Lo Greco, supra, 35 Cal.2d 621, 623, 220 P.2d 737. The complaint fails to allege a representation by decedent that a writing was not necessary or would be executed or that the statute would not be relied upon as a defense. Cf. Seymour v. Oelrichs, 156 Cal. 782, 794–795, 106 P. 88; Standing v. Morosco, 43 Cal.App. 244, 246, 184 P. 954. An allegation of misrepresentations going to the requirements of the statute of frauds is not a prerequisite to a finding of an estoppel to assert the statute (Monarco v. Lo Greco, supra, 35 Cal.2d 621, 625, 220 P.2d 737.) Nevertheless there must be an allegation of conduct by the party against whom the estoppel is asserted which would make it inequitable for him to rely on the statute as a defense. Cf. Notten v. Mensing, 3 Cal.2d 469, 474, 45 P.2d 198; Seymour v. Oelrichs, supra, 156 Cal. 782, 794, 106 P. 88; Anderson v. Stansbury, 38 Cal.2d 707, 715, 242 P.2d 305; see 23 Cal.Jur.2d 420, § 140. It is obvious that the mere making of an oral agreement which is within the statute is not *in and of itself* sufficient to estop the promisor from raising the statute as a defense. There must be additional extraordinary conduct or circumstances to justify a refusal to apply the statute. In the instant case the plaintiff has simply alleged the making of the oral promise. She has failed to allege sufficient facts to show that it would be "unconscionable" to invoke the applicable statute. As stated in Zellner v. Wassman, 184 Cal. 80, 87, 193 P. 84, 87: "* * * neither the mere omission to put a contract in writing nor such omission coupled with performance is alone sufficient to create an estoppel. * * The words and conduct on the part of decedent in making the oral promise and accepting plaintiff's performance did not amount to an inducement to plaintiff to, in effect, waive a written instrument in reliance upon a representation that decedent would stand by his agreement and not avail himself of the statute of frauds. *There is therefore, an absence of the element of fraud which is requisite to an estoppel. It is a case in which the consequences of the failure to comply with the statute must be borne by the party who seeks to enforce the agreement, and it follows that plaintiff has no cause of action upon the contract.*" (Emphasis added.)

Nor has plaintiff alleged facts establishing unjust enrichment, the second element from which an estoppel to assert the statute can be raised. Monarco v. Lo Greco, supra, 35 Cal.2d 621, 623, 220 P.2d 737. Decedent's estate would not be unjustly enriched if the oral contract on which plaintiff relies were not enforced. Cf. Ruinello v. Murray, supra, 36 Cal.2d 687, 690, 227 P.2d 251. Plaintiff did not transfer property to decedent during his lifetime (Stewart v. Smith, 6 Cal.App. 152, 162, 91 P. 667; cf. Bonnear v. Bank of America, supra, 84 Cal.App.2d 107, 110, 190 P.2d 307; see Palmer v. Phillips, supra, 123 Cal.App.2d 291, 298, 266 P.2d 850) nor make improvements on property owned by decedent (see Smith v. Smith, supra, 126 Cal.App.2d 194, 198, 272 P.2d 118.)

When plaintiff first made contact with her father in 1940 she had attained the age of 25 years. Prior to that time, according to her allegations, she had been able "to work in order to support and maintain herself and to help care for her mother." There is no allegation that plaintiff was destitute or unable to support herself during any period of time, either before or after 1940. It is difficult, therefore, to discern any tenable basis upon which plaintiff could then have predicated a legal claim against her father for past or prospective support. Her actions in "remaining away from decedent's home and social and business life and not disclosing to decedent's friends and business associates in the Los Angeles community that she was decedent's daughter" could hardly be regarded as equivalent to the rendition of services. Thus, it seems that there was nothing in the alleged "consideration" for the decedent's promise which legally could be considered to constitute unjust enrichment or to be sufficient to work an estoppel.

[8] However, assuming *arguendo* that plaintiff has alleged the rendition of services or the furnishing of some consideration which could be evaluated in terms of money, then on that assumption her remedy, if any, would lie in *quantum meruit* and not in an action on the alleged oral contract. Zellner v. Wassman, supra, 184 Cal. 80, 88, 193 P. 84; Long v. Rumsey, 12 Cal. 2d 334, 341, 84 P.2d 146; Leoni v. Delany, 83 Cal.App.2d 303, 188 P.2d 765, 189 P.2d 517; cf. Murdock v. Swanson, 85 Cal.App. 2d 380, 386, 193 P.2d 81; Palmer v. Phillips, supra, 123 Cal.App.2d 291, 299, 266 P.2d 850. However, as we shall presently show, plaintiff has failed properly to invoke that remedy.

[9, 10] Plaintiff's second contention is that a general demurrer does not lie against a common count, and that she is entitled to recover the reasonable value of the *services* alleged in her second cause of action. She relies upon the rule enunciated in Leoni v. Delany, supra, 83 Cal.App.2d 303, 188 P.2d 765, 189 P.2d 517, that where *services* have been rendered under a contract which is unenforceable because within the purview of the statute of frauds an action generally will lie upon a common count. There are, of course, many other cases which recognize the propriety of an action in *quantum meruit* for the value of services rendered in reliance upon a promise to compensate which is made unenforceable by the statute of frauds. It is well settled, however, that the filing of a proper creditor's claim is an indispensable prerequisite to the maintenance of the action under such circumstances as are here presented. Smith v. Smith, supra, 126 Cal.App.2d 194, 198, 272 P.2d 118; Murdock v. Swanson, supra, 85 Cal.App.2d 380, 385, 193 P.2d 81.

[11] The basic obstacle which confronts plaintiff in the case at bar is the inescapable fact that neither her creditor's claim nor her action is premised upon any right to recover the reasonable value of any *services* which would afford the basis for a recovery in *quantum meruit.* Although the creditor's claim (which makes no mention of services) is stated in alternative form, both statements are to the same effect, *i. e.,* that plaintiff claims $750,000, or one-half the value of the estate, pursuant to decedent's agreement "to bequeath claimant that share of his estate to which a daughter and only child is entitled under California law when her father dies intestate". The essential nature of the claim is definitely established by the following allegations of paragraph II of the common count contained in plaintiff's original complaint: "That between December 9, 1918 and June 9, 1956, the date of said decedent's death, plaintiff performed work, labor and services for the decedent, consisting of supporting, educating and maintaining herself and her mother without the aid of decedent, remaining away from decedent's home and social and business life and not disclosing to decedent's friends and business associates in the Los Angeles community that she was decedent's daughter; all at the special instance and request of the said decedent. * * * That the reasonable value of the said services is Seven Hundred Fifty Thousand Dollars ($750,000), no part of which has been paid, although payment has been duly demanded."

[12] The omission of the foregoing quoted allegations in the fourth amended complaint did not withdraw them from the court's consideration in ruling on the de-

murrer. Facts once alleged in a verified pleading and rendering it vulnerable to demurrer cannot be withdrawn from consideration by the court merely by omitting them from an amended pleading without explanation. Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 716, 128 P.2d 522, 141 A.L.R. 1358; Neal v. Bank of America, 93 Cal.App.2d 678, 682, 209 P.2d 825; Pike v. Archibald, 118 Cal.App.2d 114, 118, 257 P.2d 480. It thus appears that the only consideration for decedent's alleged promise consisted, not of services rendered, but rather of plaintiff's forbearing to assert a claim against decedent for support and of her refraining from intruding herself into his life.

Moreover, the identity of the amounts claimed in the alternative statements of the creditor's claim and the two counts of the complaint, together with the obvious fact that the amount so claimed bears no relationship to the reasonable value of any alleged services, conclusively establishes the basis of the second count.

[13–15] A general demurrer may be interposed when the complaint shows on its face that the agreement sued on is within the statute of frauds and does not comply with its requirements. Maynes v. Angeles Mesa Land Co., 10 Cal.2d 587, 590, 76 P.2d 109; Harper v. Goldschmidt, 156 Cal. 245, 252–253, 104 P. 451, 28 L.R.A.,N.S., 689. Plaintiff has attempted to avoid this familiar rule of pleading (see 23 Cal.Jur.2d 440, § 150; 39 Cal.Jur.2d 196, § 134) by alleging a second cause of action on the contract in the guise of a common count which ordinarily is not subject to general demurrer. Weitzenkorn v. Lesser, 40 Cal.2d 778, 792–793, 256 P.2d 947; see generally 2 Witkin, California Procedure, 1239, § 263. However, it is proper to sustain a general demurrer to a common count separately pleaded in a complaint where the recovery sought on the common count is obviously based on the same set of facts specifically pleaded in the count which fails to state a cause of action. Owens v. Traverso, 125 Cal.App.2d 803, 809, 271 P.2d 164; Hays v. Temple, 23 Cal.App.2d 690, 695, 73 P.2d 1248; see 39 Cal.Jur.2d 133, § 89. But if the deficiency of the first count is that it pleads a contract which is unenforceable because it is not in writing, a general demurrer will not lie to a common count in which plaintiff seeks recovery of the reasonable value of the services rendered under the otherwise valid contract. Leoni v. Delany, supra, 83 Cal.App.2d 303, 306–307, 188 P.2d 765, 189 P.2d 517.

As we have observed, plaintiff has made no effort to present a claim for the reasonable value of services rendered decedent. And plaintiff has manifestly failed to bring herself within the rule of Leoni v. Delany, supra, by pleading a second cause of action in which she seeks the reasonable value of services rendered decedent as a possible alternative to recovery of the larger sum claimed under an oral contract falling within the inhibition of the statute. Leoni v. Delany, supra, 83 Cal.App.2d 303, 307, 188 P.2d 765, 189 P.2d 517. To hold that this common count is not subject to general demurrer would be to nullify the statute (Civil Code, § 1624, subd. 6; Code Civ. Proc., § 1973, subd. 6) which declares unenforceable the oral contract on which the purported common count obviously rests. (See Restatement of Restitution, 243, § 62, comment b.)

Since the creditor's claim which plaintiff seeks to establish by this action is not one for the reasonable value of services, the instant case is governed by the holding in Murdock v. Swanson, 85 Cal.App.2d 380, 193 P.2d 81. In that case, as here, the complaint was in two counts. The first count specifically alleged an oral agreement in which the decedent promised to leave his estate to plaintiff in return for goods and services to be rendered by plaintiff during the remainder of decedent's lifetime. The second count was in *quantum meruit* for the reasonable value of such goods and services thus rendered by plaintiff. Plaintiff sought recovery of the identical amount in each cause of action. A general demurrer was sustained as to both counts. In affirming the ensuing judgment, the appellate court states in 85 Cal.App.2d at page

387, 193 P.2d at page 85: "The amended claim thus attached, and made the basis of the second cause of action, contains no reference to the reasonable value of the services and goods furnished to the decedent. It consists of a general statement of services and goods furnished to the decedent with a statement that all thereof was rendered and furnished at the request of the decedent for her use and benefit, and upon her promise to pay the claimant by making a will leaving all of her real and personal property to the claimant; * * *" And at page 388 of 85 Cal.App.2d, at page 86 of 193 P.2d: "It appears that the second cause of action, like the first, was in fact based upon the agreement and upon a claim filed demanding the entire estate because of that agreement, and no real attempt was made to allege a cause of action based upon *quantum meruit*."

Our disposition of the determinative issues of law above discussed renders it unnecessary for us to discuss or decide respondent's further contention that any possible cause of action on the theory of quantum meruit is barred by the statute of limitations. See Long v. Rumsey, 12 Cal.2d 334, 341–342, 84 P.2d 146 and Beard v. Melvin, 60 Cal.App.2d 421, 428–429, 140 P.2d 720.

The trial court did not abuse its discretion in sustaining the demurrer to the fourth amended complaint without leave to amend. In Ruinello v. Murray, supra, 36 Cal.2d 687, 227 P.2d 251, it was held that there was no abuse of discretion in so sustaining a demurrer to a third amended complaint. At page 690 of 36 Cal.2d, at page 253 of 227 P.2d, the Supreme Court stated: "Although the deficiencies in plaintiff's complaints were raised in defendant's demurrers, after three attempts he has not overcome them. The trial court could reasonably conclude that he was unable to do so, and accordingly, it did not abuse its discretion in sustaining the demurrer to the third amended complaint without leave to amend."

Since plaintiff here, after five attempts, has failed to state a cause of action, it seems fair to assume that none can be stated.

The judgment is affirmed and the purported appeal from the order sustaining the demurrer is dismissed.

FOX, P. J., and ASHBURN, J., concur.

52 Cal.2d 423

Ernest M. FUNK, Petitioner,
v.
SUPERIOR COURT of State of California, IN AND FOR COUNTY OF LOS ANGELES, Respondent.
L. A. 25404.

Supreme Court of California,
In Bank.
June 26, 1959.
Rehearing Denied July 22, 1959.

Proceeding on application for relief from denial of applicant's motion for production prior to trial of original notes made by officers of oral statements made by witnesses at preliminary hearing and for permission to inspect and copy written statements prepared from the notes. The Supreme Court, Gibson, C. J., held that in prosecution for committing abortions, accused was entitled to production before trial of original notes made by police officers of oral statements made by women upon whom abortions were allegedly performed and brother of one of them relating to matters covered in their testimony at preliminary hearing and to inspect and copy written statements prepared from the notes.

Mandate issued directing trial court to set aside denial of motion for production of notes and statements and to issue an order permitting petitioner to inspect and copy notes.

1. Criminal Law ⟹627½

In prosecution for committing abortions, accused was entitled to production before trial of original notes made by police officers of oral statements made by women upon whom abortions were allegedly performed and brother of one of them relating to matters covered in their testimony at preliminary hearing and to inspect and copy written statements prepared from the notes. West's Ann.Pen.Code, § 274.

2. Criminal Law ⟹627½

During trial, an accused can compel state to produce written statements of prosecution witnesses relating to matters covered in their testimony.

3. Criminal Law ⟹627½

In prosecution for performing abortions, accused, who sought permission to examine original notes made by officers as to oral statements by two women upon whom abortions were allegedly performed and brother of one of women relating to matters covered in their testimony at preliminary hearing, was not required to show that statements prepared by police had been signed or otherwise acknowledged by witnesses as accurate transcriptions of what was said orally. West's Ann.Pen.Code, § 274.

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Low, Stone & Emery and Joseph Stone, Beverly Hills, for petitioner.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., William B. McKesson, Dist. Atty., Jere J. Sullivan and Lewis Watnick, Deputy Dist. Attys., Los Angeles, for respondent.

GIBSON, Chief Justice.

[1] Petitioner was accused of having performed abortions in violation of section 274 of the Penal Code. At the preliminary hearing two women upon whom abortions were allegedly performed and the brother of one of them testified for the prosecution. On cross-examination it was shown that these witnesses had previously given oral statements to police officers relating to the matters covered in their testimony, that two of the statements had been recorded through the use of a stenotype machine, and that the third had been written by an officer in longhand. After being bound over to the superior court, petitioner, based on this showing, moved for an order directing that he be allowed to examine the original notes made by the officers and to inspect and copy written statements prepared from the notes. The motion was denied, and, upon petitioner's application to this court for relief, we issued an order to show cause why an appropriate writ should not be granted.

[2] The showing made by petitioner is sufficient to entitle him to production of the documents he wishes to inspect. It is settled that, during trial, an accused can compel the People to produce written statements of prosecution witnesses relating to the matters covered in their testimony. People v. Chapman, 52 Cal.2d —, 338 P.2d 428; People v. Riser, 47 Cal.2d 566, 585 et seq., 305 P.2d 1. As recent decisions of this court illustrate, there is no sound basis for applying a different rule merely because production is requested prior to, rather than during, trial. Powell v. Superior Court, 48 Cal.2d 704, 707–708, 312 P.2d 698, established that an accused has the right, before trial, to obtain written statements made by him to police officers. In Vance v. Superior Court, 51 Cal.2d 92, 330 P.2d 773, where a petitioner who was charged with violating section 288 of the Penal Code sought certain tape recordings for the purpose of refreshing his recollection prior to trial, we issued mandamus to compel the production not only of his own statements recorded by the police during interrogation but also of recordings which officers made of their conversation with the alleged victim and played to the petitioner while they were questioning him. And in Tupper v. Superior Court, 51 Cal.2d 263, 331 P.2d 977, we recognized that it is error to deny production of a statement of a prosecution witness where there is a "proper motion before trial."

[3] In laying a foundation for production of the documents, petitioner was not required to show that the statements prepared by the police had been signed or otherwise acknowledged by the witnesses as accurate transcriptions of what was said orally. People v. Riser, 47 Cal.2d 566, 587–588, 305 P.2d 1. Insofar as the cases of People v. Glaze, 139 Cal. 154, 157–158, 72 P. 965, and People v. Kostal, 159 Cal.App.2d 444, 449–450, 323 P.2d 1020, are to the contrary, they are disapproved.

Let a writ of mandate issue directing respondent to set aside its denial of petitioner's motion for production of the notes and statements in question and to issue an order permitting petitioner to inspect and copy them.

SHENK, TRAYNOR, SCHAUER, SPENCE, McCOMB and PETERS, JJ., concur.

52 Cal.2d 354

**PEOPLE of the State of California,
Respondent,
v.
Raymond DURAZO, Appellant.
Crim. 6427.**

Supreme Court of California,
In Bank.
June 23, 1959.
Rehearing Denied July 22, 1959.

Prosecution under three count indictment charging one unlawful sale of heroin to a confidential informant through whom police officer met defendant and two unlawful sales of heroin subsequently made to officer directly, wherein mistaken identity was sole defense and defendant was acquitted of first count charging sale of heroin to informant. From a judgment of conviction and from an order of the Superior Court, Los Angeles County, LeRoy Dawson, J., denying defendant's motion for a new trial, the defendant appealed. The Supreme Court, Spence, J., held that informer's identity was material to the defense and court erred prejudicially in sustaining objection to defendant's demand for informer's name.

Judgment and order reversed.

Shenk, J., dissented.

Opinion, 332 P.2d 182, vacated.

1. Criminal Law 🔑1170½(1)
Witnesses 🔑216

In prosecution under three count indictment charging one unlawful sale of heroin to a confidential informant through whom police officer met defendant and two unlawful sales of heroin subsequently made to the officer directly, wherein mistaken identity was sole defense and defendant was acquitted of first count charging sale of heroin to informant, informer's identity was material to the defense and court erred prejudicially in sustaining objection to defendant's demand for informer's name. West's Ann.Health & Safety Code, § 11500; West's Ann.Code Civ.Proc. § 1881, subd. 5.

2. Witnesses ⇐216

Existence of privilege of nondisclosure of a confidential informant depends on materiality of informer's identity to the defense. West's Ann.Code Civ.Proc. § 1881, subd. 5.

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Ellery E. Cuff, Public Defender, Paul G. Breckenridge, Jr., and John Brettmann, Deputy Public Defenders, Los Angeles, for appellant.

Edmund G. Brown and Stanley Mosk, Attys. Gen., and William E. James, Asst. Atty. Gen., for respondent.

SPENCE, Justice.

By an indictment in three counts, defendant was charged with selling heroin in violation of section 11500 of the Health and Safety Code. He was tried by the court and found guilty on counts two and three. This appeal is taken from the judgment of conviction and from an order denying defendant's motion for a new trial.

Defendant contends that the trial court committed prejudicial error in failing to require a prosecution witness to divulge the name of an informer on cross-examination. Our review of the record convinces us that this contention must be sustained.

[1] The case was submitted upon the transcript of the grand jury proceedings and additional evidence. With reference to count one, Officer Anderson testified before the grand jury as follows: On April 12, 1957, he and another man met defendant in a cafe in Los Angeles. Anderson's companion asked defendant about getting some "stuff." They went into the rest room; Anderson followed them and saw defendant give his companion a balloon in exchange for $12. The latter handed the balloon to Anderson.

With respect to count two, Anderson testified before the grand jury that on April 16, 1957, he met defendant on the sidewalk in front of a food market and asked defendant to sell him "a half." Defendant agreed and they went into the market, where Anderson gave defendant $12 in exchange for two pieces of balloon. As to count three, Anderson testified that on April 17, 1957, he again met defendant on the street and bought from him a $5 balloon. Expert testimony before the grand jury established that all the balloons contained heroin.

At the trial, Officer Anderson was the only witness for the prosecution. He testified that the person who accompanied him on April 12 was a confidential informer and claimed the privilege of withholding his name. Code Civ.Proc. § 1881, subd. 5. Anderson also testified that the informer was not present at the sales of April 16 and 17, and that they were not prearranged.

In view of the unidentified informer's participation in the first sale, the prosecution sought dismissal of count one. See People v. Castiel, 153 Cal.App.2d 653, 656–659, 315 P.2d 79; People v. Lawrence, 149 Cal.App.2d 435, 450–452, 308 P.2d 821; also Roviaro v. United States, 353 U.S. 53, 60–62, 77 S.Ct. 623, 1 L.Ed.2d 639. The court reserved its ruling on the motion and subsequently acquitted defendant on that count. With respect to counts two and three, defendant's counsel sought on cross-examination to ascertain the informer's identity. The prosecution objected upon the ground that it was privileged, and also irrelevant and immaterial. The objection was sustained.

[2] The existence of the privilege of nondisclosure depends on the "materiality of the informer's identity to the defense." People v. Williams, 51 Cal.2d 355, 333 P.2d 19, 21. Here defendant denied having sold

narcotics and denied ever having seen Officer Anderson before the trial; the sole defense was mistaken identity. Anderson testified that he had not known defendant before the sale of heroin to the informer on April 12. The grand jury proceedings at which Anderson identified defendant as the seller did not take place until May 9, some three weeks after the subsequent sales, and defendant was not arrested until September. Anderson said he had no doubt that the same person made each of the three sales. Under these circumstances, the informer was a material witness on the issue of defendant's guilt on all three counts. Had he contradicted Anderson's identification of defendant with respect to the first sale, his testimony would have been highly significant to discredit the identification with respect to the transactions of April 16 and 17. The court therefore erred prejudicially in sustaining the objection to defendant's demand for the informer's name. People v. Williams, supra, 51 Cal.2d 355, 333 P.2d 19.

The judgment and the order denying a new trial are reversed.

GIBSON, C. J., and TRAYNOR, SCHAUER, McCOMB and PETERS, JJ., concur.

SHENK, Justice.

I dissent.

The reversal in this case goes far beyond what is necessary to protect the rights of the defendant, and adds one more unnecessary impediment in the enforcement of the narcotic laws of this state. It throws the cloak of immunity from prosecution over the defendant no matter how many violations of the narcotic laws he may commit in the presence of Officer Anderson. The district attorney refused to prosecute under, and moved to dismiss count I of the indictment, obviously for the reason that the informer was a participant as to that count and he felt compelled to do so under the decisions of this court in Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39 and People v. Williams, 51 Cal.2d 355, 333 P.2d 19. However, the defendant was not so immunized under the third count. Officer Anderson testified that he made that purchase directly from, and in the presence of, the defendant and himself. There was no informant participation. Even if the prosecution would be blocked without disclosure as to count II, in order to satisfy the requirements of the majority in People v. Williams, supra, 51 Cal.2d 355, 333 P.2d 19, it should not under any compelling theory of protection for the narcotic vendor's rights render the defendant forever immune from arrest and prosecution by Officer Anderson under like circumstances.

This is a case of credibility of the witnesses. The defendant and Officer Anderson were the only witnesses at the trial. The officer first met and made a purchase from the defendant on April 12, 1957, in the presence of the informer. Following that transaction, the officer, in the absence of the informer or any other person, made purchases from the defendant on April 16 and 17, 1957. Three weeks later, on May 9, 1957, when he testified before the grand jury, the officer positively identified the defendant by photograph. Both the second and third transactions took place after the officer recognized the defendant upon a chance meeting on the street and approached him with a proposition to purchase narcotics. The officer was sufficiently familiar with the defendant to unerringly recognize him among others on the street. On the third occasion the officer and the defendant exchanged words of recognition while conducting the transaction. The officer's identification was sure and certain. He testified at the trial that the defendant was the man from whom he purchased the narcotic. The defendant testified that he was not the man. The trial court chose to believe the officer. In my opinion this court stretched the rule far enough, if not too far in favor of the narcotic vendor in the Priestly and Williams cases. It should not further extend the rule to every case where the defendant claims that he was "not the man", especially in the face of positive, direct, face to face testimony of the arresting officer that the defendant was the man and the informer had nothing to do with the transaction.

Narcotic felony violations in this state are increasing at an alarming rate. Since 1952 there has been a state-wide increase of 68 per cent in arrests based on a fixed population. The corresponding increase in convictions, however, has been but 10 per cent. Three-quarters of all arrests for narcotic violations occur in Los Angeles County. The arrest rate in that county is five times greater than that in the rest of the state, but the percentage of those arrested who are ultimately convicted in that county is approximately one-half of the percentage in the remainder of the state. (Report of the Bureau of Criminal Statistics, of the California Department of Justice, May 25, 1959.) By the very nature of the crime the use of informers plays a major role in the apprehension of narcotic violators. We are advised by the attorney general that prior to the recent restrictive decisions of this court in favor of the defendants relating to the disclosure of informers' names, the great majority of narcotic arrests resulted from the use of informers for the purpose of initiating, developing or substantiating the investigation. But since those decisions the use of informers has been almost eliminated and law enforcement in this area has become comparatively ineffective. Obviously it becomes impossible to solicit the assistance of informers where their identity is required to be revealed and they are thus exposed to retaliation on the part of narcotic violators. The hazardous position of the informer is dramatically called to our attention in Schuster v. City of New York, 5 N.Y.2d 75, 180 N.Y.S.2d 265, 154 N.E.2d 534, where it was held that inadequate protection had been furnished to an informer who was set upon and murdered prior to testifying. See also Brown v. United States, 9 Cir., 222 F.2d 293, where it is reported that an informer came to a "violent death" between trials, and Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327, where it appears that an informer was "eliminated" four days after the arrest. It is apparent that the need to protect an informer's name, and his life as well, is a factor to be given considerable weight in the balance in determining whether the state must reveal the source of its information.

In People v. Williams, supra, 51 Cal.2d 355, 333 P.2d 19, 22, the majority of this court held that the disclosure of an informer who had participated in a first sale of narcotics was necessary to a fair trial on a second count alleging a transaction "consummated in reliance on the prior" one. But in the present case the third sale was not consummated in reliance on the sale made in the informer's presence as in the Williams case. The third sale was consummated in reliance on the association which had been established between the defendant and the officer personally. At the time of the third sale the officer knew that he could deal with the defendant alone. Disclosure should not be required where there is substantial grounds for a conviction apart from facts of which the informer has knowledge. See Scher v. United States, 305 U.S. 251, 254, 59 S.Ct. 174, 83 L.Ed. 151.

The Williams case must be taken to establish the limits of the rule therein. Otherwise law enforcement in this area will become further unbalanced in favor of the defendant and against the public interest in a field of law enforcement where the unlawful narcotic traffic is so increasingly undermining the health, both mentally and physically, of its unfortunate victims.

In a recent narcotic case the Supreme Court of the United States stated: "The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense." Roviaro v. United States, 353 U.S. 53, 62, 77 S.Ct. 623, 628, 1 L.Ed.2d 639. The individual's right to prepare his defense in this case could not in any sense have been prejudiced by the nondisclosure of the informer as to count III.

The judgment and order should be affirmed as to the third count.

Rehearing denied; SHENK, J., dissenting.

52 Cal.2d 299

PEOPLE of the State of California ex rel. DEPARTMENT OF PUBLIC WORKS, Respondent,

v.

Stuart CHEVALIER et al., Defendants,

Richard C. Goodspeed et al., Appellants.

CITY OF LOS ANGELES, a Municipal Corporation, Respondent,

v.

Richard C. GOODSPEED et al., Appellants.

L. A. 25275.

Supreme Court of California,
In Bank.
June 16, 1959.
Rehearing Denied July 15, 1959.

Consolidated proceedings by city to condemn an easement across defendants' land to provide access for the parcels which became landlocked when a freeway was built and by state to condemn defendants' right of access to a street when the same freeway was built. The Superior Court, Los Angeles County, David Coleman, J., rendered judgment for plaintiffs and the defendants appealed. The Supreme Court, Spence, J., held that defendants' special defenses seeking judicial review of the recitations in city ordinance and state highway commission's resolution as to the necessity for the takings, on ground of alleged fraud, bad faith or abuse of discretion of city council and state highway commission, presented no justiciable issues, inasmuch as such recitations were conclusive evidence of the matter of necessity under the statute.

Affirmed.

McComb and Schauer, JJ., dissented.

Opinion, 331 P.2d 237, vacated.

1. Eminent Domain 🔑68

In consolidated proceedings by city to condemn an easement across defendants' land to provide access for parcels which became landlocked when a freeway was built and by state to condemn defendants' right of access to a street when the same freeway was built, defendants' special defenses seeking judicial review of the recitations in city ordinance and State Highway Commission's resolution as to the necessity for the takings, on ground of alleged fraud, bad faith or abuse of discretion of city council and State Highway Commission, presented no justiciable issues, inasmuch as such recitations were conclusive evidence of the matter of necessity under the statute. West's Ann.Code Civ.Proc. § 1241, subd. 2; West's Ann.Streets & High.Code, § 103; West's Ann.Const. art. 1, § 14.

2. Eminent Domain 🔑1

Eminent domain is an inherent attribute of sovereignty, and the constitutional provisions merely place limitations upon its exercise. West's Ann.Const. art. 1, § 14; U.S.C.A.Const. Amend. 14.

3. Eminent Domain 🔑66

The constitutional limitations that the taking must be for a public use and that just compensation must be paid for such taking create justiciable issues in eminent domain proceedings, but all other questions involved in the taking of private property are of a legislative nature. West's Ann. Const. art. 1, § 14; U.S.C.A.Const. Amend. 14.

4. Eminent Domain 🔑19

The taking of property for use as a public street or highway is a taking for a "public use" as required by the constitutional provisions, even though the street or highway will bear relatively light traffic. West's Ann.Const. art. 1, § 14; U.S.C.A. Const. Amend. 14.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Use".

5. Eminent Domain 🔑19

The taking by city of an easement across defendants' land to provide access for parcels which became landlocked when a freeway was built and the taking by state of defendants' right of access to a street when the same freeway was built were for a "public use" as required by the constitutional provisions. West's Ann. Const. art. 1, § 14; U.S.C.A.Const. Amend. 14.

6. Eminent Domain ⚷68

The conclusive effect accorded by the statutes to the condemning body's findings of necessity for the taking cannot be affected by allegations that such findings were made as the result of fraud, bad faith or abuse of discretion. West's Ann.Code Civ.Proc. § 1241, subd. 2; West's Ann. Streets & High.Code, § 103.

7. Eminent Domain ⚷68

Under statutes according conclusive effect to condemning body's findings of necessity for the taking, questions of necessity for making a given public improvement, the necessity for adopting a particular plan therefor, or the necessity for taking particular property, rather than other property, for the purpose of accomplishing the public improvement, cannot be made justiciable issues even though fraud, bad faith or abuse of discretion are alleged in connection with condemning body's determination of such necessity. West's Ann. Code Civ.Proc. § 1241, subd. 2; West's Ann.Streets & High.Code, § 103.

8. Eminent Domain ⚷55

Where the owner of land sought to be condemned for an established public use is accorded his constitutional right to just compensation for the taking, the condemning body's motives or reasons for declaring that it is necessary to take the land are no concern of the landowner. West's Ann.Const. art. 1, § 14; West's Ann.Code Civ.Proc. § 1241, subd. 2; West's Ann. Streets & High.Code, § 103.

9. Eminent Domain ⚷166

The consolidation of proceeding by city to condemn an easement across defendants' land to provide access for parcels which became landlocked when a freeway was built and by state to condemn defendants' right of access to a street when the same freeway was built was not abuse of discretion where the purpose was to allow an evaluation of the combined effects of the same project. West's Ann.Code Civ.Proc. § 1048.

10. Eminent Domain ⚷222(5)

In consolidated proceedings by city to condemn easement across defendants' land to provide access for parcels which became landlocked when a freeway was built and by state to condemn defendants' right of access to a street when the same freeway was built, the instructions given in accordance with the trial court's view that the takings were interdependent parts of the same project properly instructed on the issue of damages.

11. Eminent Domain ⚷223

In consolidated proceedings by city to condemn an easement across defendants' land to provide access for parcels which became landlocked when a freeway was built and by state to condemn defendants' right of access to a street when the same freeway was built, the form of verdict properly submitted the question of damages to the jury in accordance with the trial court's view as to the interdependence of the two takings in the construction of the freeway.

12. Eminent Domain ⚷202(4)

Evidence of a proposed use may be relevant in eminent domain proceeding, not to enhance damages, but to show that the proposed use is feasible, and, as such, might enter into a determination of the market value.

13. Eminent Domain ⚷202(4)

In eminent domain proceeding, where all the experts agreed that the land was suitable and valuable before, but not after the condemnation, for the building of a motel and restaurant project, and that this would have been a feasible plan for the use of the property, the sketch of a specific plan or development could have no other purpose than to attempt to enhance damages, and its rejection was proper.

Richard C. Goodspeed, So. Pasadena, in pro. per., Paul R. Hutchinson and Vaughan, Brandlin & Baggot, Los Angeles, for appellants.

George C. Hadley, William H. Peterson, Charles E. Spencer, Jr., Roger Arnebergh, City Atty., and Peyton H. Moore, Jr., Los Angeles, for respondents.

SPENCE, Justice.

Defendants Richard C. Goodspeed and William A. Hyland, as trustee, appeal from a judgment entered in two consolidated eminent domain actions, one brought by the state and the other by the city, to extinguish certain street access rights and to acquire an easement over said defendants' land for street purposes. The takings were incidental to the construction of a freeway. The jury found that the market value of the property taken was $7,500, and that severance damages were offset by special benefits to the portion of the land which was not taken. Defendants seek a reversal on the following grounds of alleged error: (1) the striking of portions of their answer, which purported to raise special defenses of fraud, bad faith, and abuse of discretion; (2) the consolidation of the two proceedings for trial; (3) the refusal of certain instructions bearing on the measure of damages; (4) the submitting to the jury of an alleged improper form of verdict; and (5) the exclusion from evidence of a proposed plan for improving defendants' land.

The litigation involved property in a block in the city of Los Angeles, which block was bounded on the north by 98th Street, on the east by Broadway, on the south by Century Boulevard, and on the west by Olive Street. Defendants owned a strip on the southeast corner, with a frontage of 87 feet on Century Boulevard and 441.63 feet on Broadway. 99th Street formerly cut into the block, crossing Olive Street from the west, but did not continue through to Broadway. It ended at the westerly boundary of defendants' land.

A section of the new Harbor Freeway was built, running generally along Olive Street. It does not cross defendants' land but its construction resulted in the closing of the intersection of 99th Street and Olive. Access to the west along 99th Street was thereby denied to defendants and to the owners of property located in said block on 99th Street to the east of its former intersection of Olive Street.

To provide access for the landlocked parcels located on 99th Street east of its former intersection with Olive Street, the state sought to obtain an easement measuring 60 feet by 87 feet over defendants' land, for the purpose of extending 99th Street to Broadway. Defendants successfully interposed demurrers on the theory that the condemnation to provide for this extension was beyond the power of the state with respect to the freeway project. The state and the city then entered into an agreement whereby the city agreed to condemn the easement across defendants' land. The state therefore limited its action against defendants to condemning defendants' right of access over 99th Street to and across the former Olive Street; and the city then brought the action to condemn the easement over defendants' land to extend 99th Street to Broadway.

The two actions were thereafter consolidated for trial. At the outset of the trial plaintiffs moved to strike from the defendants' answers those portions which defendants characterize as establishing "special defenses" of fraud, bad faith, and abuse of discretion. With respect to the state's action, the allegations were that it was feasible to construct the freeway over 99th Street instead of closing off defendants' westerly access, and that in failing to so construct the freeway, the State Highway Commission acted arbitrarily and abused its discretion.

The allegations of fraud, bad faith, and abuse of discretion with respect to the city's action were more detailed. They attacked the city council's action in finding that condemning an easement across defendants' land was necessary and in the public interest. In substance, the allegations were that (1) the council abused its discretion in that (a) it failed to investigate properly the advisability of providing access to the landlocked parcels by constructing a north-south service road along the east side of the freeway, from 99th Street to 98th Street, across land available for the purpose; (b) the council's finding was "pursuant to an agreement and conspiracy by and between said Council and the California State Highway Commission" merely to further the commission's desires rather than to further any of the city's own interests, since the state would otherwise have to construct the described service road; (c) the council refused to hear defendants' arguments that the described service road was more in the public interest; (2) the council acted in bad faith, fraudulently, arbitrarily, and negligently in that (a) it acted in concert with and under the domination, control, and influence of state agencies, without studying or investigating for itself the necessity or desirability of the described service road as an alternative; (b) rather than for a legitimate city interest, the condemnation was for the purpose of accomplishing for the state what the state was unable to do, and saving the state from having to build the described service road; (c) it refused to hear defendants' arguments that the public interest would be better served by the described service road.

[1] After receiving in evidence the city ordinance and the commission's resolution containing the findings attacked in the answer, the court ordered the "special defenses" stricken. The question is whether the stricken allegations presented a justiciable issue.

[2–5] Because eminent domain is an inherent attribute of sovereignty, constitutional provisions merely place limitations upon its exercise. County of San Mateo v. Coburn, 130 Cal. 631, 634, 63 P. 78, 621; County of Los Angeles v. Rindge Co., 53 Cal.App. 166, 174, 200 P. 27. The only limitations placed upon the exercise of the right of eminent domain by the California Constitution (art. I, § 14) and the United States Constitution (Fourteenth Amendment) are that the taking be for a "public use" and that "just compensation" be paid for such taking. Each of these limitations creates a justiciable issue in eminent domain proceedings. But "all other questions involved in the taking of private property are of a legislative nature." University of Southern California v. Robbins, 1 Cal.App.2d 523, 525, 37 P.2d 163, 164. The taking of property for use as a public street or highway is clearly a taking for an established public use (Rindge Co. v. Los Angeles County, 262 U.S. 700, 706, 43 S.Ct. 689, 67 L.Ed. 1186; 2 Nichols on Eminent Domain (Third Ed.) § 7.512 [2], p. 489), even though the street or highway will bear relatively little traffic. Sherman v. Buick, 32 Cal. 241, 255. There is no question, then, that the takings in the instant case are for a public use. Defendants did not allege fraud, bad faith, or abuse of discretion in the sense that the condemner does not actually intend to use the property as it resolved to use it. The stricken allegations in defendants' "special defenses" sought judicial review of the findings that the respective takings were necessary and commensurate with the greatest public good and the least private injury. These legislative determinations are frequently termed the question of necessity.

The recitations in the city ordinance and highway commission's resolution of the "public necessity" of the proposed improvements, that "such property is necessary therefor," and that the improvements were "planned or located in the manner which will be most compatible with the greatest public good, and the least private injury," are "conclusive evidence" of those matters. Code Civ.Proc., § 1241, subd. 2; Sts. and Hy. Code, § 103. In upholding the constitutionality of this conclusive presumption, the United States Supreme Court said: "That the necessity and expediency of taking property for public use is a legislative and not a judicial question is not open to discussion. * * * The question is purely political, does not require a hearing, and is not the subject of judicial inquiry." Rindge Co. v. Los Angeles County, supra, 262 U.S. 700, 709, 43 S.Ct. 689, 693, 67 L.Ed. 1186.

However, defendants maintain that there is an implied exception to the statutory conclusive presumption. They argue that the determination of necessity is justiciable when facts constituting fraud, bad faith, or abuse of discretion are affirmatively pleaded. Plaintiffs, on the other hand, assert that implying such an exception would allow public improvements to be unduly impeded by frequent and prolonged litigation by persons whose only real contention is that someone else's property should be taken, rather than their own. Plaintiffs point out that property owners do have considerable protection in any case, since just compensation must always be paid, and since the conclusive presumption attaches only to those city ordinances that have been passed by a two-thirds vote. Code Civ. Proc., § 1241, subd. 2.

There is no doubt that the language used in several decisions seems to imply that the condemning body's findings of necessity are reviewable in condemnation actions when facts establishing fraud, bad faith, or abuse of discretion are affirmatively pleaded. People ex rel. Department of Public Works v. Lagiss, 160 Cal.App.2d 28, 32–33, 324 P.2d 926; Orange County Water Dist. v. Bennett, 156 Cal.App.2d 745, 750, 320 P.2d 536; Los Angeles County Flood Control Dist. v. Jan, 154 Cal.App.2d 389, 394, 316 P.2d 25; City of La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal.App.2d 762, 777, 304 P.2d 803; People ex rel. Department of Public Works v. Schultz Co., 123 Cal.App.2d 925, 941, 268 P.2d 117; People v. Thomas, 108 Cal.App.2d 832, 835, 239 P.2d 914; People v. Milton, 35 Cal.App.2d 549, 552, 96 P.2d 159. But the cases upon which defendants rely appear to confuse the question of public use with the question of necessity for taking particular property. This is especially true in those instances in which the property owner's contention was that the condemning body was seeking to take more land than it intended to put to a public use. See People ex rel. Department of Public Works v. Lagiss, supra, 160 Cal.App.2d 28, 324 P.2d 926; Los Angeles County Flood Control Dist. v. Jan, supra, 154 Cal.App.2d 389, 316 P.2d 25; People ex rel. Department of Public Works v. Schultz Co., supra, 123 Cal.App.2d 925, 268 P.2d 117; People v. Thomas, supra, 108 Cal.App.2d 832, 239 P.2d 914; People v. Milton, supra, 35 Cal.App.2d 549, 96 P.2d 159. See also 2 Nichols on Eminent Domain (Third Ed.) § 7.5122, p. 492. However, the distinction between the question of public use and the question of necessity has been, and should be, recognized. County of Los Angeles v. Rindge Co., supra, 53 Cal.App. 166, 174, 200 P. 27; People v. Olsen, 109 Cal.App. 523, 531, 293 P. 645.

The failure of some of the cases to recognize such distinction may have resulted from adherence to the language employed in certain earlier cases decided before section 1241 of the Code of Civil Procedure was amended in 1913 to provide that the condemning body's determination of "necessity" should be "conclusive evidence" thereof. Stats.1913, p. 549. That amendment, however, definitely brought the law of this state into line with that of the vast majority of other jurisdictions. See numerous cases cited in Note L.R.A.,N.S., Vol. 22, page 64, at page 71. The majority rule is summarized in the cited note as follows: "If a use is a public one, the necessity, propriety, or expediency of appropriating private property for that use is ordinarily not a subject of judicial cognizance. In general, courts have nothing to do with questions of necessity, propriety, or expediency in exercises of the power of eminent domain. They are not judicial questions." Continuing on page 72, it is further said: "Once it is judicially established that a use is public, it is within the exclusive province of the legislature to pass upon the question of necessity for appropriating private property for that use, unless the question of necessity has been made a judicial one, either by the Constitution or by statute." Such a constitutional provision is found in the Constitution of Michigan 1850 (Art. 18, § 2) but as stated at page 70 in the cited note: "This provision, according to the court in Paul v. [City of] Detroit, 32 Mich. 108, is not found in Constitutions generally, and was never known in Michigan until the adoption of the Constitution of 1851."

As above indicated, the only pertinent limitations placed by the California Constitution upon the exercise of the right of eminent domain (art. I, § 14) are that the taking be for a "public use" and that "just compensation" be paid for such taking. It is further clear that since 1913, our statutory provisions (Code Civ.Proc., § 1241, subd. 2; see also Sts. and Hy. Code, § 103) have placed the determination of the question of "necessity" within the exclusive province of the condemning body by expressly declaring that the latter's determination of "necessity" shall be "conclusive evidence" thereof.

[6–8] We therefore hold, despite the implications to the contrary in some of the cases, that the conclusive effect accorded by the Legislature to the condemning body's findings of necessity cannot be affected by allegations that such findings were made as the result of fraud, bad faith, or abuse of discretion. In other words, the questions of the necessity for making a given public improvement, the necessity for adopting a particular plan therefor, or the necessity for taking particular property, rather than other property, for the purpose of accomplishing such public improvement, cannot be made justiciable issues even though fraud, bad faith, or abuse of discretion may be alleged in connection with the condemning body's determination of such necessity. To hold otherwise would not only thwart the legislative purpose in making such determinations conclusive but would open the door to endless litigation, and perhaps conflicting determinations on the question of "necessity" in separate condemnation actions brought to obtain the parcels sought to carry out a single public improvement. We are therefore in accord with the view that where the owner of land sought to be condemned for an established public use is accorded his constitutional right to just compensation for the taking, the condemning body's "motives or reasons for declaring that it is necessary to take the land are no concern of his." County of Los Angeles v. Rindge Co., supra, 53 Cal. App. 166, 174, 200 P. 27, 31, affirmed Rindge Co. v. Los Angeles County, 262 U.S. 700, 43 S.Ct. 689, 67 L.Ed. 1186. Any language in the prior cases implying a contrary rule is hereby disapproved. It follows that there was no error in the trial court's ruling striking the "special defenses" relating to the question of necessity.

[9] Defendants next contend that the court erred in consolidating the two proceedings for trial. Code of Civil Procedure, section 1048, permits the consolidation of actions "in the discretion of the court, whenever it can be done without prejudice to a substantial right." Defendants argue that the consolidation here resulted in prejudice to their damage claims, which were based on distinct compensable takings: the state's taking of a right of access to a street that was closed off by the freeway, and the city's taking of a strip of land for a street extension in the opposite direction, from which no benefits could be set off against the state's taking. The trial court's consolidation resulted from its view that the two takings were interrelated, both being incidental to the same freeway project. Since the state and city were acting in cooperation toward accomplishing the same improvement, there was no abuse of discretion in consolidating the actions for the purpose of allowing an evaluation of the combined effects of the project.

[10] Defendants next claim error in the court's refusal of certain instructions on the issue of damages. The substance of their objections is that the instructions given did not make clear to the jury that severance damages to defendants' property were the possible results of each of the takings, and confused the resultant benefits which could be set off against the damages. The court's refusal to give the requested instructions was, again, in accordance with its view that the takings were interdependent parts of the same project. From a general reading of the instructions, it appears that the jury was properly instructed in computing damages on the facts of this case. Contrary to defendants' claim, it does appear that the jury was instructed that they could find damage in the state's taking of the right of access to the west. Furthermore, the court used defendants'

submitted instructions for distinguishing special benefits from general benefits, and for determining the net severance damage.

[11] Defendants next complain of the form of the verdict submitted to the jury. It was prepared by the court and combined the two proceedings into one verdict, calling for these three items: (1) value of the land taken in opening 99th Street (found to be $7,500); (2) severance damages to the balance of the land caused by the taking of the right of access and the extension of 99th Street incident to the construction of the freeway (found to be $1,500); and (3) special benefits to the remaining land (found to be $1,500). Again this was in accord with the court's view as to the interdependence of the two takings in the construction of the freeway, the propriety of the consolidation of the two proceedings for trial, and the consequent submission of the case with its integrated damage considerations for determination by the jury. Defendants argue that there was no provision in the verdict for the fixing of damages for the loss of their right of access over 99th Street to the west, but as above indicated, provision was made for this taking in connection with severance damages, listed as the second item in the verdict.

[12, 13] Defendants finally contend that the court erred in denying admission of an architect's sketch showing a proposed improvement of their land. Defendants sought to show thereby that their property in one single piece, without the street bisection, would be suitable and valuable for building a motel and restaurant project, and that the severance ruined the prospect of such a development. It is true that evidence of a proposed use may be relevant, not to enhance damages but to show that the proposed use is feasible and, as such, might enter into a determination of the market value. Laguna Salada Union Elementary School Dist. v. Pacific Development Co., 119 Cal.App.2d 470, 476, 259 P.2d 498. However, all the experts agreed that the land was suitable and valuable, before but not after the condemnation, for the building of a motel and restaurant project, and that this would have been a feasible plan for the use of the property. It therefore appears that the sketch of a specific plan or development could have no other purpose than to attempt to enhance damages, and its rejection was proper. People v. La Macchia, 41 Cal.2d 738, 751, 264 P.2d 15; City of Los Angeles v. Kerckhoff-Cuzner Mill & Lumber Co., 15 Cal.App. 676, 677–678, 115 P. 654.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR and PETERS, JJ., concur.

McCOMB, Justice.

I dissent. I would reverse the judgment for the reasons expressed by Justice Lillie in the opinion prepared by her for the District Court of Appeal in People v. Chevalier, 331 P.2d 237.

SCHAUER, J., concurs.

Rehearing denied; SCHAUER and McCOMB, JJ., dissenting.

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52 Cal.2d 411

VINNELL COMPANY, Inc. (a Corporation), Respondent,
v.
PACIFIC ELECTRIC RAILWAY COMPANY (a Corporation), Appellant.
L. A. 25377.

Supreme Court of California,
In Bank.

June 26, 1959.
Rehearing Denied July 22, 1959.

Action for damages caused when railroad's locomotive and freight cars were pushed into an open excavation maintained by contractor constructing a storm drain, the terminal end of which was in or under railroad's service yard, wherein railroad by cross-complaint sought to recover damages caused to its equipment. The Superior

Court, Los Angeles County, Emil Gumpert, J., rendered judgment for contractor, and railroad appealed. The Supreme Court, Shenk, J., held that where railroad granted easement to flood control district to construct drain below surface of its property, and granted contractor license to go on railroad's property to construct drain, agreement drawn by railroad whereby contractor agreed to indemnify railroad against claims resulting directly or indirectly from performance of any work to be done upon property fell short of expressing railroad's intention to exculpate itself from its own negligence and railroad was liable for damage to contractor sustained when railroad's employees mistakenly directed locomotive and train of cars along track which terminated at an excavation and railroad could not recover from contractor for damage to its locomotive and cars even though railroad derived no particular benefit from the construction.

Affirmed.

McComb and Schauer, JJ., dissented.

Opinion, 334 P.2d 139, vacated.

1. Indemnity ⚷3

To be sufficient as an exculpatory provision against one's own negligence, party seeking to rely thereon must select words or terms clearly and explicitly expressing that that was the intent of the parties.

2. Indemnity ⚷8

Where railroad granted easement to flood control district to construct drain below surface of its property, and granted contractor license to go on railroad's property to construct drain, agreement of contractor to indemnify railroad against any claims, resulting directly or indirectly from performance of any work to be done upon property fell short of expressing railroad's intention to exculpate itself from its own negligence and railroad was liable for damage to contractor occurring when railroad's employees mistakenly directed locomotive and train of cars along track which terminated at excavation and railroad could not recover for damage to its locomotive and cars even though railroad derived no particular benefit from the construction; disapproving Southern Pac. Co. v. Fellows, 71 P.2d 75.

3. Indemnity ⚷6

Indemnification clauses are to be strictly construed against the indemnitee in cases involving affirmative acts of negligence on his part.

4. Indemnity ⚷8

Where primary purpose of clause of agreement between railroad and contractor, who was to construct storm drain below surface of railroad's property, was to protect railroad against liability to third parties as well as costs of litigation resulting from contractor's negligent acts or negligent acts of contractor's subcontractors, regardless of whether such third parties might further claim, successfully or unsuccessfully, that railroad had also been negligent, such clause had a definite practical meaning of benefit to railroad and it was not necessary to read into a contract an agreement by parties to indemnify railroad against damages to its own property or property of others caused solely by its own negligence.

5. Indemnity ⚷8

If an indemnitor is to be made responsible for negligent acts of indemnity over whose conduct he has no control, language imposing such liability should do so expressly and unequivocally so that contracting party is advised in definite terms of liability to which it is exposed.

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E. D. Yeomans, Edward A. Hume and James W. O'Brien, Los Angeles, for appellant.

Thelen, Marrin, Johnson & Bridges, James W. Baldwin, Ernest R. Baldwin, Callaway, Kirtland & Packard and Wallace C. Reed, Los Angeles, for respondent.

SHENK, Justice.

This is an appeal from a judgment for the plaintiff Vinnell Company, Inc., in an action for damages caused when the defendant Pacific Electric Railway Company's locomotive and freight cars were switched into an open excavation maintained by the plaintiff while constructing a storm drain, the terminal end of which was in or under the defendant's Fairbanks service yard. By a cross-complaint the defendant seeks to recover damages caused to its equipment.

It appears from an agreed statement of fact that the Los Angeles Flood Control District undertook to construct a storm drain, a portion of which was to lie beneath the surface of the defendant's Fairbanks yard. The plaintiff, on or about October 21, 1954, entered into a contract with the flood control district for the construction of that portion of the drain. Thereafter, and pursuant to agreement as hereinafter appears, the plaintiff entered the defendant's yard and commenced construction. This required that the defendant take up portions of its tracks while the plaintiff excavated the ditch and laid the storm drain conduits. The defendant arranged for temporary tracks and switching so that it could carry on its work in the yard. While the construction was in progress the defendant's employees engaged in operating freight trains through the yard. During the operation they mistakenly aligned a switch in such a way as to direct a locomotive and a train of cars along a track which had been terminated at an excavation, rather than along the track intended as a detour. As a result the locomotive and cars ran off the track and into the excavation, damaging the plaintiff's work in progress and the defendant's property in agreed sums. An employee of the defendant was injured and has made claim for damages against both the plaintiff and defendant.

It is admitted by the defendant railroad that such action on the part of its employees amounted to negligence, and that neither the plaintiff nor its employees were contributorily negligent.

Prior to the plaintiff's entry into the defendant's yard to commence construction, the defendant granted to both the flood control district and the plaintiff a right of entry and an easement to use the defendant's lands for the drainage project. These grants to the plaintiff were contained in a contract which, after reciting the relationships of the parties, provides among other things that the plaintiff would procure, in advance of doing any work, public liability insurance for damages arising out of bodily injuries or death, property damage insurance for damages arising out of injury to or destruction of property, and also public liability and property damage insurance "insuring the contractual liability of Contractor [plaintiff] under the provisions of Section 8 hereof." Section 8 provides as follows: "8. Contractor hereby releases and agrees to indemnify and save Railroad harmless from and against any and all injuries to and deaths of persons, claims, demands, cost, loss, damage and liability, howsoever same may be caused, resulting directly or indirectly from the performance of any or all work to be done upon the property and beneath the tracks of Railroad and upon the premises adjacent thereto under said agreement between District and Contractor, also from all injuries to and deaths of persons, claims, demands, cost, loss, damage and liability, howsoever same may be caused either directly or indirectly, made or suffered by said Contractor, Contractor's agents, employes and subcontractors, and the agents and employees of such subcontractors, while engaged in the performance of said work."

The agreement was prepared by the defendant railroad and executed by the plaintiff with no modifications. Thereafter the plaintiff entered the yard and commenced construction.

The question is whether such an indemnity clause operates to exculpate the defendant from the consequences of its own negligence where the clause does not expressly state that damage caused by the defendant's negligence is intended to be included in the coverage of the clause. The trial court held that the parties did not intend that the plaintiff should indemnify the defendant against liability caused by its own negligence, or that the defendant should be released from liability to the plaintiff for damages sustained by the plaintiff as a result of the defendant's negligence.

[1, 2] It would appear that "to be sufficient as an exculpatory provision against one's own negligence, the party seeking to rely thereon must select words or terms clearly and explicitly expressing that this was the intent of the parties." Sproul v. Cuddy, 131 Cal.App.2d 85, 95, 280 P.2d 158, 164. The language of the present clause, prepared on behalf of the defendant railroad, falls short of so expressing the defendant's intention to exculpate itself. As stated in Basin Oil Co. of California v. Baash-Ross Tool Co., 125 Cal.App.2d 578, 595, 271 P.2d 122, 132, quoting from Pacific Indemnity Co. v. California Electric Works, Ltd., 29 Cal.App.2d 260, 274, 84 P.2d 313, "The defendant itself wrote the provision into the contract for its own benefit. It could have plainly stated, if such was the understanding of the parties, that the plaintiff agreed to relieve it in the matter from all liability for its own negligence. As it did not do so, we resolve all doubt, as we should, in favor of the plaintiff, and hold that it was not the intent of the parties to give to the contract as written the effect claimed by the company." See also City of Oakland v. Oakland Unified School Dist., 141 Cal.App.2d 733, 736–738, 297 P.2d 752; Barkett v. Brucato, 122 Cal.App.2d 264, 264 P.2d 978; Butt v. Bertola, 110 Cal.App.2d 128, 140, 242 P.2d 32; Guy F. Atkinson Co. v. Merritt, Chapman & Scott Corp., D.C., 126 F.Supp. 406, 407.

The rule in this state, as expressed in the cases referred to, is in accord with the weight of authority. "In the overwhelming majority of the cases the result reached by their interpretational efforts can be condensed into the simple rule that where the parties fail to refer expressly to negligence in their contract such failure evidences the parties' intention not to provide for indemnity for the indemnitee's negligent acts." Annotation 175 A.L.R. 8.

[3] The only dissenting voice of which we need take note in the numerous expressions of the rule is heard in Southern Pac. Co. v. Fellows, 22 Cal.App.2d 87, 71 P.2d 75. But that case has not been followed for the proposition here referred to in subsequent decisions in this state, although on numerous occasions the courts have reconsidered the issues there involved. The courts have consistently adopted the position that indemnification clauses are to be strictly construed against the indemnitee in cases involving affirmative acts of negligence on his part. Cf. Barkett v. Brucato, supra, 122 Cal.App.2d 264, 276, 278, 264 P.2d 978; Annotation, 175 A.L.R. 8, 89–92, supra; 26 A.L.R.2d 1044, 1055–1056. Insofar as the Fellows case is inconsistent with anything said herein it is disapproved.

It is also contended that in circumstances wherein the indemnitee derives no particular benefit from the transaction involved, the indemnification clause should not be strictly construed against it. Thus, it is claimed, the defendant derived no particular benefit in granting the plaintiff the right to enter the yard to construct the drain, and it should not be caused to suffer any loss thereby. It is not disputed that had the parties agreed that due to the circumstances under which the plaintiff was to enter the defendant's yard the defendant should not be caused to suffer any loss relating to the construction, including that caused by the defendant's own negligence, such an agreement would effectively protect the defendant. But the question is not whether the defendant should have been so protected, but whether by their agreement the parties intended to afford that protection. It is clear by the applicable rules of construction that they did not. The fact that the defendant derived no benefit from the transaction would not broaden the indemnity clause beyond the intent of the parties. See City of Oakland v. Oakland Unified School Dist., supra, 141 Cal.App.2d 733, 737, 297 P.2d 752.

[4] It is also contended that unless the clause is construed to protect the defendant from claims of damage caused by its own negligence, such clause has no practical meaning of benefit to the defendant. But such is not the case. One of the primary purposes of the clause was obviously to protect defendant against "liability" to third parties, as well as the "cost" of litigation, resulting from plaintiff's negligent acts or the negligent acts of plaintiff's subcontractors in the performance of the construction work, regardless of whether such third parties might further claim, successfully or unsuccessfully, that defendant had also been negligent. Thus the clause has a definite practical meaning of benefit to the defendant, and we find no justification for reading into it any agreement by the parties to indemnify the defendant against damage to its own property or the property of others caused solely by its own negligence.

[5] Both by precedent and good reason, if an indemnitor such as the plaintiff is to be made responsible for the negligent acts of an indemnitee over whose conduct it has no control, the language imposing such liability should do so expressly and unequivocally so that the contracting party is advised in definite terms of the liability to which it is exposed. The indemnification clause in the present case, by not expressly stating that the defendant was protected against acts of its own negligence, failed to meet this requirement.

The judgment is affirmed.

GIBSON, C. J., and SPENCE and PETERS, JJ., concur.

McCOMB, Justice.

I dissent. I would reverse the judgment, for the reasons expressed by Mr. Justice Patrosso in the opinion prepared by him for the District Court of Appeal in Vinnell Co. v. Pacific Electric Ry. Co., 334 P.2d 139.

SCHAUER, J., concurs.

Rehearing denied; SCHAUER and McCOMB, JJ., dissenting.

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52 Cal.2d 347

Clarence E. LAMBERT et al., Appellants,

v.

SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA (a Corporation), Respondent.

L. A. 25414.

Supreme Court of California, In Bank.

June 23, 1959.

Action by owners of bulldozer against ranch owners who had rented bulldozer and against gas company for destruction of bulldozer by fire when it struck a high pressure gas line less than 15 inches under the ground. The Superior Court, Santa Barbara County, Ernest D. Wagner, J., sustained the gas company's demurrer to the complaint, and the owners appealed. The Supreme Court, Spence, J., held that under complaint filed by owners of bulldozer, which had been rented to ranch owners and which was totally destroyed by fire after striking a high pressure gas line less than 15 inches under the surface, containing one count charging that ranch owners were negligent in operation of bulldozer and a second count charging that gas company was negligent in permitting its pipe line to remain so near surface of ground, each count of complaint had to be tested on basis of its own allegations, and allegations of negligence in operation of bulldozer, which negligence was imputable to owners, was not available to defeat owners' cause of action against gas company, which was alone named in count two, and such count was sufficient to state a cause of action against gas company.

Judgment reversed with directions.

Opinion, 335 P.2d 512, vacated.

1. Pleading ⟹192(6)

Generally, a complaint which shows on its face contributory negligence is demurrable.

2. Negligence ⟹93(13)

Self-propelled caterpillar tractor with a bulldozer blade attachment constituted a device which could be propelled, moved or drawn upon a highway and was a "motor vehicle" within terms of Vehicle Code, even though caterpillar exceeded limitations regarding weight, size, and construction of equipment that could be lawfully moved on the highway and even though it was being used on private property at time that it was damaged by fire, and provisions of Vehicle Code pertaining to negligent operation thereof were applicable to action by owners against lessees of bulldozer and gas company for destruction of bulldozer by fire when it struck an underground gas line. West's Ann.Vehicle Code, §§ 31, 32, 402, 694(a), 705(a), 710, 710.5.

See publication Words and Phrases, for other judicial constructions and definitions of "Motor Vehicle".

3. Automobiles 🔑1

For purposes of classification as a "motor vehicle" under broad definition of the Vehicle Code, it is not required that the device be one that may legally be self-propelled upon a highway. West's Ann.Vehicle Code, §§ 31, 32.

4. Negligence 🔑93(13)

Under statute providing that every owner of a motor vehicle is liable and responsible for injury to property resulting from negligence in operation of such motor vehicle by any person operating the same with permission of owner and that negligence of such person shall be imputed to owner for all purposes of civil damages, alleged negligence of ranch overseer in operation of a bulldozer, which had been rented to ranch owners, was imputable to owners of bulldozer for all purposes of civil damages. West's Ann.Vehicle Code, § 402.

5. Negligence 🔑93(13)

Under statute providing that every owner of motor vehicle is liable and responsible for injury to property resulting from negligence in operation of vehicle by any person using or operating the same with permission of owner and that negligence of such person shall be imputed to the owner for "all purposes of civil damages", the quoted phrase indicates application of statute to all cases where rights and obligations of owner are involved in civil actions for damages regardless of whether owner is the plaintiff or the defendant. West's Ann.Vehicle Code, § 402.

See publication Words and Phrases, for other judicial constructions and definitions of "All Purposes of Civil Damages".

6. Pleading 🔑53(1)

A plaintiff may plead inconsistent causes of action in separate counts of a single complaint.

7. Pleading 🔑51

Each count or cause of action in a complaint must be complete in itself, and must either contain all averments necessary to state a cause of action or expressly refer therefor to other counts.

8. Pleading 🔑54

A count sufficient within itself may not ordinarily be defeated by importing, from another count, an allegation to which the sufficient count makes no reference.

9. Pleading 🔑193(1)

A common count may be joined with a count wherein all of facts are specially pleaded, and if count containing specific facts is demurrable, the common count is also demurrable.

10. Pleading 🔑54

A count in a complaint premised on detailed factual allegations in another count must stand or fall with the other count.

11. Gas 🔑20(1)

Under complaint filed by owners of bulldozer, which had been rented to ranch owners and which was totally destroyed by fire after striking a high pressure gas line less than 15 inches under surface, containing one count charging that ranch owners were negligent in operation of bulldozer and a second count charging that gas company was negligent in permitting its pipe line to remain so near surface of ground, each count of complaint had to be tested on basis of its own allegations, and allegations of negligence in operation of bulldozer, which negligence was imputable to owners, was not available to defeat owners' cause of action against gas company, which was alone named in count two, and such count was sufficient to state a cause of action against gas company. West's Ann. Vehicle Code, §§ 31, 32, 402, 694(a), 705(a), 710, 710.5; West's Ann.Code Civ.Proc. § 430.

12. Pleading ⚷51

Where bulldozer rented by ranch owners was destroyed by fire when it struck a high pressure gas line less than 15 inches under the surface, and owners were in doubt as to whether ranch owners or gas company should be held liable for damages sustained, owners, under right of joinder, could set forth two causes of action in one complaint against ranch owners and gas company. West's Ann.Code Civ.Proc. §§ 379a–379c.

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W. P. Butcher and Frank R. Crandall, Santa Barbara, for appellants.

Schramm, Raddue & Seed and Edw. W. Schramm, Santa Barbara, for respondent.

SPENCE, Justice.

Plaintiffs appeal from a judgment in favor of defendant Southern Counties Gas Company entered after said defendant's general demurrer to the first amended complaint had been sustained without leave to amend.

Plaintiffs sought damages for the loss of their "Caterpillar D8 tractor equipped with a Bulldozer 8S blade attachment and No. 29 Cable Control attachment; * * * hereinafter * * * referred to as plaintiffs' bulldozer." They had rented it to certain ranch owners and it was totally destroyed by fire after striking and puncturing a high-pressure gas pipeline less than 15 inches under the surface of the ranch property. The amended complaint is in two counts. Count one concerns only the alleged negligence of the ranch owners in the operation of the bulldozer over the pipeline when they should have known its location. Count two concerns only the alleged negligence of the gas company in permitting its pipeline to remain so near the surface of the ground.

The general demurrer of the gas company (the only defendant named in count two) was sustained on the ground that plaintiffs had affirmatively pleaded their own contributory negligence by alleging negligence on the part of the ranch overseer in count one, which negligence is imputed to plaintiffs, as owners of the bulldozer, under section 402 of the Vehicle Code. That section provides: "Every owner of a motor vehicle is liable and responsible for the * * * injury to * * * property resulting from negligence in the operation of such motor vehicle * * * by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages."

[1] Plaintiffs contend: (1) That their bulldozer may not properly be classified as a motor vehicle so as to permit the imputation of negligence as provided by said section 402; but (2) even if section 402 does apply so as to permit such imputation, the allegations of negligence of the ranch overseer in count one are not available to defeat plaintiffs' separately stated cause of action against the gas company in count two. On the other hand, the gas company claims: (1) That plaintiffs' bulldozer constitutes a motor vehicle within the meaning of the Vehicle Code so as to justify the imputation of negligence under section 402; and (2) that such negligence as shown in count one amounts to an affirmative pleading of plaintiffs' own contributory negligence so as to defeat plaintiffs' claim against the gas company though separately stated in count two. The gas company cites the general rule that a complaint which shows on its face contributory negligence is demurrable. Routh v. Quinn, 20 Cal.2d 488, 493, 127 P.2d 1, 149 A.L.R. 215; Nicolosi v. Clark, 169 Cal. 746, 747–748, 147 P. 971, L.R.A.1915F, 638; La Com v. Pacific Gas & Electric Co., 132 Cal.App.2d 114, 117, 281 P.2d 894, 48 A.L.R.2d 1455. By stipulation, defendant ranch owners are

not required to answer the amended complaint until this appeal from the judgment sustaining the gas company's demurrer has been decided.

[2, 3] In Behling v. County of Los Angeles, 139 Cal.App.2d 684, 294 P.2d 534, 535, an "Allis-Chalmers tractor, crawler type with bulldozer," was held as a matter of law to be a "motor vehicle" within the meaning of sections 31 and 32 of the Vehicle Code. Likewise here, plaintiffs' bulldozer as designated in their amended complaint constitutes a "device" which "may be propelled, moved or drawn upon a highway" (Veh.Code, § 31) and concededly is "self-propelled" (Veh.Code, § 32) so as to be a "motor vehicle" within the terms of the Vehicle Code. Yarrow v. State of California, Cal.App., 336 P.2d 1030. Plaintiffs argue that their bulldozer was being used on private property rather than in the construction of a public roadway at the time of the accident. Cf. Behling v. County of Los Angeles, supra. But that fact does not affect the basic definition of a "motor vehicle" for purposes of application of the Vehicle Code. People v. Pakchoian, 114 Cal.App.2d Supp. 831, 832–833, 250 P.2d 767. Nor does it aid plaintiffs to assert certain claimed facts in their opening brief in an attempt to show that their bulldozer exceeds the limitations regarding weight, size, and construction of equipment that may "lawfully" be moved on the highway. E. g., Veh.Code, §§ 694, subd. (a), 705, subd. (a). For purposes of classification as a "motor vehicle" under the broad definition of the Vehicle Code, it is not required that the device be one that may *legally* be "self-propelled upon a highway." Veh. Code, §§ 31, 32. The Vehicle Code comprehends those vehicles which may require special safeguard or special permit in order to be legally operated on the highways (Veh.Code, §§ 710, 710.5) as well as those vehicles which comply with existing statutory limitations. Plaintiffs' bulldozer therefore appears to be a "motor vehicle" as a matter of law, and the provisions of the Vehicle Code pertaining to the negligent operation thereof apply.

[4, 5] Count one of the amended complaint alleges the negligence of the ranch overseer, the agent of plaintiffs' bailees, in the operation of plaintiffs' bulldozer, and such negligence is imputable to plaintiffs as the "owner of a motor vehicle * * * for all purposes of civil damages." Veh. Code, § 402. Manifestly, the phrase *"all* purposes of civil damages" indicates application of the statute to "all cases where the rights and obligations of the owner are involved in civil action for damages" (Milgate v. Wraith, 19 Cal.2d 297, 300, 121 P.2d 10, 11), regardless of whether the owners be plaintiffs as here or whether the owner be the defendant as in Behling v. County of Los Angeles, supra. The gas company argues that since for the purpose of ruling on its demurrer, the allegations of the first amended complaint must be accepted as true (Carruth v. Fritch, 36 Cal.2d 426, 429, 224 P.2d 702, 24 A.L.R.2d 1403; Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 41, 172 P.2d 867), and it has demurred to the entire amended complaint rather than only to count two, it may avail itself of anything appearing "upon the face" of the amended complaint (Code Civ.Proc. § 430) to support its demurrer. Accordingly, it seeks to "dip into" count one of the amended complaint and avail itself of the allegations of negligence therein as imputed to plaintiffs to defeat plaintiffs' cause of action as separately stated in count two.

[6–8] But a plaintiff may plead inconsistent causes of action in separate counts of a single complaint. Steiner v. Rowley, 35 Cal.2d 713, 719, 221 P.2d 9; Goldwater v. Oltman, 210 Cal. 408, 423, 292 P. 624, 71 A.L.R. 871; Turner v. Turner, 173 Cal. 782, 785–786, 161 P. 980; Tanforan v. Tanforan, 173 Cal. 270, 273, 159 P. 709; Western Title Insurance & Guaranty Co. v. Bartolacelli, 124 Cal.App.2d 690, 694, 269 P.2d 165; see also Stockton Combined Harvester & Agricultural Works v. Glens Falls Ins. Co., 121 Cal. 167, 171, 53 P. 565; Haskins v. Crumley, 157 Cal.App.2d 524, 526, 321 P.2d 19. Each count or cause of action in a complaint must be complete in itself, and must either contain all the averments necessary to state a cause of action (Hopkins v. Contra Costa County, 106 Cal. 566, 570, 39 P. 933; Reading v. Reading, 96 Cal. 4, 6, 30 P. 803; Haskell v. Haskell, 54 Cal. 262, 264–265) or expressly refer therefor to other counts. Treweek v. Howard, 105 Cal. 434, 442, 39 P. 20; Green v. Clifford, 94 Cal. 49, 52, 29 P. 331. Similarly a count sufficient within itself may not ordinarily be defeated by importing, from another count, an allegation to which the sufficient count makes no reference. Lord v. Garland, 27 Cal.2d 840, 850, 168 P.2d 5; see also Steiner v. Rowley, supra, 35 Cal.2d 713, 719, 221 P.2d 9.

[9, 10] There are exceptional instances where the allegations of one count have been considered in connection with the allegations of another count in ruling on a demurrer. Thus a common count may be joined with a count wherein all of the facts are specially pleaded; and if the count containing the specific facts is demurrable, so is the common count which is obviously based on the same set of facts. Orloff v. Metropolitan Trust Co., 17 Cal. 2d 484, 489, 110 P.2d 396; Neal v. Bank of America, 93 Cal.App.2d 678, 681, 209 P. 2d 825; Rose v. Ames, 53 Cal.App.2d 583, 589, 128 P.2d 65; Hays v. Temple, 23 Cal. App.2d 690, 695, 73 P.2d 1248. This rule with respect to pleadings involving a common count apparently is based "on the anomalous nature of the common count in our system of pleading." Western Title Insurance & Guaranty Co. v. Bartolacelli, supra, 124 Cal.App.2d 690, 694, 269 P.2d 165, 168. Similarly in an extension of this rule, a count in a complaint premised on detailed factual allegations in another count must stand or fall with the other count. Ephraim v. Metropolitan Trust Co., 28 Cal.2d 824, 833, 172 P.2d 501; Ray v. Hanisch, 147 Cal.App.2d 742, 751, 306 P. 2d 30; Stafford v. Russell, 117 Cal.App. 2d 326, 327, 255 P.2d 814; Bos v. United States Rubber Co., 100 Cal.App.2d 565, 571, 224 P.2d 386. But in each of the last-cited cases, each count of the complaint rested basically on the same set of facts, and involved only a varying statement of the cause of action against the same defendant or defendants.

[11, 12] Here the gas company alone is named defendant in count two, and only its alleged negligence is involved in count two. Count two does not concern the alleged negligence of the ranch owners, which rests on a different premise for the recovery of damages as stated in count one. In short, the two counts in their respective separate statements of alleged negligence—that of the ranch owners, on the one hand, and that of the gas company, on the other—indicate that plaintiffs are in doubt as to which defendants should be held liable for the damages sustained, and for that reason plaintiffs have elected to set forth their two causes of action in the one complaint. Plaintiffs may do this under the right of joinder of defendants afforded by our system of code pleading (Code Civ.Proc. §§ 379a, 379b, and 379c; Kraft v. Smith, 24 Cal.2d 124, 130, 148 P. 2d 23; Sareussen v. Lowe, 125 Cal.App.2d 288, 289–290, 270 P.2d 27). It would defeat the principles underlying our liberal system of pleading to permit the gas company, the only defendant named in count two, to import, from the separately stated count one, allegations against other defendants based on a different premise of liability. Rather, as plaintiffs' amended complaint is framed here, each count should be tested upon the basis of its own allegations. Lord v. Garland, supra, 27 Cal.2d 840, 850, 168 P.2d 5. So tested, we conclude that the allegations of count two are sufficient to state a cause of action against the gas company, and that its general demurrer should have been overruled.

The judgment is reversed, with directions to the trial court to overrule the general demurrer of defendant gas company to the amended complaint and to allow said defendant a reasonable time within which to answer.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, McCOMB, and PETERS, JJ., concur.

52 Cal.2d 322

In re Oliver O. CLARK, on Suspension of License.

L. A. 25406.

Supreme Court of California,
In Bank.

June 19, 1959.

Disciplinary proceedings against an attorney. The Supreme Court held that attorney's plea of guilty in prosecution for selling stock without a permit constituted a "conviction" within statute making conviction of a felony or a misdemeanor a ground for disbarment, if involving moral turpitude, that the conduct of the attorney on which the charges were based involved moral turpitude and that, in view of his past record, a suspension for three years was not an excessive penalty.

Order of suspension from practice for three years.

1. Attorney and Client ⚷39

A plea of guilty constitutes a "conviction" within statute making a conviction for an offense involving moral turpitude a cause for disbarment. West's Ann. Bus. & Prof.Code, § 6101.

See publication Words and Phrases, for other judicial constructions and definitions of "Conviction".

2. Attorney and Client ⚷39

Although violations of Corporate Security Act are essentially malum prohibitum rather than malum in se, moral turpitude may be involved, and if violations are not merely technical but are accompanied by an intent to evade act with object of gain or profit they involve moral turpitude. West's Ann.Corp.Code, § 26104(a).

3. Attorney and Client ⚷39

In disciplinary proceeding against attorney who had pleaded guilty to charges of violating Corporations Code by selling stock without a permit, attorney, in view of record of his conviction, was precluded from questioning his guilt of knowingly selling securities without a permit. West's Ann.Corp.Code, § 26104(a); West's Ann. Bus. & Prof.Code, § 6101.

4. Attorney and Client ⚷53(2)

In disciplinary proceeding against attorney who was active in organization and management of corporation, evidence of manner in which attorney used money received for stock for corporate purposes and then obtained issuance of stock to cover his alleged advances to corporation established that attorney's conduct involved "moral turpitude" in violating Corporation Code by selling stock without a permit. West's Ann.Corp.Code, § 26104(a); West's Ann.Bus. & Prof.Code, § 6101.

See publication Words and Phrases, for other judicial constructions and definitions of "Moral Turpitude".

5. Attorney and Client ⚷53(2)

The fact that court in prosecution against attorney for selling stock without a permit placed attorney upon probation rather than imposing a fine or a prison sentence did not require a finding of absence of moral turpitude in disciplinary proceeding based on the same conduct. West's Ann.Corp.Code, § 26104(a); West's Ann.Bus. & Prof.Code, § 6101.

6. Attorney and Client ⚷58

Suspension for three years of 73 year old attorney who had pleaded guilty in criminal prosecution to charges of selling stock without a permit was not excessive in view of past disciplinary proceedings and the questionable manner in which he handled financial transactions of the corporation.

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Morris Lavine, Los Angeles, for petitioner.

Garrett H. Elmore, San Francisco, and Willis E. Urick, Jr., Los Angeles, for respondent.

PER CURIAM.

On May 22, 1956, Oliver O. Clark, an attorney at law, was charged by information with eight counts of grand theft and five counts of selling securities of the

United States Onyx Corporation (hereafter referred to as "Onyx Corporation") without first obtaining a permit from the California Commissioner of Corporations. The jury found defendant guilty on all thirteen counts. Defendant's motion for a new trial was granted. Before the retrial, Clark changed his plea and pleaded guilty to two charges of violating section 26104 (a) of the Corporations Code by knowingly selling stock of Onyx Corporation without a permit to Fred Jacobsen on November 23, 1954, and to Eugene F. Lombardo on December 18, 1954. Proceedings were suspended on these two counts and defendant was granted probation for five years upon the conditions that he make restitution to those persons who wished to have their money returned and that he not engage in any form of illegal activities. The remaining eleven counts of the information were dismissed.

[1] Clark's plea of guilty constitutes a "conviction." Bus. & Prof.Code, § 6101, as amended Stats.1955, ch. 1190, p. 2201, § 1. A report of the conviction was filed with this court, and on July 8, 1957 we referred the matter to the Board of Governors of the State Bar of California for hearing and report on the question whether the offenses involved moral turpitude and for recommendation as to the discipline, if any, to be imposed.

[2] Although violations of the Corporate Security Act are essentially malum prohibitum rather than malum in se, it does not follow that they may not involve moral turpitude. If they are not merely technical, but are accompanied by an intent to evade the act with the object of gain or profit, they involve moral turpitude. In re Hatch, 10 Cal.2d 147, 152, 73 P.2d 885; see also In re Hallinan, 43 Cal.2d 243, 246–248, 272 P.2d 768.

Hearings were held before a Special Administrative Committee of the State Bar. The Board of Governors adopted the findings of the committee and concluded that Clark "* * * intentionally violated and evaded the Corporate Securities Act of California with the object of personal gain," and that "The facts and circumstances surrounding the commission of the offenses to which respondent pleaded guilty * * * involved moral turpitude." The committee recommended that Clark be disbarred. The Board recommends that he be suspended for a period of three years.

The Board took account of Clark's past record in recommending the discipline to be imposed. Clark was admitted to practice in this state in 1907. In 1949 the Board publicly reproved him for obtaining $1,000 from a client upon the false representation that he had filed a complaint for the client. In 1952 he was suspended for six months for gross negligence in the handling of funds as a guardian and for filing misleading accounts with the probate court. Clark v. State Bar, 39 Cal.2d 161, 246 P.2d 1. He is a skilled practitioner and must be deemed to have been aware of the requirements of the Corporate Securities Act. He has organized a number of corporations in the past and in so doing has applied to and obtained from the California Commissioner of Corporations the necessary permits for the issuance of securities.

In 1952, primarily through Clark's promotional activities, Onyx Corporation was organized under the laws of the State of Nevada. Since that time he has been a director of the corporation and has been its president for most of this period, as well as its principal attorney and manager. After the incorporation in Nevada, promoters of the corporation caused to be transferred to it leasehold interests in deposits of onyx, scortia, and marble in Arizona and Nevada. The proposed operations of the corporation included the exploitation of these deposits, transshipping the stone to a processing plant near Los Angeles, and marketing the finished products as building materials. Clark evaluated the potential value of the leasehold interests as in excess of $500,000. Despite the expectations of the promoters and the investment of considerable sums by various persons, the corporation did not commence operations and is insolvent.

The articles of incorporation provide for three classes of stock: common stock in an authorized amount of 25,000 shares without par value; Class A preferred stock in an authorized amount of 150,000 shares with a par value of $1 per share, and Class B preferred stock in an authorized amount of 70,000 shares with a par value of $1 per share. Purchasers of Class A preferred stock are entitled to receive certificates for common stock, without additional consideration being paid, at a rate of 75 shares for each 1,000 shares of Class A stock purchased. The entire block of 70,000 shares of Class B stock was issued to the corporation's predecessor in interest in the deposits in consideration for the transfer of these interests. The sales of stock hereafter referred to are sales of Class A preferred stock.

When Onyx Corporation was incorporated, it issued 3,750 shares of common stock to Clark's wife in consideration of Clark's promotional services and authorized 1,666⅔ shares of Class A stock to be issued to her for $1 per share. The corporate records indicate that no other shares were issued by the corporation to Clark or his wife before the sales of stock to Jacobsen and Lombardo.

[3] Clark maintains that the stock that he sold to Jacobsen and Lombardo was his personally owned stock and that therefore no permit was required. This claim is based on the alleged existence of a "pool" of subscribed for, but unissued, stock that Clark maintains he owned and upon which he periodically drew in selling Onyx Corporation stock to various investors, including Jacobsen and Lombardo. The Board made extensive findings of fact to the effect that Clark's offers to subscribe to certain amounts of stock, if they actually had been made, had never been accepted by any valid action of the corporation's board of directors, and that consequently no such "pool" of unissued stock was controlled or owned by Clark. These findings are not necessary to refute Clark's contention that no permit was needed for the sales in question. In these proceedings Clark is precluded from questioning his guilt of knowingly selling securities without a permit, since the record of his conviction for this offense is conclusive on the question. In re Hatch, 10 Cal.2d 147, 150, 73 P.2d 885; Bus. & Prof.Code, § 6101.

[4] The following facts amply support the Board's conclusion that Clark's conduct involved moral turpitude. In May 1953 he obtained a "loan" of $27,000 from a Mr. Barker and a Mr. Futernick. These funds were apparently expended by him for corporate purposes. The corporation's minute book states that on May 23, 1953, at a meeting of the board of directors, Clark stated that the corporation was indebted to him, on his open account, for sums in excess of $32,500 and that he therefore tendered his subscription for preferred stock in this amount, to be paid for by an immediate debit to his account. The oral subscription was purportedly accepted by the board, and a certificate for 27,000 shares, with a par value of $27,000, was issued to Mr. Nat C. Recht, as trustee for Barker and Futernick, to "secure the indebtedness."

In June 1953 Clark obtained, in California, "loans" of $12,500 in the "Snyder-Stanton transaction." This money was apparently expended by Clark for corporate purposes. The minute book states that on July 15, 1953, Clark announced to the board of directors that the corporation was indebted to him on his open account for more than $14,000 for moneys advanced by him to the corporation, and that he tendered his subscription for 14,000 shares of Class A stock to be issued upon his request and to be paid for by an immediate debit to his account. Following the meeting, certificates for 12,500 shares of Class A stock were issued on Clark's instructions to Snyder and Stanton.

At meetings of the board of directors on September 21, 1954 and November 15, 1954, Clark stated that the corporation was indebted to him in excess of $3,500 on his open account. At each meeting his oral subscription for 3,500 shares was purportedly tendered and accepted, the certificates to be issued on his request. Clark admits that at the time there was no actual written account of the amounts expended, and that the figures were carried in his head. He does not have cancelled checks, receipts, or vouchers evidencing more than a fraction of the claimed advances.

In September 1954, using his stationery as an attorney in Los Angeles, Clark offered Mr. Ray Myers, president of a Los Angeles construction firm, 25,000 shares of Class A stock in exchange for the construction of a $25,000 marble processing plant in Cucamonga, California. On September 23, 1954, a certificate for 25,000 shares of stock was issued in Myers' name "in pledge" to secure the corporation's promissory note for $25,000.

In November and December of 1954 Clark received a total of $10,000 ($2,500 on November 23; $500 on December 2; $5,000 on December 7; and $2,000 on December 15) from Jacobsen, and $2,000 from Lombardo, for the purchase of Class A stock. At different times after the first purchase by Jacobsen, Clark obtained the following sums for stock purchases from persons in California: Mr. Cherry, $1,000; Mrs. Munson, $2,000; Mr. Hennessy and Mr. Ball, $2,500; Mr. Heller, $1,000; Betty M. Langley, $1,250; Mr. Cuddleback, $1,250; Mr. Leslie, $10,000; and Mr. Ohmer, $500. The minutes of a directors' meeting of January 28, 1955, state: "Mr. Clark stated that he had advanced to and for this corporation as loans to it moneys aggregating $9,500.00 as follows, to wit: $500.00 on or about December 2, 1954; $2,500.00 on or about December 7, 1954; $2,000.00 on or about December 15, 1954; $4,500.00 on or about December 20, 1954." The minutes state that Clark's subscription for 10,000 shares was tendered and accepted, to be paid for by an immediate debit to his open account. Clark identifies these amounts as representing the money expended for corporate purposes that had been received by stock sales to Mrs. Munson, Mr. Ohmer, Mr. Lombardo, and half of the money received from Mr. Jacobsen ($5,000 of Jacobsen's investment was paid on account of Clark's Barker-Futernick loan). The minutes for March 11, 1955 show a tender and acceptance of a subscription for 14,500 shares, made in the same manner. Clark admits that the receipts from the 10,000 share sale to Leslie, the 1,000 share sale to Cherry, and the 2,500 share sale to Hennessy and Ball "constitute a portion of the $14,500.00 which at that [March 11th] meeting I stated to the Board of Directors was then owing to me by the corporation for moneys theretofore advanced by me to it."

The inference is plain that the sales to Jacobsen and Lombardo were not sales of Clark's personally owned stock, but were merely part of a series of sales in a scheme to sell Onyx Corporation securities without complying with the Corporate Securities Act. Clark admits that Onyx Corporation was incorporated in Nevada partly for the purpose of avoiding the necessity of securing the approval of the California Commissioner of Corporations for the issuance of its securities. It is apparent that Clark also attempted to avoid the necessity of securing a permit by a plan to receive money for stock, use it for corporate purposes, and then, on the basis of a purported loan to the corporation, to have alleged "personal" stock issued to fulfill his obligations to the investors. In People v. Ratliff, 131 Cal.App. 763, 771–772, 22 P.2d 245, a similar scheme for financing a corporation was held to violate the Corporate Securities Act. As a stockholder and creditor of an insolvent corporation Clark stood to gain personally from the receipt of additional funds by the corporation. The Board's conclusion that Clark's conduct involved moral turpitude in that he "intentionally violated and evaded the * * * [act] with the object of personal gain" finds ample support in the record, and it is therefore unnecessary to consider his contention that the evidence does not support the Board's findings that he misrepresented and concealed material facts in connection with the sales to Jacobsen and Lombardo.

[5] Clark contends that the trial judge who heard the testimony regarding the commission of the offenses at the trial in the superior court was in the best position to judge whether or not moral turpitude was involved in Clark's conduct, and that his determination not to fine or imprison Clark amounts to a finding that there was no moral turpitude. Since the question whether an attorney should be disciplined for an act involving moral turpitude was not before the trial court, the granting of probation upon Clark's pleas of guilty cannot be regarded as a finding on that question. "Whether petitioner was convicted of a crime involving moral turpitude or of one not involving moral turpitude was a question of law and not one of fact, and the prerogative to decide that question of law is with this court, upon the transmission to this court of the certified copy of the record of conviction by the clerk of the trial court, and not with the trial court." In re McAllister, 14 Cal. 2d 602, 604, 95 P.2d 932, 933.

[6] Counsel for Clark urges that in view of his advanced age of 73 years, a suspension for three years is equivalent to disbarment and is therefore excessive. In considering the discipline to be imposed we cannot overlook Clark's past record and his apparent disinclination to mend his ways to avoid again becoming subject to disciplinary action. Twice before leniency has been extended him, yet the record is replete with evidence that he has continued to take "short-cuts" in carrying out the responsibilities he has assumed in connection with handling the funds of others, e. g., his diversion of at least $2,500 of Jacobsen's investment from the represented purpose of putting the processing plant in operation to a payment on account of his loan from Barker and Futernick; his failure to maintain any written account of the moneys received from investors and allegedly expended by him for corporate purposes; his failure to cause the corporation to maintain a stock ledger or any account that accurately identifies the stockholders or their holdings; his practice of causing to be drawn up in advance the minutes of directors' meetings at which his subscriptions for shares of stock were purportedly accepted, and his apparent reconstruction of the minutes of certain of these meetings after the criminal charges had been filed against him; his dealings in cashiers' checks, telegraphic money orders, and cash which, along with the nonmaintenance of even a personal bank account, makes impossible an accurate reconstruction of his handling of investors' and the corporation's funds; and his causing certain certificates of stock to be antedated or issued out of order in violation of the articles of incorporation.

It is ordered that Oliver O. Clark be suspended from the practice of law for a period of three years, commencing 30 days after the filing of this opinion.

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52 Cal.2d 341

COUNTY of SAN BERNARDINO et al.,
Respondents,
v.
HARSH CALIFORNIA CORPORATION
(a California Corporation),
Defendant;

United States of America, Intervener and Appellant.
L. A. 25089.

Supreme Court of California,
In Bank.
June 23, 1959.

Action to recover personal property taxes. The Superior Court, San Bernardino County, S. Thomas Bucciarelli, J., assigned by chairman of judicial counsel, entered order denying motion of United

States for leave to intervene. The United States appealed. The Supreme Court, Traynor, J., held that where defendant, under a 75-year-lease from United States, operated a military housing project on federally owned land, the county assessed personal property taxes against defendant's leasehold interest without any deduction for expenditures made by United States for facilities or services normally provided by local taxing agency and the county instituted action to collect such taxes from defendant, United States had an interest in sustaining its fiscal policy by securing an adjudication of the validity and correct interpretation of federal statute providing that interest of such a lessee is subject to local taxes, properly equalized, less payments made by United States to local taxing agencies with respect to such property and also less any money expended for facilities or services normally provided by local taxing agencies, and such interest was sufficient to support intervention of United States.

Reversed.

McComb, J., dissented.

Opinion, 335 P.2d 163, vacated.

1. United States ⚷135

Where defendant, under a 75-year lease from United States, operated a military housing project on federally owned land, the county assessed personal property taxes against defendant's leasehold interest without any deduction for expenditures made by United States for facilities or services normally provided by local taxing agency and the county instituted action to collect such taxes from defendant, United States had an interest in sustaining its fiscal policy by securing an adjudication of the validity and correct interpretation of federal statute providing that interest of such a lessee is subject to local taxes, properly equalized, less payments made by United States to local taxing agencies with respect to such property and also less any money expended for facilities or services normally provided by local taxing agencies, and such interest was sufficient to support intervention of United States. West's Ann. Code Civ.Proc. § 387; National Housing Act, §§ 801–809 as amended 12 U.S.C.A. §§ 1748–1748h; Housing Amendments of 1955, § 408 as amended by Housing Act of 1956, § 511, 42 U.S.C.A. § 1594 note.

2. Parties ⚷38

The purposes of intervention are to protect the interests of those who may be affected by the judgment and to obviate delay and multiplicity of actions, but intervention may be denied if these objectives are outweighed by the rights of the original parties to conduct their lawsuit on their own terms. West's Ann.Code Civ.Proc. § 387.

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Charles K. Rice, Asst. Atty. Gen., Lee A. Jackson and John J. Crown, Department of Justice, Washington, D. C., Laughlin E. Waters, U. S. Atty., Edward R. McHale, Asst. U. S. Atty., Los Angeles, and Melvin L. LeBow, Washington, D. C., for appellant.

Albert E. Weller, County Counsel, and John B. Lawrence, Deputy County Counsel, San Bernardino, for respondents.

TRAYNOR, Justice.

[1] The United States of America appeals from an order denying its motion for leave to intervene in an action to recover unsecured personal property taxes.

Defendant Harsh is the operator of a Wherry Act Military Housing Project located on federally owned land at the Marine Corps Supply Center near the town of Barstow. Defendant operates the project under a 75-year lease from the United States executed pursuant to title VIII of the National Housing Act. 12 U.S.C.A. §§ 1748–1748h. Under the terms of the lease, defendant built 337 family dwelling units for occupancy by those military and civilian personnel designated by the United States. Title to all improvements and personal property installed therein is in the United States. The United States agreed to furnish fire and police protection, if available, and retained the right to regulate the rents charged to the subtenants.

In 1956, the Supreme Court of the United States held that Congress had consented to the taxation by local authorities of a lessee's possessory interest in a Wherry Act housing project. Offutt Housing Co. v. Sarpy County, 351 U.S. 253, 76 S.Ct. 814, 100 L.Ed. 1151. Congress then amended the National Housing Act (§ 408 [as amended by § 511, Housing Act of 1956, ch. 1029, 70 Stat. 1110–1111]) to provide that:

> "* * * Nothing contained in the provisions of title VIII of the National Housing Act in effect prior to August 11, 1955, or any related provision of law, shall be construed to exempt from State or local taxes or assessments the interest of a lessee from the Federal Government in or with respect to any property covered by a mortgage insured under such provisions of title VIII: *Provided,* That, no such taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessee shall exceed the amount of taxes or assessments on other similar property of similar value, less such amount as the Secretary of Defense or his designee determines to be equal to (1) any payments made by the Federal Government to the local taxing or other public agencies involved with respect to such property, plus (2) such amount as may be appropriate for any expenditures made by the Federal Government or the lessee for the provision or maintenance of streets, sidewalks, curbs, gutters, sewers, lighting, snow removal or any other services or facilities which are customarily provided by the State, county, city, or other local taxing authority with respect to such other similar property * * *." 42 U.S.C.A. § 1594 note.

The designee of the Secretary of Defense, in accordance with section 511, supra, determined that Harsh was entitled to a reduction of $27,759 with respect to assessments for the 1957–1958 tax year. The assessor, however, sent Harsh a tax bill for the full amount of its assessment without any reduction.

The county brought this action to recover taxes and penalties in the amount of $23,099.04. Defendant pleaded that the designee of the Secretary of Defense had determined that defendant was entitled to a reduction of $27,759 in its taxes, that notice of this determination had been served on plaintiff's board of supervisors, and that plaintiff had refused to comply with this determination.

The United States filed a petition and proposed answer in intervention. It alleged that it had paid more for facilities or services normally provided by the local taxing agencies than the amount of the taxes levied against defendant's possessory interest, that the money so paid was in lieu of taxes, and that pursuant to federal law the Secretary of Defense had notified the county board of supervisors of his determination that the local taxes on defendant's possessory interest must be reduced by $27,759.

Section 387 of the Code of Civil Procedure provides:

> "At any time before trial, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding. An intervention takes place when a third person is permitted to become a party to an action or proceeding between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant * * *."

The United States contends that the matter in litigation includes the validity and operation of the federal statute, that it has an interest therein, that it seeks to unite with defendant in resisting plaintiff's claim, and that it is therefore entitled to intervene. Plaintiff contends that the interest of the United States is not "of such a direct and immediate character that" the United States "will either gain or lose by the direct legal operation and effect of the judgment" (Elliott v. Superior Court, 168 Cal. 727, 734, 145 P. 101, 105; see, also, Allen v. California Water & Telephone Co., 31 Cal.2d 104, 109, 187 P.2d 393, and cases cited), and that leave to intervene was therefore properly refused. It points out that neither the legal nor economic incidence of the tax on defendant's possessory interest falls on the United States (see DeLuz Homes, Inc. v. County of San Diego, 45 Cal.2d 546, 570, 290 P.2d 544), that a decision upholding or invalidating the tax will affect the rents defendant may charge government personnel indirectly or not at all and therefore even more remotely the United States, and that the interest of the United States in securing a favorable precedent is alone not enough to support intervention. See Jersey Maid Milk Products Co. v. Brock, 13 Cal.2d 661, 664, 91 P.2d 599.

It may be conceded that the outcome of plaintiff's action will not directly affect the federal fisc. The payments claimed to be in lieu of taxes have been made, if defendant loses it cannot recoup its tax payments from the United States (cf., General Dynamics Corp. v. County of Los Angeles, 51 Cal.2d 59, 330 P.2d 794), and if it wins it need not reimburse the government for the in lieu payments that extinguished its tax liability. Nevertheless, the United States has a vital interest in establishing the validity and correct delineation of the fiscal policy set forth by Congress.[1]

Congress determined that local taxing agencies should not secure windfalls by being permitted fully to tax privately held interests in Wherry Act Military Housing Projects when they were also receiving payments from the United States for services ordinarily rendered to taxpayers or being relieved by the United States of the necessity of rendering such services. It concluded that unless such windfalls were prevented, government payments or services would not reduce taxes and thereby allowable rents, but result in the housing projects' carrying more than their share of the expenses of local government. Such windfalls would subvert the purpose of providing housing for government personnel at reasonable rents.

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[1] The purpose of the 1956 amendment to the National Housing Act was set forth in the report of the House Committee on Banking and Currency (H.Rep. No. 2363 on H.R. 11742, 84th Cong., 2d Sess., pp. 48–49), U.S.Code Cong. & Adm.News 1956, p. 4556, as follows:

"The need for a clarification of this matter has existed since the initiation of the Wherry Act program because of the doubtful validity and effectiveness of various tax statutes of the States as applied to the interest of the mortgagor corporations where the projects are located on lands owned by the United States. The problem has involved the major constitutional question of the right of States to tax the mortgagor's leasehold interest, and has been complicated by the large variety of statutes in the individual States which local taxing officials have attempted to apply to the mortgagor's interests. There has been a substantial amount of litigation on this matter in State and lower Federal courts over the period of the program without uniformly resolving the questions involved. The recent decision of the Supreme Court of the United States in the case of Offutt Housing Company v. County of Sarpy (May 28, 1956) [351 U.S. 253, 76 S.Ct. 814, 100 L.Ed. 1151] upheld the right of local taxing officials in the State of Nebraska to levy certain State and county 'personal property' taxes against the lessee's interest in a title VIII project, measured by the full value of the buildings and improvements. However, as a large portion of the projects have not been subject to State and local taxes, payments in lieu of taxes have frequently been made to local taxing officials in exchange for usual services, such as schools, furnished to the projects. Also, many expenditures have been made by the Federal Government for streets, utilities, schools, and other services normally furnished by taxing bodies. As tax payments for a project normally have an ultimate effect on the rentals paid by military and civilian personnel at the military installations, it is important that no payments be made to communities which would constitute a windfall over and above normal taxes. Consequently, it is very important to assure that the project does not duplicate payments for services furnished to it. This duplication would be avoided under the provisions in the bill for deductions from tax payments, as explained above."

Defendant's resistance to the payment of the tax is based squarely on the federal statute, and accordingly, this case directly involves not only defendant's liability to plaintiff, but the validity and operation of federal fiscal policy defined by federal statute. The interest of the United States in sustaining its fiscal policy by securing an adjudication of the validity and correct interpretation of its statute is fully sufficient to support its intervention whether or not the judgment will directly and immediately affect its pecuniary interests. The Exchange, 7 Cranch 116, 146, 3 L.Ed. 287; State of Florida v. State of Georgia, 17 How. 478, 494–495, 15 L.Ed. 181; Commonwealth of Pennsylvania v. Williams, 294 U.S. 176, 178–179, 186, 55 S.Ct. 380, 79 L.Ed. 841; Muench v. Public Service Commission, 261 Wis. 492, 53 N.W.2d 514, 523, 55 N.W.2d 40; Van Riper v. Jenkins, 140 N.J.Eq. 99, 45 A.2d 844, 845, 163 A.L.R. 1343; Mundy v. McDonald, 216 Mich. 444, 185 N.W. 877, 880, 20 A.L.R. 398; Jamaica Gaslight Co. v. Nixon, 110 Misc. 494, 181 N.Y.S. 620, 622; Parker v. State, 132 Ind. 419, 31 N.E. 1114; see also, Securities and Exchange Comm. v. United States Realty & Improvement Co., 310 U.S. 434, 460, 60 S.Ct. 1044, 84 L.Ed. 1293; Coleman v. Miller, 307 U.S. 433, 441–442, 59 S.Ct. 972, 83 L.Ed. 1385; Hopkins Federal Savings & Loan Ass'n v. Cleary, 296 U.S. 315, 339–341, 56 S.Ct. 235, 80 L.Ed. 251; Rocca v. Thompson, 223 U.S. 317, 330, 32 S.Ct. 207, 56 L.Ed. 453; United States v. State of Minnesota, 270 U.S. 181, 195, 46 S.Ct. 298, 70 L.Ed. 539; United States v. Rickert, 188 U.S. 432, 444, 23 S.Ct. 478, 47 L.Ed. 532; State of Georgia v. Pennsylvania R. Co., 324 U.S. 439, 450, 65 S.Ct. 716, 89 L.Ed. 1051; In re Debs, 158 U.S. 564, 584–586, 15 S.Ct. 900, 39 L.Ed. 1092; Percy Summer Club v. Astle, C.C., 110 F. 486, 489; Griffin v. United States, 8 Cir., 168 F.2d 457, 459; United States v. Fitzgerald, 8 Cir., 201 F. 295, 296–297; State ex rel. Johnson v. Alexander, 87 Utah 376, 49 P.2d 408, 415–416; In re Estate of Quinn, 43 Cal.2d 785, 787, 278 P.2d 692; Koehn v. State Board of Equalization, 50 Cal.2d 432, 435–437, 326 P.2d 502.

[2] The purposes of intervention are to protect the interests of those who may be affected by the judgment (State of Florida v. State of Georgia, 17 How. 478, 494–495, 15 L.Ed. 181; Voyce v. Superior Court, 20 Cal.2d 479, 485, 127 P.2d 536) and to obviate delay and multiplicity of actions (Belt Casualty Co. v. Furman, 218 Cal. 359, 362, 23 P.2d 293; Elms v. Elms, 4 Cal.2d 681, 684, 52 P.2d 223, 102 A.L.R. 811), but intervention may be denied if these objectives are outweighed by the rights of the original parties to conduct their lawsuit on their own terms. See Willett v. Jordan, 1 Cal.2d 461, 465, 35 P.2d 1025; Isaacs v. Jones, 121 Cal. 257, 262, 53 P. 793, 1101. In the present case the United States is entitled to be heard to protect its fiscal policy, and its full participation as a party will assist in securing a judgment that should become definitive of the issues involved in similar situations. It is making common cause with the defendant, and no prejudice to the rights of either plaintiff or defendant will result from its presence. Under these circumstances its right to intervene is clear.

People v. Brophy, 49 Cal.App.2d 15, 120 P.2d 946, and Faus v. Pacific Electric Ry. Co., 134 Cal.App.2d 352, 285 P.2d 1017, are not contrary to our conclusion herein. In the Brophy case the city of Los Angeles and the Attorney General sought to intervene in an action by a subscriber against the telephone company to enjoin discontinuance of service. It was contended that the contract between the company and the subscriber was illegal because the telephone was being used to communicate racing information. The court held that the contract was not illegal and that its performance could not be enjoined and that therefore the city and the Attorney General had no interest that could be served by allowing them to intervene. In the Faus case, the county of Los Angeles sought to intervene in quiet title actions between the plaintiff and the city of San Marino involving abandoned railroad rights of way. The court held that the county's interest in the city's securing the rights of way for public streets was "simply consequential and indirect." 134 Cal.App.2d 352, 359, 285 P.2d 1017, 1021. The case involved title to real property and was governed, not by a county ordinance enacted to promote county interests, but by applicable state law. In the present case, on the contrary, a federal statute is the heart of the litigation, and its validity and operation is necessarily directly involved.

The order is reversed. The county shall bear the costs of this appeal.

GIBSON, C. J., and SHENK, SCHAUER, SPENCE and PETERS, JJ., concur.

McCOMB, J., dissents.

52 Cal.2d 417

PACIFIC EMPLOYERS INSURANCE CO., Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION and Tom L. Stroer, Respondents.

L. A. 25397.

Supreme Court of California,
In Bank.
June 26, 1959.

Rehearing Denied July 22, 1959.

Proceeding by employer's workmen's compensation insurer for annulment of award by Industrial Accident Commission of maximum temporary partial disability benefits to employee who had suffered industrial back injury which prevented him from doing his regular "rough" carpentering work. The Supreme Court, Peters, J., held that under statutory provision that in case of temporary partial disability, weekly loss in wages should be difference between average weekly wage prior to injury and amount injured employee would probably be able to earn during disability but that if evidence of exact loss of earnings is lacking, weekly loss may be computed from proportionate loss of physical ability or earning power caused by injury, where partial temporary disability accounted for total wage loss, Industrial Accident Commission was not required to make findings as to probable earnings or loss of physical ability or earning power.

Award affirmed.

McComb, J., dissented.

Opinion 335 P.2d 125 vacated.

1. Workmen's Compensation 🔑1733

Statutory provision that in case of temporary partial disability, weekly loss in wages should be difference between average weekly wage prior to injury and amount injured employee would probably be able to earn during disability but that if evidence of exact loss of earnings is lacking, weekly loss may be computed from proportionate loss of physical ability or earning power caused by injury does not in all cases require specific findings as to the probable earnings or the proportionate loss of physical ability or earning power but simply contains general instructions to Industrial Accident Commission as to how loss should be computed. West's Ann.Labor Code, § 4657.

2. Workmen's Compensation 🔑1653

In proceeding by employee, who had sustained industrial back injury which prevented him from doing his regular "rough" carpentering work, against employer's workmen's compensation insurer to recover disability payments for five-month period which followed discontinuance of voluntary workmen's compensation payments and during which employee went to union hall almost every day and sought "finish" carpentering work, which was lighter and which was work that he could do, evidence supported finding of Commission that disability from injury accounted for total wage loss for the five-month period. West's Ann.Labor Code, § 4657.

3. Workmen's Compensation ⟹1733

Where partial temporary disability accounted for total wage loss, Industrial Accident Commission was not required to make findings as to probable earnings or loss of physical ability or earning power. West's Ann.Labor Code, § 4657.

4. Workmen's Compensation ⟹1733

Employee is expected to be willing to earn such wages as he is able considering his injuries, and if some ascertainable cause other than the injury substantially contributes to inability to earn wages, such separate cause must be separately evaluated and only portion chargeable to industrial injury allowed as compensation, and specific findings as to how much employee probably can earn while so disabled or as to proportionate loss of physical ability or earning power caused by injury are required. West's Ann.Labor Code, § 4657.

5. Workmen's Compensation ⟹1743

Certainty and completeness in findings of Industrial Accident Commission are to be encouraged. West's Ann.Labor Code, § 4657.

6. Workmen's Compensation ⟹1743

Findings of Industrial Accident Commission should be interpreted liberally in favor of sustaining award, and even if finding, by itself, is inadequate for uncertainty, finding will still be upheld if it can be made certain by reference to record. West's Ann.Labor Code, § 4657.

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Clopton & Penny and Robert C. Wreisner, Los Angeles, for petitioner.

Everett A. Corten, San Francisco, Edward A. Sarkisian, Levy, Russell, DeRoy & Geffner and Abe F. Levy, Los Angeles, for respondents.

Charles P. Scully, Lowell A. Airola and Victor Van Bourg, San Francisco, as amici curiae on behalf of respondents.

PETERS, Justice.

By this proceeding petitioner insurance carrier seeks an annulment of an award of maximum temporary partial disability benefits to respondent Tom L. Stroer.

The facts are not substantially in dispute. On July 29, 1957, Stroer, employed as a carpenter, sustained an admitted industrial injury to his back. The employer's insurance carrier, the petitioner, voluntarily furnished medical care, and paid compensation, until February 17, 1958. No challenge is made as to such payments and cost of such care.

On February 17, 1958, the temporary disability payments were terminated on the recommendation of the insurance carrier's doctor that Stroer was no longer totally disabled and should return to work. Stroer was unable to find appropriate work until July 7, 1958. The Commission awarded Stroer maximum temporary partial disability payments for the period February 17, 1958, through July 6, 1958. The insurance carrier challenges that award.

Stroer testified before the Commission that during the period in question he was unable to do "rough" carpentering, his regular job, but could have worked as a "finish" carpenter, which was work of a lighter nature; that on February 18, 1958, he registered at his union hiring hall for work as a finish carpenter; that he reported to the hall almost daily; that he would have accepted finish carpenter work had it been available; that no such work was offered to him because none was available. Stroer also produced the report of a doctor who had examined him on April 7, 1958. That report pointed out that, because of the industrial injury which had necessitated an operation, Stroer's back was still weak; that he recommended that Stroer wear a back support and should refrain from lifting any weight over 25 pounds, and that he should also avoid any work that required the employee to change his position frequently, or to crouch or stoop. Walking, according to the report, should be avoided.

The Commission found that the industrial injury "caused temporary partial disability beginning February 17, 1958, to and including July 6, 1958, during which time work of a type which the applicant could perform was not available to him, entitling him to $40.00 per week during said time, based on maximum earnings."

In denying a petition for reconsideration a Commission panel stated in its report and order that there was substantial evidence that until July 7, 1958, it was inadvisable for Stroer to engage in any of the activities that his doctor had recommended that he avoid, and that, for that reason there was no point in granting reconsideration "to either find that applicant, as a temporarily partially disabled person, was an odd lot on the labor market or to find that for all practical purposes he was totally disabled during the period in question. In our opinion, the applicant was substantially disabled during this period, * * * and that he was without any significant earning capacity because of his disability during said time."

The insurance carrier does not complain of the finding that during the period in question the employee was temporarily partially disabled. Its major contention is that the Commission, under section 4657 of the Labor Code, was required to make specific findings as to the "probable earnings" of the employee or as to "the proportionate loss of physical ability or earning power caused by the injury." It is contended that such express findings were not made, and that, for this reason, the award must be annulled.

Section 4657 provides: "In case of temporary partial disability the weekly loss in wages shall consist of the difference between the average weekly earnings of the injured employee and the weekly amount which the injured employee will probably be able to earn during the disability, to be determined in view of the nature and extent of the injury. In computing such probable earnings, due regard shall be given to the ability of the injured employee to compete in an open labor market. If evidence of exact loss of earnings is lacking, such weekly loss in wages may be computed from the proportionate loss of physical ability or earning power caused by the injury."

[1-3] It is clear that this section does not require specific findings in all cases involving temporary partial disability. The section simply contains general instructions to the Commission as to how "wage loss" shall be computed. Where the evidence, as here, reasonably supports the conclusion that the partial temporary disability accounts for a total wage loss, the finding as to the wages lost is the only ultimate fact that need be found. Specific findings relating to each factor set forth in the code section are not then required.

[4] There can be no doubt that section 4657 makes it quite clear that in cases of temporary partial disability the employee is expected to be willing to earn such wages as he is able considering his injury, and that if some other ascertainable cause other than the injury substantially contributes to his inability to earn wages, such separate cause must be separately evaluated, and only the proportion chargeable to the industrial injury allowed as compensation. In such a case specific findings are required. But where, as here, it appears that no other separate cause contributed to the employee's inability to earn wages during the period he was temporarily partially disabled, the wage loss is obviously 100 per cent, and that is the only ultimate fact that need be found. There can be no question but that, in such a case, keeping in mind the fact that the employee is entitled, of course, to full compensation, the award must be the same as would have been pay-

able for total temporary disability. This is so because, in such a case, the entire wage loss is caused by the industrial injury. This was the holding in Meyers v. Industrial Accident Com., 39 Cal.App.2d 665, 667, 103 P.2d 1025. (See also Transport Indemnity Co. v. Ind. Acc. Com., 157 Cal.App.2d 542, 321 P.2d 21.) The panel's report, in denying reconsideration, referred to this last cited case, and stated that "for all practical purposes he was totally disabled during the period in question * * * the applicant * * * was without any significant earning capacity because of his disability during said time."

The insurance carrier contends, however, that the case of Calfornia Compensation Ins. Co. v. Ind. Acc. Com., 128 Cal.App.2d 797, 276 P.2d 148, 277 P.2d 442, held that specific findings on the criteria mentioned in section 4657 are required in all cases of temporary partial disability awards. In that case the court was primarily concerned with the legal effect to be given to the fact that a partially disabled employee had received unemployment compensation disability benefits for the identical period of disability for which he had received compensation.[1] The Commission had allowed the employee full compensation for this period. The award was annulled. After disposing of the main point involved, the court went on to discuss the form and sufficiency of the findings required by the section. The court stated (128 Cal.App.2d at page 813, 276 P.2d at page 156) that the evidence "was not such as to necessarily require a finding that Moore's disability was of a type which rendered him unable to compete in the open market," and then held (128 Cal.App.2d at page 813, 276 P.2d at page 156) that the "commission should have made appropriate findings of fact as to whether Moore was an 'odd-lot,' and if not, as to what earnings were reasonably to be anticipated by Moore in his then state of disability, taking into consideration the factors enumerated in section 4657." Whatever factors the court had in mind in that case are not involved in the instant one. Here, as is indicated by the report on reconsideration, the evidence shows that although the disability was only partial, the wage loss was total. For all practical purposes the disability was a temporary total one so far as wage loss is concerned. There was no evidence by the employer that any "light" work was available to Stroer; in fact, the evidence is the contrary. How a finding that Stroer was or was not an "odd lot" would help to clarify the situation does not appear. The crucial questions were whether Stroer was disabled in an industrial accident; was that disability still existent; and, if so, what was the "wage loss" caused thereby? These elements were covered in the Commission's finding. If there is any language in the Moore case (128 Cal.App.2d 797, 276 P.2d 148, 277 P.2d 442) holding that in a case like the instant one more detailed findings are required as a matter of law, such language is wrong, and is disapproved.

[5, 6] While certainty and completeness in the findings of the Commission are to be encouraged, and while the findings in the instant case could well have been in more detail, we cannot hold, as a matter of law, that they are insufficient. In interpreting such findings the basic rule "is to interpret them liberally in favor of sustaining the award, and even if a finding, by itself, is inadequate for uncertainty it will still be upheld if it can be made certain by reference to the record." Mercer-Fraser Co. v. Industrial Acc. Com., 40 Cal.2d 102, 123, 251 P.2d 955, 966.

The award is affirmed.

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[1] The insurance carrier contends that this same issue is involved in the instant case. It is urged that, although Stroer did not in fact seek unemployment benefits, he was entitled to the same, and thus might have received double compensation. We are not concerned with what might have happened. We are concerned only with what did happen. What did happen, according to the supported findings of the Commission, is that Stroer, because of an industrial injury and although only partially disabled, suffered a total wage loss. He is entitled to compensation for that wage loss.

GIBSON, C. J., and SHENK, SCHAUER and SPENCE, JJ., concur.

McCOMB, Justice.

I dissent. I would annul the award, for the reasons expressed by Mr. Justice Patrosso in the opinion prepared by him for the District Court of Appeal in Pacific Employers Ins. Co. v. Ind. Acc. Com., 167 Cal.App.2d —, (335 P.2d 125)

Rehearing denied; McComb, J., dissenting.

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52 Cal.2d 404

PEOPLE of the State of California, Respondent,

v.

Lawrence Glenn CORWIN, Appellant.

Cr. 6395.

Supreme Court of California,
In Bank.
June 24, 1959.

Prosecution for homicide in which jury returned verdict of guilty of murder in the first degree and after proceedings of penalty returned a verdict imposing death penalty. The Superior Court, Los Angeles County, A. A. Scott, J., entered order denying motion for new trial and an automatic appeal followed. The Supreme Court, Spence, J., held that during subsequent proceedings on issue of penalty, court did not commit error in admitting conversation of deputy sheriff with defendant during which defendant stated that if he had to do it all over again he would do the same thing and would like to kill a couple of others, in view of the defendant's three separate voluntary statements and confessions to various police officers and his voluntary re-enactment of crime.

Affirmed.

1. Criminal Law ⚷986

In proceeding on penalty issue after defendant was found guilty of murder of the first degree, court's admission of conversation between deputy sheriff and defendant in which defendant stated that he would kill victim again and would like to kill some others, was not error in view of defendant's three separate voluntary confessions to various police officers together with voluntary re-enactment of crime. West's Ann.Pen.Code, § 190.1.

2. Criminal Law ⚷986

There was no error by trial court in proceeding on penalty issue to allow prosecution, as the customary procedure on a criminal trial, to open and close the argument to the jury. West's Ann.Pen.Code, §§ 190.1, 1093, subd. 5.

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Ellery E. Cuff, Public Defender, Richard S. Buckley and Richard W. Erskine, Deputy Public Defenders, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., and William E. James, Asst. Atty. Gen., for respondent.

SPENCE, Justice.

Defendant was found guilty of murder of the first degree and, after proceedings pursuant to section 190.1 of the Penal Code, the jury returned a verdict imposing the death penalty. His motion for a new trial was denied. The appeal is automatic. Pen.Code, § 1239, subd. (b).

Defendant does not question the sufficiency of the evidence to sustain his conviction nor complain of any error during the trial on the issue of his guilt. He confines his objections solely to the subsequent proceedings on the issue of penalty. He contends that the court erred in the penalty hearing in (1) admitting in evidence a conversation defendant had with a deputy sheriff during the progress of the trial on the issue of guilt; and (2) allowing the prosecution to both open and close the arguments to the jury. We have concluded that his contentions are without merit.

It appears that defendant killed Mrs. Martha Gibbs, and 80-year-old woman, about 1 a. m. on June 3, 1958. The autopsy revealed that death was caused by some 34 stab wounds of the chest. Defendant was arrested about 1:20 a. m. on June 5, 1958, at which time he volunteered the statement: "I know you want me. I killed her. I was going to turn myself in in the morning. * * *" Defendant was immediately taken to the police station, where he made a tape-recorded statement. He said that he had gotten mad at his girl and "took it out" on "Grandma"; and he described the manner of the killing. Defendant was then taken to the deceased's apartment, where he reenacted the crime. Upon his return to the police station, defendant made and signed another statement substantially the same as the previously tape-recorded one. At the trial on the issue of guilt, defendant neither testified nor presented any evidence on his behalf.

Following the jury's finding of murder of the first degree, the trial proceeded on the penalty issue. While defendant still did not testify, he presented two witnesses: (1) a court-appointed psychiatrist, who stated that defendant had a "moronic" mental condition, with his mental age fixed at "probably * * * about ten years," a "defective" but not a "diseased mind"; and (2) defendant's mother, who related briefly defendant's background—his meager schooling, his "trouble learning," and the difficulties he encountered by reason of a broken home life following his parents' separation when he was 11 years old. Defendant was 23 when this crime was committed. The prosecution presented only one additional witness, a deputy sheriff, who, over defendant's objection, testified to a conversation he had with defendant when taking him from jail to the courtroom during progress of the trial on the issue of defendant's guilt. He stated that he asked defendant "why did he kill the old lady," and defendant replied that "he didn't know why * * * but if he had it to do all over again, he would do the same thing * * * [and] he would also like to kill a couple of detectives * * * [and] his brother-in-law."

Section 190.1 of the Penal Code provides that at the proceedings on the issue of penalty, evidence may be presented "of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty." Defendant concedes that the conversation with the deputy sheriff is admissible under the section, but he claims that it would not have been so "damaging" if presented during the trial on the issue of guilt. He contends that the admission of the conversation on the trial for the determination of the penalty was "highly prejudicial," producing "a bombshell effect," which situation he compares to the impropriety of the prosecution withholding evidence of a defendant's confession as part of its case in chief for the purpose of using it later for impeachment or rebuttal. Cf. People v. Rodriguez, 58 Cal.App.2d 415, 418, 136 P.2d 626.

[1] Preliminarily, it should be said that such interrogation of defendant by the deputy sheriff cannot be approved as proper practice, particularly when defendant was represented by counsel who was not present at the time. Nevertheless it is understandable that the deputy sheriff should have asked the question here in view of defendant's three separate voluntary statements and confessions to various police officers, together with his voluntary reenactment of the crime. Unquestionably, the broad language of section 190.1 sustains the propriety of the court's ruling admitting the conversation as relevant evidence on the trial of the penalty issue. The principle of the Rodriguez case does not apply. The record does not indicate, as defendant admits, whether the prosecution knew that the deputy sheriff had the conversation in question with defendant before the conclusion of the trial on the issue of guilt; and defendant only assumes such knowledge for the purpose of this suggested analogy with the Rodriguez case.

[2] Likewise there appears to have been no impropriety in the court's ruling on the presentation by respective counsel of argument at the conclusion of the proceedings on the penalty issue. Defendant's counsel requested that each side be limited to one argument, but the court ruled that the prosecution might open and close the argument to the jury. The recently enacted section 190.1 (Stats.1957, ch. 1968, § 2) does not specifically provide for the order of argument by counsel on the bifurcated trial regarding the issues of guilt and penalty, and the court merely followed the customary procedure on a criminal trial. Pen.Code, § 1093, subd. 5. We find no error here. Cf. People v. Kimball, 5 Cal.2d 608, 611, 55 P.2d 483; People v. Hickman, 204 Cal. 470, 482–483, 268 P. 909, 270 P. 1117; People v. Wellman, 141 Cal.App.2d 101, 107, 296 P.2d 82.

The judgment and order denying a new trial are affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, McCOMB and PETERS, JJ., concur.

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52 Cal.2d 397

MORRO PALISADES COMPANY (a Corporation), Appellant,

v.

HARTFORD ACCIDENT AND INDEMNITY COMPANY (a Corporation) et al., Respondents.

L. A. 25357.

Supreme Court of California,
In Bank.
June 24, 1959.

Action by the assignee of a county to recover on a faithful performance bond. Judgment of dismissal in Superior Court, San Luis Obispo County, Ray B. Lyon, J., and the assignee appeals. The Supreme Court, Schauer, J., held that where it was county which was indemnified by the express terms of a surety bond against loss from damages which it might suffer from principal's default in either building roads in a certain tract or in failing to fully reimburse the county for all expenses it might incur in making good any default, action on the bond for the default of the principal was required to be brought by the county and alleged assignment of the county's rights in the bond was ultra vires.

Judgment affirmed.

Opinion 333 P.2d 372, vacated.

1. Principal and Surety 🔑59

Rights and liabilities under a surety bond are determined from the language of the bond read in light of the applicable statutes. West's Ann.Bus. & Prof.Code, §§ 11500–11628, 11611.

2. Counties 🔑22

In action by assignee of county on a bond provided by subdivider to secure faithful performance of agreement to improve streets and roads situated within a certain tract, where under contract, the county was entitled to have the streets improved, which right was of equal value to the cost of the work, and the contract was breached by failure to perform, the county was entitled to recover a sum equal to the cost of the uncompleted portion of the work, and the work not having been received, the county was entitled to receive in lieu thereof as damages a sum equal in value to the uncompleted work which the contract called for and the surety was liable under its bond up to the penal sum therein specified. West's Ann.Bus. & Prof. Code, §§ 11500–11628, 11611.

3. Counties 🔑22

In action by assignee of county to recover on a bond assuring that the principal would improve streets and roads within a certain tract, right to recover under the bond was the right of a county rather than of the owner of a portion of the property which might be affected by the default where it was the county which was indemnified by the bond from the principal's default. West's Ann.Bus. & Prof.Code, §§ 11500–11628, 11611; West's Ann.Gov.Code, §§ 14371–14375, 25455.

4. Counties ⚷22

Generally, if a public improvement faithful performance bond runs to the public body, the action thereon must be brought in that body's name.

5. Counties ⚷22

Where it was county which was indemnified by express terms of a surety bond against loss from damages which it might suffer from principal's default in either building roads in a certain tract or in failing to fully reimburse the county for all expenses it might incur in making good any default, action on the bond for the default of the principal was required to be brought by the county and alleged assignment of the county's rights in the bond was ultra vires, and assignee as present owner of the land in the subdivided tract was not entitled to maintain an action on the bond as a third-party beneficiary. West's Ann. Bus. & Prof.Code, §§ 11500–11628, 11611, 11612; West's Ann.Civ.Code, § 1559; West's Ann.Gov.Code, §§ 14371–14375, 25203, 25455.

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Charles E. Ogle, Morro Bay, for appellant.

A. H. Brazil, San Luis Obispo, for respondents.

SCHAUER, Justice.

This action is brought by plaintiff corporation as assignee of San Luis Obispo County. By such action the assignee seeks to have an allegedly assigned faithful performance bond reformed and to recover on it as reformed. The trial court sustained an amended demurrer to the complaint, without leave to amend, and ordered judgment of dismissal. Plaintiff appeals. We have concluded that defendant is correct in its contention that the bond could not properly be assigned to plaintiff, that no right of plaintiff to recover on the bond appears, and that the dismissal should be upheld.

The bond in question names defendant The Hartford Accident and Indemnity Company as surety, defendant Westfall as principal, and the County of San Luis Obispo as obligee, and purports to assure that Westfall would improve all of the streets and roads situated within a certain 34.7 acre tract of land subdivided by him in 1953 into 110 lots, and would "indemnify * * * the Obligee from all cost and damage which the Obligee may suffer by reason of failure so to do and shall fully reimburse * * * the Obligee all * * * expense which the Obligee may incur in making good any such default * * *"

Besides alleging assignment of the bond to plaintiff the complaint avers that in June, 1953, defendant Westfall, acting as owner and subdivider of the tract, "caused the Board of Supervisors of San Luis Obispo County to accept a final subdivision map" of the tract in consideration of Westfall's promise that he would, as provided in county subdivision ordinance No. 184,[1] within a reasonable time improve all of the streets and roads in the tract as shown on the subdivision map, and that he would post with the county a sufficient bond to insure his faithful performance of the work.

About ten days later Westfall, pursuant to his agreement with the county, delivered the bond in question, a copy of which is attached as an exhibit to the complaint. It is in the amount of $28,000 and recites that "Whereas, the Principal [Westfall] has entered into a *certain written contract with the Obligee, dated the 29th day of June, 1953* to Complete Roads, Los Osos Highlands, No. 2, Subdivision * * * *which contract* is hereby referred to and made a part hereof as fully * * * as if copied at length herein.

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[1] Ordinance No. 184 is pleaded by title and date of passage, as permitted by section 459 of the Code of Civil Procedure.

"Now, Therefore, the condition of this obligation is such that, if the Principal shall faithfully perform the contract on his part, and shall fully indemnify and save harmless the Obligee from all cost and damage which the Obligee may suffer by reason of failure so to do and shall fully reimburse and repay the Obligee *all outlay and expense which the Obligee may incur* in making good any such default, and shall pay all persons who have contracts directly with the Principal for labor or materials, then this obligation shall be null and void, otherwise it shall remain in full force and effect." (Italics added.)

The complaint further alleges that "by mutual mistake of the parties thereto the bond * * * did not fully and truly express the intention and meaning of the parties * * * in that the bond recites that the principal entered into a written contract * * * on the 29th day of June, 1953, whereas in truth and fact the principal * * * entered into an oral contract with the obligee on or about the 20th day of June, 1953."

It is further pleaded that Westfall commenced improving the roads but abandoned all work about the middle of December, 1953; the county road commissioner has estimated that it will cost $22,030 to complete the road work; the obligee county, in March, 1956, made written demand on defendant surety to perform the obligation of the bond, but the surety refused; plaintiff presently owns more than fifty per cent of the land in the tract; in October, 1957, the obligee county assigned its rights in the bond to plaintiff. The purported assignment is in writing and states that "In consideration of the execution, concurrently herewith, of Forbearance to Sue" by plaintiff, the county assigns to plaintiff "all of its right, title and interest, legal or equitable, as obligee, to enforce the provisions" of the bond. No document purporting to constitute a covenant not to sue anyone for anything appears in the record, nor are any terms or conditions of any such agreement alleged.

The complaint, filed October 21, 1957, seeks judgment against both the principal and the surety in the sum of $22,030. It does not appear from the complaint whether Westfall still owns land in the tract or has sold or conveyed to others the portions thereof not owned by plaintiff. Neither does plaintiff allege the means by which it became owner of the "more than fifty per cent" of the land which it claims. It does not appear that plaintiff is the only person (if any) who may or might have a claim against the county because of the principal's default.

Defendant contends, among other things, that the complaint fails to state a cause of action in that the alleged assignment of the county's rights in the bond is illegal and ultra vires. This contention is meritorious.

[1] The rule is that rights and liabilities under a surety bond are to be determined from the language of the bond read in the light of applicable statutes. (See County of Placer v. Aetna Casualty and Surety Co. (1958), 50 Cal.2d 182, 186 [1], 323 P.2d 753; Fernelius v. Pierce (1943), 22 Cal. 2d 226, 245 [7], 138 P.2d 12; Milliron v. Dittman (1919), 180 Cal. 443, 445 [1], 181 P. 779; Hub Hardware Co. v. Aetna Accident & Liability Co. (1918), 178 Cal. 264, 267, 173 P. 81; 8 Cal.Jur.2d 620–621; 46 Cal.Jur.2d 236–237.) The statutes applicable here are to be found in the state Subdivision Map Act (Bus. & Prof.Code, §§ 11500–11628), and in the county subdivision ordinance. That act provides (§ 11611) that following filing of the final subdivision map for approval the governing body shall approve the map if it conforms to legal requirements, and "shall at that time also accept or reject any or all offers of dedication and shall, as a condition precedent to the acceptance of any streets or easements, require that the subdivider, at his option, either improve or agree to improve the streets or easements in accord-

ance with standards established by such governing body by local ordinance." In section 11612 it is provided that "In the event an agreement for the improvement of the streets or easements is entered into, the governing body may require that the agreement shall be secured by a good and sufficient bond * * *"

[2] As declared in County of Los Angeles v. Margulis (1935), 6 Cal.App.2d 57, 59–60 [2], 44 P.2d 608, where the county sued to recover on a similar bond provided by a subdivider to secure faithful performance of his agreement to improve certain streets and build a storm drain, "Under the contract the county was entitled to have these highways so improved, and this right was of a value equal to the cost of the work. The contract having been breached by a failure to perform, the county was entitled to a sum equal to the cost of the uncompleted portion of the work * * * Under the contract the county was entitled to receive work of a certain value. This work not having been received, the county was entitled to receive in lieu thereof as damages a sum of money equal in value to the uncompleted work which the contract called for, and appellant as surety was liable under its bond up to the penal sum therein specified."

[3, 4] Here, as in the Margulis case, the county presumptively is entitled to receive the road work which Westfall agreed to complete. And here the right to recover under the bond appears clearly to be a right of the county rather than of the owner of a portion of the property which might be affected by the default. (See Evola v. Wendt Construction Co. (1959), 170 Cal. App.2d 21, 338 P.2d 498. It is the county which is indemnified by the express terms of the bond against loss from "all cost and damage which * * * [it] may suffer" from Westfall's default either in building the roads or in failing to "fully reimburse and repay the * * * [county] all outlay and expense which * * * [it] may incur in making good any * * * default." The involved surety bond may thus be likened to faithful performance bonds required by statute from contractors on state public works (Gov.Code, §§ 14371–14375) and on county building contracts (Gov.Code, § 25455). The general rule appears to be that if a public improvement faithful performance bond runs to the public body, action thereon must be brought in that body's name. (See McQuillin, Municipal Corporations, Vol. 13, §§ 37.200, 37.206; 8 Cal.Jur.2d 667–670; 41 Cal.Jur.2d 399, § 13.)

We recognize that in Christie v. Commercial Casualty Ins. Co. (1935), 6 Cal.App. 2d 710, 714 [1], 45 P.2d 263, it was held that a laborer (the foreman of the construction work) could recover unpaid wages on a public works performance bond. But there the bond was conditioned "to secure the payment of all work and labor 'of any kind' performed in the course of the construction of the roadway" and the court held that "The language of the bond leave no doubt it was furnished for the direct benefit and protection of those who perform work or supply materials for the roadway in accordance with the contract, although they may not be parties to that instrument." The bond in issue here is conditioned for the benefit of the obligee county and by no possible view of its language can it be held to have been "furnished for the direct benefit and protection" of the principal (the subdivider) or other landowners in the tract. Furthermore, the Christie case does not hold, nor does any authority which has been cited or discovered suggest, that the public body may assign its rights under such a bond to another, as plaintiff alleges has been done in the present case. And insofar as concerns any suggestion that the county's assignee might prosecute the action for the partial or ultimate benefit of the county, section 25203 of the Government Code specifies that the board of supervisors "shall direct and control the prosecution and defense of all suits to which the county is a party * * *" (See also Contra Costa

County v. Soto (1902), 138 Cal. 57, 60, 62, 70 P. 1019.

Plaintiff claims, however, that in any event it, as the present owner of land in the subdivided tract, is a third-party beneficiary under the bond; i. e., one for whose benefit the roads were to be improved. The same may be said of other purchasers of lots in the tract, as well as of members of the public generally, who would use the roads.[2] What plaintiff seeks by its complaint is not to compel improvement of the subdivision roads, but to recover in full on its own behalf a money judgment representing the cost of such improvement. Such a recovery appears to be authorized neither by the terms of the bond itself nor under any assignment which the county could make of its rights under the bond. (Cf. County of San Diego v. California Water & Telephone Co. (1947), 30 Cal.2d 817, 823 [2], 186 P.2d 124, 175 A.L.R. 747.) By the purported assignment here to *one* person the county has attempted to divest itself of the indemnity provided by the bond against the claims of *all* persons. Even if the bond could be construed as having been furnished for the direct benefit of the public, or of all landowners in the tract, the county could not convey such bond, or any interest thereunder, to one of the several interested landowners.

[5] For the reasons stated it follows that the complaint does not, and that plaintiff would be unable to amend to, state a cause of action on the allegedly assigned bond. The trial court was correct in sustaining the amended demurrer without leave to amend and in ordering dismissal of the action.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SPENCE, McCOMB and PETERS, JJ., concur.

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171 Cal.App.2d 478

George S. HAAS, Plaintiff and Appellant,

v.

James C. HODGE, Defendant and Respondent.

Civ. 23577.

District Court of Appeal, Second District, Division 2, California.

June 24, 1959.

Rehearing Denied July 23, 1959.

Hearing Denied Aug. 19, 1959.

Action, between physicians who had formerly been associated in practice, wherein plaintiff sought to enjoin defendant from practicing within 25 miles of plaintiff's offices, in accordance with their agreement. The Superior Court of Los Angeles County, Joseph W. Vickers, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Ashburn, J., held that where, under agreement between two doctors for association in practice, practice belonged to plaintiff doctor and defendant doctor made present renouncement of any interest in professional practice or good will so that he had no inchoate right to future accruing good will, he could not make sale of present or future good will within meaning of statutes providing that any one selling good will of business may agree to refrain from competing within specified area but that otherwise restraint against engaging in lawful profession is void, and provision of their agreement under which defendant agreed not to practice, upon termination of agreement, within 25 miles of plaintiff's office was void.

Affirmed.

1. Contracts ⚷143

The fact that parties have undertaken to define legal result of contract and have applied a mistaken legal conclusion to it cannot prevail over correct legal result which flows from acts they have undertaken to perform.

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[2] Of course neither plaintiff nor any other lot purchaser comes within the provision of section 1559 of the Civil Code: "A contract, made *expressly* for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." (Italics added.)

2. Contracts ⟹261(1)

All contracts, including contracts of employment, may be terminated for substantial breach by one of the parties. West's Ann.Labor Code, § 2924.

3. Contracts ⟹117

Where, under agreement between two doctors for association in practice, practice belonged to plaintiff doctor and defendant doctor made present renouncement of any interest in professional practice or good will so that he had no inchoate right to future accruing good will, he could not make sale of present or future good will within meaning of statutes providing that any one selling good will of business may agree to refrain from competing within specified area but that otherwise restraint against engaging in lawful profession is void, and provision of their agreement under which defendant agreed not to practice, upon termination of agreement, within 25 miles of plaintiff's office was void. West's Ann.Labor Code, § 2924; West's Ann.Bus. & Prof.Code, §§ 16600, 16601.

◆

Robert M. Bushnell and Ralph R. Sleeper, Los Angeles, for appellant.

Alpern & Vallier, by Robert Vallier, Los Angeles, for respondent.

ASHBURN, Justice.

This case arises from a contract for the association of two doctors in the practice of medicine. The relationship having terminated, plaintiff Dr. George S. Haas brought suit against defendant Dr. James C. Hodge to obtain an injunction against his practicing within 25 miles of plaintiff's offices, for damages and other relief. Judgment went for defendant and plaintiff appeals therefrom.

The contract (received in evidence as Exhibit 3) provides: "It is hereby stipulated and agreed by the parties that in the event this agreement is terminated for any reason whatsoever, that from and after the said termination, Dr. Hodge shall not maintain an office for the practice of his profession at any place within a radius of 25 miles from the said office of Dr. Haas." Also: "That Dr. Hodge expressly hereby disclaims, absolutely and irrevocably, any right or claim of right to any the professional practice herein mentioned and referred to and to the good-will thereof."

Plaintiff's office is at 1200 West 80th Street in Los Angeles, and defendant, after the contract was terminated, opened an office for the practice of his profession in Inglewood, Los Angeles County, at a distance considerably less than 25 miles from plaintiff's location, some 5 miles therefrom.

Appellant's counsel has limited the appeal to the question whether defendant sold to plaintiff his interest in the good will of the business, thus falling within the validating effect of § 16601, Business & Professions Code, quoted *infra*. The trial court found: "That at no time during or after the association of plaintiff and defendant in their practice of medicine was there a sale of good will of the practice by either of the parties to the other." Appellant's brief says: "Plaintiff appeals and hereby limits the appeal to the question of the validity of the contract, Exhibit 3 introduced in evidence, that is to say, Appellant contends that the restrictive covenant in Exhibit 3 is valid and that the conclusion of the trial court to the contrary is erroneous as a matter of law * * *. This appeal is limited to a consideration of that point alone, *i. e.*, that Respondent Hodge by the terms of the contract, Exhibit 3, did lawfully transfer and sell to Appellant Haas all the interest he had acquired in the good will of the medical practice involved herein; that consequently, under the statutes, the restrictive covenant of Exhibit 3 [Par. 10] against opening an office near their West 80th Street office was valid and binding on both parties; that the ruling and finding of the trial court to the contrary is erroneous as a matter of law." Respondent's counsel joins in this restricted submission.

[1] The question whether defendant sold or had any good will to sell to plaintiff must be determined from the written contract, there being no parol evidence thereon. The parties undertook to define their relationship in these words: "It is expressly agreed and stipulated by the parties that this association of these two practicing physicians and surgeons in the manner herein provided for is somewhat unique and unusual, and further, that it does not, as between the parties, in anywise constitute, nor shall it be deemed to constitute, a partnership, joint venture or contract of employment." An analysis of the writing discloses the defendant became an employee of plaintiff, or at least occupied a status akin to that of employee, and hence had no good will to sell. The fact that the parties have undertaken to define the legal result of the contract and have applied a mistaken legal conclusion to it cannot prevail over the correct legal result which flows from the acts they have undertaken to perform. It is held in respect to partnerships that a mistaken appellation in a contract cannot control the result. San Joaquin Light & Power Corp. v. Costaloupes, 96 Cal.App. 322, 332, 274 P. 84; Constans v. Ross, 106 Cal.App.2d 381, 386, 235 P.2d 113; Martyn v. Leslie, 137 Cal.App.2d 41, 61, 290 P.2d 58; Singleton v. Fuller, 118 Cal.App.2d 733, 740, 259 P.2d 687. In the San Joaquin case it is said, 96 Cal.App. at page 330, 274 P. at page 87: "The question thus presented hinges upon the construction of a written contract before us. * * * It may be stated that both parties concede that the determination of whether or not a partnership existed must result from a construction of the contract itself and the recitals therein contained." At page 332, of 96 Cal.App., at page 88 of 274 P.: "We may concede that a relationship of debtor and creditor is shown and also that the contract expressly declares that the parties thereto are not partners. However, this does not establish the fact that the parties did not intend to create a partnership between themselves or as to a third person. The parties did intend to create exactly the relationship as shown by the contract, but did not intend that relationship to be called that of partners. Their intention in this respect is immaterial. Appellant and respondent here concede that if the contract by its terms establishes a partnership between the parties, the expressed intent that it should not be so classed would be of no avail. It is the intent to do these things which constitute a partnership that usually determines whether or not that relation exists between the parties." The same principle is applicable here. See 32 Cal.Jur.2d § 8, p. 402.

The subject agreement made on September 13, 1955, recites that plaintiff, Dr. Haas, is practicing at 1200 West 80th Street, Los Angeles, that Dr. Hodge is also practicing at an unspecified address and the parties desire to associate in the practice. It is agreed that Dr. Hodge will devote his entire time and attention to such practice during the term of the agreement; the parties shall cooperate but in any case of disagreement the opinion or instructions of Dr. Haas shall be conclusive. The practice shall be conducted at Dr. Haas' offices and all expenses shall be borne by him. Dr. Hodge shall furnish his own automobile and shall receive $60 a month to defray the cost of its operation. All employees shall be paid by Dr. Haas and they shall be solely under his supervision and direction. All compensation paid by patients shall go to Dr. Haas and Dr. Hodge shall not participate in any division of same; nor shall Dr. Haas be required to make any accounting with respect to any monies received. All fees shall be fixed and adjustments made by Dr. Haas solely. Paragraph 4 says: "That it is not the intention of either of these parties to interfere with or dictate to the other how, any particular case shall be handled; nor to dictate the proper technique to pursue, nor to interfere in the diagnoses of cases, but nevertheless these parties may consult, one with the other, from time to time, as to all such matters." Dr. Hodge shall keep such records and make such reports as may be agreed upon but in case of any disagreement the discretion and instruction of Dr. Haas shall prevail. Dr. Hodge shall receive from Dr. Haas, until termination of agreement, "compensation for his services rendered hereunder" at the rate of $800 a month; unless the agreement is sooner terminated the compensation shall be increased on December 1, 1955, to $850 a month and gradually thereafter to and including the month of November, 1956, until the sum of $1,400 is reached; thereafter Dr. Hodge shall receive that monthly compensation until termination of the agreement, but after termination no further compensation whatsoever shall be paid him. Here follows paragraph 10 above quoted, which says that after the termination of such agreement Dr. Hodge shall not maintain an office within a radius of 25 miles from Dr. Haas' office. The contract is terminable by death or incapacity of either party or upon 30 days written notice given by either party. Then follows the provision to the effect that the contract shall not be deemed to constitute a partnership, joint venture or contract of employment, but that Dr. Haas may nevertheless procure workmen's compensation insurance "against other liabilities or hazards which may arise by reason of these parties associating together in the manner herein provided", the matter of procuring such insurance being a matter of Dr. Haas' sole discretion. Finally, there is the paragraph to the effect that Dr. Hodge disclaims absolutely and irrevocably any right or claim to "any the professional practice herein mentioned and referred to and to the good will thereof."

[2] This document bears most of the indicia of an employment agreement (cf. Hamilton v. Salopek, 71 Cal.App.2d 104, 106, 161 P.2d 955); the only element lacking seems to be the right of immediate discharge without cause (see 32 Cal.Jur.2d § 8, p. 405; § 9, p. 406). Of course, any contract can be terminated for substantial breach by one of the parties and this is true of an employment contract (Labor Code, § 2924). If this is an employment contract defendant would acquire no part of the good will of the business. But it is not necessary to decide the specific question.

[3] Whatever may be the technical status flowing from the contract it remains true that the last paragraph operates as a present renouncement of any interest in the "professional practice" of Dr. Haas or the good will thereof. This left Dr. Hodge with no inchoate right to future accruing good will, for the practice belonged to Dr. Haas and the good will belonged to him as an incident to ownership of the practice, present and future.

Section 16600, Business & Professions Code, provides: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Section 16601: "Any person who sells the good will of a business * * * may agree with the buyer to refrain from carrying on a similar business within a specified county or counties, city or cities, or a part thereof, in which the business so sold * * * has been carried on, so long as the buyer, or any person deriving title to the good will or shares from him, carries on a like business therein."

Defendant could not sell the present or future good will of the business in this instance, for the business and its good will belonged to plaintiff Haas. See Russell v. Russell, 39 Cal.App. 174, 176–177, 178 P. 307.

This does not imply that defendant could not have required a good will adhering to his own person and skill, one which would follow him to a new location; if in fact he did have such a personal good will he did not sell or undertake to sell it to plaintiff, and as matter of law could not do so.

The judgment is affirmed.

FOX, P. J., and HERNDON, J., concur.

171 Cal.App.2d 491

Russell ROSSMAN, Betty Rossman, Steven Rossman, by Russell Rossman, his guardian ad litem, Plaintiffs and Appellants,

v.

Parker William HALL, Defendant and Respondent.

Civ. 23726.

District Court of Appeal, Second District, Division 2, California.

June 25, 1959.

Rehearing Denied July 16, 1959.

Hearing Denied Aug. 19, 1959.

Action for personal injuries sustained in an intersectional automobile collision. The Superior Court, Los Angeles County, Harold P. Huls, J., entered judgment for defendant and plaintiffs appealed from such judgment, from the verdict, and from an order denying new trial. The District Court of Appeal, Herndon, J., held that where counsel for plaintiffs learned the names of two witnesses merely by reading a statement one of the plaintiffs had given an investigator for defendant's insurer, plaintiffs were not entitled to a new trial on grounds of newly discovered evidence based on fact that counsel for plaintiffs did not know of such witnesses until after the trial.

Judgment affirmed; appeals from verdict and order denying new trial dismissed.

1. New Trial ⚷90

Where counsel for plaintiffs, in an action for injuries sustained in an intersectional automobile collision, interviewed a witness before trial, but apparently, only after the trial, made an inquiry of such witness about a statement he had given an adjuster for defendant's insurer, or the circumstances under which it was given or the manner in which it was prepared and signed, and there was no showing of any irregularity in the obtaining or the use of the statement which differed substantially from direct testimony of the witness, plaintiffs were not entitled to a new trial on ground of surprise through the production and use by defendant of such written statement.

2. New Trial ⚷101

Where counsel for plaintiffs, in action for personal injuries sustained in an intersectional automobile collision, learned of the names of two witnesses merely by reading a statement one of the plaintiffs had given an investigator for defendant's insurer, plaintiffs were not entitled to a new trial on grounds of newly discovered evidence based on fact that counsel for plaintiffs did not know of such witnesses until after the trial.

◆

L. I. Williams, Sepulveda, for appellants.

Moss, Lyon & Dunn, Homer C. Hathaway and Henry F. Walker, Los Angeles, for respondent.

HERNDON, Justice.

In this personal injury action growing out of an automobile collision at an intersection, the jury's verdict was in favor of defendants. Plaintiffs have noticed an appeal from the verdict and judgment and from the order denying their motion for a new trial. No claim is made in the briefs that any error occurred in the admission or rejection of evidence, in the giving or refusal of instructions, or in any other respect, during the trial. Neither is it contended that the evidence is insufficient to support the verdict and the judgment. The sole contention advanced is that the trial court erred in denying plaintiffs' motion for a new trial on the grounds of surprise and of newly discovered evidence.

Four witnesses testified at the trial: plaintiffs Russell and Betty Rossman, one Rudy Caldron and defendant Hall. Plaintiffs' theory was that the accident was caused by defendant's failure to obey the command of a boulevard stop sign before entering the highway upon which they were traveling. The testimony of the Rossmans tended to support this theory as did that of Rudy Caldron. The testimony of the latter witness is summarized as follows in the opening brief: "The plaintiffs called Rudy Caldron, a Mexican boy 13 years of age at the time of trial, who testified that he was drinking a soft drink in a gasoline service station at the northwest corner of the intersection and was looking in the direction of the intersection at the time. He said that he saw a dark Chevrolet, identified as that of Mr. Hall, the defendant, going east on Katella. That this car did not make any stops either before entering the intersection or during the time it was within the intersection until after the collision with the northbound car in which the Rossmans, the plaintiffs, were riding."

It further appears from appellants' opening brief that "[u]pon calling Rudy Caldron to the witness stand, or just before, plaintiffs' counsel approached the bench and stated that the witness was afraid to testify, but did not inform the Court of any reason why the witness was afraid. Upon the witness being sworn the Court told Rudy to state his name and told him that he was there only for the purpose of telling the truth and for no other reason, and that he should answer truthfully questions put to him by plaintiffs' counsel and by defendant's counsel."

On cross-examination defendant's counsel showed Rudy a statement which he acknowledged he had signed. This statement set forth a version of the facts substantially different from that to which the witness had testified on direct examination. Although the statement was admitted in evidence over plaintiffs' objection, it is not now contended that its admission was erroneous. The contention appears to be that the production of the impeaching statement constituted "surprise".

The defendant Hall testified in substance that as he approached the intersection he made the boulevard stop then went out into the intersection and stopped a second time at a divider in the center of the highway, that he moved forward slightly and stopped a third time before entering the lane of traffic in which plaintiffs were moving. He testified that he was completely at a standstill when plaintiffs' car collided with him.

Surprise

[1] The basis of appellants' claim of surprise is set forth in the affidavit of their counsel. After referring to the testimony given on cross-examination by the witness Caldron concerning the statement he had signed at the instance of defendant's investigator, counsel averred: "Counsel for plaintiff was surprised at this testimony and was unaware that defendant's representatives had taken any statement. After the trial the boy was asked about his inconsistent statement and asked about this purported written statement. The boy replied that some man called on him and wrote down the statement entirely as the man saw fit and then indicated to him that he had to sign it, which he did. The boy stated at the time of the trial that he was afraid he would be hurt if he told the truth. Affiant states that this surprise was unexpected and could not have been anticipated. It was extremely prejudicial and resulted in the loss of the case to the plaintiff. If affiant had been aware of this statement taken by the insurance adjuster plaintiffs could have investigated the taking of this statement and could have rehabilitated this witness by calling the insurance adjuster or producing other evidence showing the facts surrounding the taking of this statement."

We find no semblance of merit in the contention that the production and use by defendant of the statement which impeached the witness Caldron constituted "surprise" of such a nature as to require the granting of a new trial. It appears from the affidavit of counsel that the name of the witness appeared on the police report and that counsel had interviewed him, but it nowhere appears that counsel had inquired, prior to calling the witness to the stand, whether he had been interviewed by anyone else or whether he had given a statement. Counsel for plaintiffs evidently did not claim "surprise" at the trial when the damaging statement was produced. Apparently, it was only *after the trial* that counsel made any inquiry of his witness about the statement, or the circumstances under which it was given or the manner in which it was prepared and signed. Since there is no sufficient showing of any irregularity in the obtaining or in the use of the impeaching statement, we must characterize appellants' contention with respect to it as completely frivolous. See Fletcher v. Pierceall, 146 Cal.App.2d 859, 865–867, 304 P.2d 770; Kauffman v. De Mutiis, 31 Cal. 2d 429, 432, 189 P.2d 271.

Newly Discovered Evidence

Appellants' arguments relating to the second asserted ground of their motion—that of newly discovered evidence are also entirely implausible. We have noted that no affidavit of either of the plaintiffs was filed. Counsel's affidavit, insofar as it relates to newly discovered evidence, avers in substance that until after the trial he knew nothing of the witnesses John and Edward Wais. He states that in preparation for the trial he obtained a copy of the police report relating to the accident, and that the only witness whose name was given therein was Rudy Caldron. Counsel states that in addition to obtaining a copy of the police report, affiant made a diligent effort to locate any other witnesses and "diligently canvassed the neighborhood in the area surrounding the scene of the collision but learned of no one who knew anything in particular about the accident except the hereinbefore referred to witness Rudy Caldron. Affiant therefore believed that the only disinterested witness who actually saw the collision was Rudy Caldron."

However, it appears from the record without dispute that long prior to the trial plaintiff Russell Rossman gave a written statement to an investigator for defendants' insurance carrier. This statement, which was offered by defendants and received in evidence without objection, contains, among other things, the following: "There was a car following me. The driver gave me his card. His name is John Wais, Jr., asst. sales mgr. Pittsburg Steel Co. Statler Center Los Angeles. He said he was following me and overhauling me and he was going 40–45 M.P.H. His son was really driving on a driver's permit and the father was with him."

Thus, it clearly appears that long before the trial plaintiff Rossman knew the name and address of the witness John Wais and knew that Wais and his son were closely following plaintiff's car immediately before the accident. The act of Wais in giving Rossman his business card not only gave clear notice that he was a potential witness, but could reasonably be construed as practically an offer to testify.

By way of explaining the manner in which he learned of the "newly discovered" witnesses, appellants' counsel, in his affidavit, stated as follows: "When affiant pointed out to the plaintiffs that they probably would have prevailed had they had other evidence which showed the defendant was actually moving at the time, Mr. Rossman then recalled that he had been given a card by some person at the scene of the collision but it was his impression that the man was just being a 'good samaritan' and that he did not actually see anything of any consequence. Mr. Rossman then remembered that when the insurance adjuster came out to take his statement he was told that the company was no doubt liable but that he wanted to get all of the facts. Mr. Rossman recalled that he had this party's card at the time that the insurance adjuster called and he believed that he showed it to the adjuster, but he doesn't remember having the card after the conversation with the adjuster. Mr. Rossman then recalled that when he read the statement in Court that was taken by the adjuster, he noted that it had a name of some party in it. When affiant heard this he immediately went to Department 68 to see the exhibits of defendant which were introduced in the matter. Out of said statement affiant did obtain the name of one John Wais, Jr., whose name Counsel's file in the matter did not show as a witness. Affiant thereafter called on this party and learned that both he and his son Edward actually witnessed the accident. Said Mr. Wais stated that both he and his son actually saw the eastbound car within the intersection and further saw it strike the plaintiffs' car on the rear. Mr. Wais further stated that at no time did the defendant's car come to a stop before the collision."

[2] Thus it appears from the affidavit that counsel learned the names of the new witnesses by reading the statement of his own client—a statement which evidently he did not take the trouble to read before it was received in evidence during the course of the trial. It is self evident that the testimony of these witnesses was available to plaintiffs at the time of trial. There is such an obvious lack of an adequate showing of diligence that the ruling of the trial court is beyond serious challenge. See Allin v. Snavely, 100 Cal.App.2d 411, 415–416, 224 P.2d 113; Putnam v. Pickwick Stages, 98 Cal.App. 268, 274, 276 P. 1055.

The nugatory appeals from the verdict and from the order denying a new trial are dismissed. The judgment is affirmed.

FOX, P. J., and ASHBURN, J., concur.

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171 Cal.App.2d 353

Charlotte O. JOHNS, Plaintiff and Appellant,

v.

W. Harry JOHNS et al., Defendants,

Henry L. Watts, Norma L. Watts, Home Federal Savings and Loan Association, Western Title Insurance and Guaranty Company, Elizabeth A. Osterlund, Defendants and Respondents.

Civ. 18293.

District Court of Appeal, First District, Division 1, California.

June 16, 1959.

Action in which the Superior Court, City and County of San Francisco, Raymond J. Arata, J., entered order sustaining demurrers to plaintiff's first amended complaint and plaintiff appealed. The District Court of Appeal, Wagler, J. pro tem., held that where record disclosed that demurrer was entered with consent of plaintiff, she could not appeal such order.

Affirmed.

1. Appeal and Error 🔑903

Minute order of Trial Court disposing of demurrer was presumed to be correct.

2. Appeal and Error 🔑903

Any uncertainty in record would be resolved against appellant.

3. Appeal and Error 🔑901

If minute order of trial court did not state the true facts, burden was upon appellant to take steps to correct the same.

4. Appeal and Error 🔑883

Where plaintiff consented to sustaining of demurrer to her complaint the order sustaining demurrer would not be reviewed or disturbed on her appeal therefrom.

◆

Fredricks & Sullivan, San Francisco, for appellant.

Royal E. Handlos, San Francisco, for respondents.

WAGLER, Justice pro tem.

On September 3, 1957, plaintiff filed her first amended complaint naming as defendants her husband, W. Harry Johns, from whom she had obtained an interlocutory decree of divorce, one Arnett and respondents herein.

Thereafter all of the defendants except Johns and Arnett who are not parties to this appeal filed demurrers. These were by order of the court sustained and from the judgment entered thereon plaintiff has appealed.

Respondents assert that the appeal should be dismissed on the ground that the order sustaining demurrer was entered with plaintiff's consent.

The record contains the following minute order dated December 11, 1957, Raymond J. Arata, Judge: "In this action *upon stipulation of respective counsel* [emphasis added], not present at hearing, the Court ordered the demurrer to plaintiff's first amended complaint sustained with 10 days to amend."

The record also contains a stipulation dated February 27, 1958, waiving notice of sustaining of demurrer and agreeing to the entry of judgment.

On March 11, 1958, the court signed a formal judgment in favor of the respondents herein which contains the following preamble:

> "The demurrer of Western Title Insurance and Guaranty Company, a corporation, Henry L. Watts, Norma L. Watts, Elizabeth A. Osterlund and Home Federal Savings and Loan Association, having been duly argued and submitted to the Court, and the Court having sustained the said demurrers and granted to the plaintiff ten days within which to amend, if so advised, and it appearing that the plaintiff and the said defendants have entered into a stipulation wherein plaintiff waived notice of sustaining of demurrer, and has stipulated that judgment may be entered in said action,
>
> "And good cause appearing," etc.

Not once in her brief has appellant denied the accuracy of the minute order which recites that the demurrer was sustained *"upon stipulation of respective counsel."* She contents herself with the assertion that the record is ambiguous and that the recitation in the judgment that the demurrer was *"duly argued and submitted to the Court"* necessarily negatives the idea that she consented to the sustaining of the demurrer.

[1, 2] We are unable to agree. The minute order and the recitals of the judgment are not necessarily in conflict. It is entirely possible that the demurrer was argued and submitted and that at a later date counsel stipulated that the demurrer could be sustained. The minute order is presumed to be correct. Reed v. Murphy, 196 Cal. 395, 238 P. 78; John H. Spohn Co. v. Bender, 18 Cal.App.2d 447, 64 P.2d 152. Furthermore any uncertainty in the record, if existent, must be resolved against appellant. Boyer v. Pacific Mutual Life Ins. Co., 1 Cal.App. 54, 81 P. 671.

[3] If in fact the minute order did not state the true facts, the burden was upon appellant to take steps to correct the same. Christina v. R. Z. Adams Co., Inc., 16 Cal. App.2d 139, 60 P.2d 186. None have been taken.

[4] The rule is well established that "[a] judgment or order will not be reviewed or disturbed on an appeal prosecuted by the party who consented thereto" (3 Cal.Jur.2d 590; Hibernia Savings & Loan Soc. v. Waymire, 152 Cal. 286, 92 P. 645; Christina v. R. Z. Adams Co., Inc., supra; Wilson v. City of Los Angeles, 156 Cal.App.2d 776, 320 P.2d 93).

Judgment affirmed.

BRAY, P. J., and TOBRINER, J., concur.

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171 Cal.App.2d 568

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Francis Douglas SMITH, Defendant and Appellant.

Cr. 6533.

District Court of Appeal, Second District, Division 3, California.

June 29, 1959.

Defendant was convicted of burglary and from a judgment of the Superior Court of Los Angeles County, J. Howard Ziemann, J., the defendant appealed. The District Court of Appeal, Vallée, J., held that the appellate court must presume that an officer had a warrant for the arrest of defendant and reasonable cause for the arrest and that he had a search warrant and that search and seizure of stolen property were lawful and that the evidence sustained conviction.

Affirmed.

1. Criminal Law ⚷322

Where there was nothing in the record to indicate that an officer arresting defendant and searching his car did not have a warrant for the defendant's arrest or that he did not have a search warrant, it would be presumed that he had both. West's Ann.Code Civ.Proc. § 1963, subds. 1, 15, 33.

2. Criminal Law ⚷1144

Where record was silent as to whether officer arresting defendant and searching his car and recovering stolen property had a warrant for the arrest of defendant and was silent as to whether he had a search warrant, appellate court must presume that he regularly and lawfully performed his duties and that he had a warrant for the arrest of defendant and that he had reasonable cause for his arrest that hence the search and seizure were lawful. West's Ann.Code Civ.Proc. § 1963, subds. 1, 15, 33.

3. Criminal Law ⚷394.5(4)

Burden was on defendant to show that an officer making arrest of defendant and search of his car and seizure of stolen property acted without proper warrant. West's Ann.Code Civ.Proc. § 1963, subds. 1, 15, 33.

4. Burglary ⚷41(1)

Evidence warranted finding that defendant and female companion were principals in the burglary of two stores so as to warrant conviction for burglary.

◆

Harry Weiss, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., and Jack E. Goertzen, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

In a nonjury trial defendant was convicted on two counts of burglary. The burglaries were alleged to have been committed on March 26, 1958 in entering two stores in West Covina, known as Elegantia Men's Wear and Norm Meager's Men's Store. Defendant appeals from the judgment.

In the morning of March 26, 1958 defendant and Beverly Day drove an automobile from Los Angeles to West Covina. In West Covina they entered Elegantia Men's Wear. The owner and Mr. Wise, the manager, were in the store. Elegantia carried only men's wear. Defendant had been in the store on one prior occasion looking for a suit. Wise waited on defendant for about 15 minutes. During this time Beverly was on the opposite side of the store in a section where jackets and slacks were kept. Wise's back was toward her. There were some sixteen suits in that section which had been received by the store the night before and had not been "ticketed." After defendant had looked at several suits he and Beverly left the store. A few minutes later Wise started to ticket the sixteen suits and found only fifteen.

A little later that morning defendant and Beverly entered Norm Meager's Men's Store, also in West Covina. Mr. Bouquette was working alone in the store. He showed a suit to defendant. Beverly was present when they started to look at the suit and then she went to the back of the store. She requested permission to use one of the dressing rooms to fix a shoulder strap. While defendant was looking at suits she stepped out the back door toward the parking lot and later returned. Defendant tried on a suit and asked Bouquette if he (Bouquette) would slip it on. Defendant appeared to like it. Bouquette figured the price of the suit. Defendant then walked to the end of the store where he talked to Beverly. He pulled out a "folded bunch of bills," counted them, and talked to Beverly as to whether they could afford the suit. Beverly shook her head, indicating she disagreed. Defendant and Beverly then told Bouquette they would talk it over and return later. Later that day, after a call from the police, Bouquette found that three suits were missing from the store. He looked in the dressing room which Beverly had used and found three of the store's wooden hangars similar to the ones on which the three missing suits had been hanging.

Later defendant and Beverly were in Greene's Men's Wear Store in West Covina. Then they drove to Redlands, where they entered Fowler's Men's Store. During the course of the day they went into six or seven men's stores.

About 2:45 the same day Officer Elliott of the Redlands Police Department received from the chief of police of Redlands a description of defendant and the automobile which he was driving. He walked down the street in front of Levine's Men's Store in Redlands, saw an automobile in front of the store which answered the description of the car which had been given to him, and entered the store where defendant was trying on a coat. Beverly was seated on a chair near him. He arrested them immediately.

Elliott asked defendant for the keys to the car. Defendant searched through his pockets and pretended not to find the keys. At the request of Elliott defendant went outside the store with him to see if the keys were in the car. The car was parked "immediately adjacent in front of the store." The keys were not in the car. Elliott and defendant returned to the store. Elliott again asked defendant for the keys and he again searched without results. Elliott then told him to take everything from his pockets and defendant did so but did not produce the keys. Elliott then asked defendant to search in the jacket he was wearing. Other officers arrived at the scene and one of them found the keys in a pocket of the jacket.

Elliott then opened the trunk of the car. In the trunk there was one suit enclosed in an Elegantia wrapper with an Elegantia label sewn inside; three suits carrying Norm Meager's labels and lot numbers; a suit from Greene's Men's Store; and two suits which had been described to Elliott prior to the arrest as having been stolen from Fowler's Men's Store in Redlands a few minutes earlier.

When questioned by Elliott defendant denied any knowledge of the suits. He told another officer he had bought the suits the morning of the arrest in Los Angeles from an unknown party for $100. At the trial he admitted the latter statement was untrue.

Defendant objected to the receipt in evidence of the suits from Elegantia Men's Wear and from Norm Meager's Men's Store on the ground that they were obtained by unlawful search and seizure. Defendant's first contention appears to be that the arrest was unlawful, that the search was made incident to the unlawful arrest and was, therefore, unlawful, and thus the evidence obtained therefrom should have been excluded.

[1-3] There is nothing in the record to indicate that Officer Elliott did not have a warrant for defendant's arrest or that he did not have a search warrant. In the absence of any showing to the contrary, it must be presumed he had both. Code Civ.Proc. § 1963, subds. 1, 15, 33. Since the record is silent as to whether the officer had a warrant for the arrest of defendant and is silent as to whether he had a search warrant, we must presume he regularly and lawfully performed his duties, that he had a warrant for the arrest of defendant, and therefore that he had reasonable cause for his arrest; and we must presume he had a search warrant and therefore that the search and seizure were lawful. People v. Farrara, 46 Cal.2d 265, 268–269, 294 P.2d 21; People v. Morris, 157 Cal.App.2d 81, 83, 320 P.2d 67. The burden was on defendant to show that Officer Elliott made the arrest and the search and seizure without proper warrants. Badillo v. Superior Court, 46 Cal. 2d 269, 272, 294 P.2d 23. Since there was no showing that either the arrest or the search and seizure was made without a proper warrant, the court correctly overruled the objection to the reception of the suits in evidence.

[4] As a witness for defendant, Beverly testified she took the two suits from Fowler's. Defendant contends, if we understand his point, that since Beverly admitted guilt of the theft from Fowler's "any belief" that defendant "acted in concert with her would be no more than speculation and would not support the charge of burglary," and thus there was no evidence that he aided and abetted Beverly in the burglaries of the West Covina stores. Without further discussion of the evidence, it is enough to say that it may be reasonably inferred from the evidence that defendant and Beverly were principals in the burglary of both Elegantia and Norm Merger's.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

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171 Cal.App.2d 527

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association, Plaintiff and Respondent,

v.

Walter C. AGLES and Christine Agles, Defendants and Appellants.

No. 18309.

District Court of Appeal, First District, Division 1, California.

June 26, 1959.

Action on promissory note in which defendants relied on four-year statute of limitations. The Superior Court, County of San Mateo, A. R. Cotton, J., entered judgment against defendants and they appealed. The District Court of Appeal, Fred B. Wood, J., held that where note by its terms was payable on or before five years from date, note was not a demand note but was payable at a fixed or determinable future time and hence statute of limitations did not commence to run until due date on note.

Affirmed.

Limitation of Actions 🔑48(2)

Where note was payable on or before five years from date, note was payable at a fixed or determinable future time and hence was not payable on demand as such expression is used in four-year statute of limitations, and hence statute of limitations did not commence to run until due date of note. West's Ann.Code Civ.Proc. § 337, subd. 1; West's Ann.Civ.Code, §§ 3082(3), 3085(2), 3088.

Cyril Saunders, San Francisco, for appellants.

Samuel B. Stewart, George Chadwick, Jr., San Francisco, for respondent.

FRED B. WOOD, Justice.

Defendants have appealed from a judgment against them upon their promissory note executed and dated June 13, 1951. The complaint was filed January 11, 1957. They rely upon their plea of the bar of section 337, subd. 1 of the Code of Civil Procedure, the four-year statute of limitations, claiming that this was a demand note.

By its terms this note was payable "on or before five (5) years from date." Plaintiff claims and the trial court held that this phrase made the note payable at a "fixed or determinable future time," within the meaning of that expression as used in section 3082, subdivision (3), and section 3085, subdivision (2), of the Civil Code, hence not "payable on demand" as the latter expression is used in section 3088 of the Civil Code.

We are persuaded that the trial court correctly interpreted the phrase in question, that the statute of limitations did not commence to run until June 13, 1956; hence, that the complaint was filed well within the four-year period.

The judgment is affirmed.

BRAY, P. J., and TOBRINER, J., concur.

171 Cal.App.2d 397

AMERICAN FIRE PROTECTION SERVICE, Plaintiff and Appellant,

v.

Bernard J. WILLIAMS, George R. Stephens and Food Products, Inc., Defendants and Respondents.

No. 18128.

District Court of Appeal, First District, Division 1, California.

June 17, 1959.

Action to recover from enjoined defendant and those who aided and abetted him in violating injunction against engaging in flue cleaning business in competition with plaintiff. The Superior Court, San Mateo County, A. R. Cotton, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Hanson, J. pro tem., held that evidence sustained finding that defendants had not conspired to violate injunction and that enjoined defendant was not engaging in flue cleaning business.

Affirmed.

1. Judgment 🔑648

Contempt proceedings are criminal in nature; and in suit to recover from enjoined defendant and those who allegedly aided and abetted him in violating injunction restraining him from engaging in business competitive with plaintiff's, record made on contempt citation was inadmissible and could not be treated as an estoppel, or collateral estoppel, or as a conclusive adjudication upon issue as to whether defendants had violated injunction.

2. Appeal and Error 🔑1071(6)

In action to recover from enjoined defendant and those who aided and abetted him in violating injunction against engaging in flue cleaning business in competition with plaintiff, finding that enjoined defendant had not engaged in such business rendered nonprejudicial any error in failing to find exactly what injunction said and that injunction had imposed upon defendants a duty not to violate it.

3. Injunction 🔑230(3)

In action to recover from enjoined defendant and those who aided and abetted him in violating injunction against engaging in flue cleaning business in competition with plaintiff, evidence sustained finding that defendants had not conspired to violate injunction and that enjoined defendant was not engaging in flue cleaning business.

4. Damages 🔑40(1), 190

For breach of duty, in connection with plaintiff's business, measure of damages is normally loss of "profits" caused by breach, that is, gross income less amount of costs; and where plaintiff, seeking to recover for violation of injunction against competition, only proved amount of gross profits it lost and not net profits, it failed to meet burden of proving damages.

See publication Words and Phrases, for other judicial constructions and definitions of "Profits".

5. Action 🔑2

Breach of duty in vacuum, without damage, does not normally give rise to cause of action.

6. Costs 🔑172

Damages 🔑71

Generally, fees paid to attorneys are not recoverable from opposing party, either as costs, damages or otherwise, in absence of express statutory or contractual authority. West's Ann.Code Civ.Proc. § 1021.

7. Damages 🔑72

In action to recover from enjoined defendant and those who aided and abetted him in violating injunction against engaging in flue cleaning business in competition with plaintiff, it was not error to deny recovery of expense incurred by plaintiff for attorney fees in prior injunction and contempt proceedings. West's Ann.Code Civ. Proc. § 1021.

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Irvin Goldstein, San Francisco, for appellant.

Joseph Genser, Richmond, Thomas Pierce Rogers, San Francisco, for respondents.

HANSON, Justice pro tem.

This is a suit to recover damages brought by the plaintiff, American Fire Protection Service, against the defendant Williams, and others who, it is alleged, aided and abetted him in violating a permanent injunction which restrained Williams from engaging in the flue cleaning business in certain counties of California in competition with the plaintiff and from soliciting the business of persons and corporations who were customers of the plaintiff on and prior to January 2, 1953.

The salient fact which needs to be mentioned here as a preliminary to all of the facts is that Williams prior to June 9, 1950, was engaged, with a partner, in the flue cleaning business. The partnership sold its business on that date to the plaintiff and, by the terms of the sale, each partner agreed that he would not engage in the type of business sold in any of the northern California counties specified and that neither would solicit any of his customers in those counties. Upon the sale of the business the defendant Williams was employed by the plaintiff at a stated salary as an employee and continued to be so employed until January 2, 1953, at which time he left the employ of plaintiff and engaged in a competing business under the name of the A–1 Fire Protection Service. As a consequence of Williams' action the plaintiff instituted a suit to procure an injunction against him. The court in that case, on March 9, 1954, granted a permanent injunction which, by its terms, restrained Williams and A–1 Fire Protection Service from directly or indirectly soliciting or inducing any customer (in the counties named), who became such customer prior to January 2, 1953, to quit the service of the plaintiffs, and further restraining them from carrying on the flue business and kindred services of the character which had been sold to plaintiff.

On May 7, 1954, Williams sold A–1 Fire Protection Service to Food Products, Inc., one of the companies under which name defendant Stephens operated. At that time and prior thereto, Stephens, the president of the defendant company, had read and was familiar with the terms of the injunction referred to above. Williams was nevertheless hired by defendant at a salary of $575 a month. His duties included solicitation of business, the making of estimates, sales, computation of prices, office work, road work, preparation of job records and schedules, and supervision of other employees. Williams solicited some business, but most of the time Stephens accompanied him. He made some surveys and estimates for the purpose of submitting bids, but the submission of the final bid was only made after consultation with Stephens. With regard to the office work Williams merely typed job sheets in the San Francisco office whereas the billing was handled from the Richmond office. Williams was not really the manager of the San Francisco office as Stephens spent two days a week at that office and the rest of the time at the Richmond office.

On February 9, 1955, plaintiff in the superior court at San Francisco, instituted contempt proceedings for the violation of the injunction against Williams, Stephens, and Food Products, Inc., and all the parties just named were found in contempt by the court.

Thereafter on January 3, 1956, plaintiff filed the instant civil action in the Superior Court of San Mateo County.

In its complaint in this case for damages the plaintiff averred that the injunction that was issued in its favor on March 4, 1954, restrained the defendant Williams not only from engaging in the flue type of business in which plaintiff was engaged, but also restrained Williams from directly or indirectly soliciting or inducing any customer (in the counties named) who became such customers prior to January 2, 1953, to quit the service of the plaintiffs. The complaint then went on to aver that not only had Williams violated the various terms of the injunction but that he was aided and abetted in so doing by the other defendants. The complaint set forth four specific instances of soliciting and inducing customers to quit the services of the plaintiff, to wit: (1)

the Uncle H. Bakery, (2) the Emporium, (3) the Continuation High School, and (4) St. Mary's College.

Turning now to these four "accounts" on which appellant relies as having been solicited contrary to the terms of the injunction we find from the record that the Uncle H. Bakery "account" and the Emporium "account" were both solicited and procured by Stephens when he was accompanied by Williams. Stephens, however, testified that Williams accompanied him to the bakery and the Emporium merely to deliver letters to them stating he could no longer fulfill his obligations under any contracts with regard to the flue cleaning business because he had been restrained from engaging in that business.

Much evidence was elicited with regard to the fact that Williams had made surveys on both the Continuation High School in San Francisco and St. Mary's College in Moraga for the purpose of preparing a bid to submit to these institutions. This evidence was irrelevant with respect to the solicitation charge, because as plaintiff's president admitted, these two institutions were *never* accounts of plaintiff, much less being accounts as of January 1953. Plaintiff's president contended, however, that he construed Williams' action in making the surveys as "engaging in business" of flue cleaning. However, it would *not* seem that making a survey for an employer in preparation for a bid, so that the employer could make a bid, would amount to "engaging in business" as a matter of law.

[1] At the trial of the action, which is here for review, the trial court proceeded on the theory that the record made on the contempt citation not only was inadmissible in this civil action for damages, but that it could not be treated as an estoppel, or collateral estoppel, or conclusive adjudication upon the issue whether or not the respondents had violated the injunction. We agree with that view. The well-established rule which makes inadmissible a conviction of a criminal offense as proof of the facts upon which the conviction was based is the rule which must be applied here. As was said in Balestreiri v. Arques, 49 Cal.App.2d 664, 669, 122 P.2d 277, 280, "But even assuming that there had been a 'final judgment' of conviction in the criminal proceeding, we know of no rule of law which would have prevented plaintiff from again raising, in a subsequent civil action between himself and defendant, any issues previously presented and passed upon in the criminal proceeding and having the court, in the subsequent civil action, render its independent judgment upon such issue. The issues previously determined * * * were not *res judicata* because the parties to the civil action were different from the parties to the criminal proceeding. * * *" See also Burbank v. McIntyre, 135 Cal.App. 482, 485–486, 27 P.2d 400, 401, "It is a general rule that a judgment in a criminal prosecution may not be received in a civil action to establish the truth of the facts in which it was rendered, but an exception thereto is recognized where the defendant has entered a plea of guilty, such record then being admitted not as a judgment establishing the fact, but as an admission against interest. [Citations.]" See also 3 Witkin, California Procedure (1942–1943), § 58; Tennessee Odin Ins. Co. v. Dickey, 190 Tenn. 96, 228 S.W.2d 73, 18 A.L.R.2d 1287.

The determinative question would thus seem to be the nature of contempt proceedings, whether civil or criminal. If civil, the judgment rendered in the contempt proceeding would operate as a collateral estoppel upon the defendants to deny the facts found by the contempt proceedings; whereas, if criminal the judgment of conviction would be no bar to the defendant's denying such facts, and such judgment would be inadmissible in the subsequent civil action. That contempt proceedings are criminal in nature is tolerably plain from the cases.

Thus, in H. J. Heinz Co. v. Superior Court, 42 Cal.2d 164, 266 P.2d 5, the court said: "The enforcement of an order of contempt in this state is not for the vindication of a private right but is for the maintenance of the dignity and authority of the court, and to preserve the peace and dignity of the people of the State of California. In re Morris, supra, 194 Cal. 63, 69, 227 P. 914." 42 Cal.2d at page 175, 266 P.2d at page 12. And in Bailey v. Superior Court, 142 Cal.App.2d 47, 297 P.2d 795, the court states: "It is settled * * * that a contempt proceeding is not a civil action but is of a criminal nature even though its purpose is to impose punishment for violation of an order made in a civil action; * * *" (Id., 142 Cal.App.2d at page 53, 297 P.2d at page 799.) The result of the Heinz and Bailey cases would seem to indicate that collateral estoppel would not apply in a civil action brought after a contempt proceeding.

[2] The next contention of the plaintiff-appellant is that the court erred in its findings of fact, and that the facts, as found, are not sustained by any substantial evidence.

The appellant urges as error the fact that the trial court made no finding with respect to the fact that the injunction (which the trial court found to exist), restrained the defendant from engaging in the flue cleaning business. It is true that the trial court only found that the injunction restrained the defendant from inducing or endeavoring to induce any customer of plaintiff to terminate its service and did not find specifically that the defendant was enjoined by the injunction from engaging in the flue cleaning business. However, the trial court found that Williams had not engaged in the business. It is difficult to see how the plaintiff is prejudiced by the trial court's not having found exactly what the injunction said.

The appellant also points out that the trial court did not find that the injunction imposed upon the defendants a duty not to violate it. This would not seem properly a finding of fact, but merely a conclusion of law. Since the trial court found that the injunction had not in fact been violated such a finding was not necessary.

On the basis of the facts we have enumerated appellant contends that the defendants had conspired to violate the injunction issued against Williams. If it is granted for the purpose of argument that a finding to the effect that Williams and Stephens had solicited some of the business formerly serviced by the plaintiff and that defendant was engaging in the "flue cleaning business" could have been made, it is, nevertheless, the fact that, the trial court, on the basis of substantial evidence, found that the defendants had not so conspired and that Williams was not engaged in the flue cleaning business.

[3] While the trial court on the evidence which we have recited could have found for the plaintiff, it was the exclusive province of that court to appraise and weigh the evidence and the credibility of the witnesses; and under that rule long established in the jurisprudence of this state, there was adequate substantial evidence to sustain the court's findings.

[4, 5] We come then to the next contention of appellant that the evidence was sufficient to support a finding that plaintiff suffered actionable damages by reason of the acts of the defendants and that the court's finding to the contrary based upon the admissible evidence was erroneous.

The only evidence pertaining to actual damages suffered by the plaintiff in relation to the alleged violations by the defendants of the injunction was that it lost $440 per year *gross* in business diverted from it by the defendants. For the breach of a duty, in connection with the plaintiff's business, normally the measure of damages is the loss of profits caused by the breach. See Elsbach v. Mulligan, 58 Cal.App.2d 354, 366–368, 136 P.2d 651. Profits, of course, are the amount of gross income less the amount of costs. Plaintiff, in this regard, only proved the amount of gross profits it lost and not the net profits. Plainly, the plaintiff did not meet the burden of proving damages. The breach of a duty in a vacuum without damage does not normally give rise to a cause of action.

[6, 7] There remains for consideration the contention that the court erred in holding that the plaintiff was not entitled to re-

cover the attorney fees in the sum of $5,175 it paid or incurred to its counsel in preparing and trying the prior injunction and contempt proceedings. The appellant has not cited any statute or case which allows a recovery for attorney fees expended in prior proceedings of the character here involved. Generally, fees paid to attorneys are not recoverable from the opposing party either as costs, damages, or otherwise, in the absence of express statutory or contractual authority (Viner v. Untrecht, 1945, 26 Cal.2d 261, 158 P.2d 3; see also Code Civ.Proc. § 1021).

Appellant cites certain cases which permit a recovery of attorney fees. But these cases give no support to appellant's contention. They are clearly distinguishable and require no mention by us.

Judgment affirmed.

BRAY, P. J., and FRED B. WOOD, J., concur.

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171 Cal.App.2d 335

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Harry Robert RIVERS, Defendant and Appellant.

Cr. 1418.

District Court of Appeal, Fourth District, California.

June 15, 1959.

Rehearing Denied July 14, 1959.

Prosecution for abortion. The Superior Court, San Diego County, James C. Toothaker, J., entered judgment of conviction and defendant appealed from such judgment and an order denying a new trial. The District Court of Appeal, Shepard, J., held that trial court did not err in admitting evidence that defendant indulged in oral copulation of the victim's sex organs during preparations for and immediately preceding his insertion of a catheter into the victim, on theory that such evidence tended to unnecessarily degrade and prejudice defendant in the minds of the jury, since the act of oral copulation was an incident of the preparations for the culminating act of the abortion charged, and as such was admissible as a part of the res gestae as well as tending to show motive, intent and a relevant circumstance.

Judgment and order denying motion for a new trial affirmed.

1. Abortion 🔑11

Evidence sustained conviction for abortion.

2. Criminal Law 🔑539(1)

Trial court, in abortion prosecution, would not be deemed to have committed error in permitting testimony of victim at preliminary hearing to be read in evidence at the trial of the cause on theory that defendant was unduly restricted in cross-examination of the victim during the preliminary hearing, where questions to which an objection was sustained either were repetitive, or were questions which on their face did not appear to be material and of which defense gave no explanation of materiality.

3. Criminal Law 🔑1036(1)

Error will not be predicated on a trial court's refusal to allow questions which have no apparent materiality unless counsel makes clear to the trial court the purpose of such questions, and such questions do, in fact, have a legitimate purpose.

4. Criminal Law 🔑1036(2)
Witnesses 🔑268(1)

Cross-examination in criminal prosecution should be allowed considerable latitude and freedom and should not be unduly restricted, but where a question does not show on its face whether or not it is material, the questioner, in order to claim error in sustaining an objection thereto, must reframe it or make offer of proof to show its materiality.

5. Criminal Law ⚷338(7), 365(1), 369(2)

In abortion prosecution, trial court did not err in admitting evidence that defendant indulged in oral copulation of the victim's sex organs during preparations for and immediately preceding his insertion of a catheter into the victim, on theory that such evidence tended to unnecessarily degrade and prejudice defendant in the minds of the jury, since the act of oral copulation was an incident of the preparations for the culminating act of the abortion charged, and as such was admissible as a part of the res gestae as well as tending to show motive, intent and a relevant circumstance.

6. Criminal Law ⚷369(2)

Evidence of an intermixed or blended detail of the whole criminal scheme is not rendered inadmissible merely because it tends to show the commission of a separate crime or because it happens to degrade the defendant.

7. Criminal Law ⚷543(1)

Where evidence, in an abortion prosecution, showed victim had been placed under subpoena by the prosecution, but had in fact left the state, and a bench warrant was issued and "returned unable to serve", before the close of the case, permitting reading of transcript of her testimony at preliminary examination was proper. West's Ann.Penal Code, § 686.

8. Criminal Law ⚷829(18)

In prosecution for abortion, trial court did not commit prejudicial error in failing to give an instruction that prosecution must establish beyond reasonable doubt that defendant employed instrument in question on the person of the victim in the belief that the employment of the instrument would procure a miscarriage, in view of instructions given.

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Harry Ellman, Howard R. Harris, San Diego, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Ernest E. Sanchez, Deputy Atty. Gen., for respondent.

SHEPARD, Justice.

Defendant was charged with the crime of abortion. After a trial by jury he was found guilty as charged, his motion for a new trial was denied, and he was granted probation for five years on condition he serve 60 days in the custody of the sheriff of San Diego County. He appeals from the judgment of conviction and from the order denying his motion for new trial.

[1] A brief summary of the evidentiary details is necessary to understand the points of law raised. Defendant is a licensed pharmacist. The prosecuting witness, whom we will hereinafter call "victim" for brevity's sake, applied at his place of employment for the purchase of epsom salts to induce the recommencement of her menstrual period. Defendant volunteered to her that such an effect would not be produced by epsom salts, but that if the victim would meet him after midnight at an appointed place he would have something for her. At such later meeting a conversation there occurred about her possible pregnancy, and the use of drugs and an instrument to cause an abortion. They went to the victim's apartment and he performed a sex act on her. He then inserted a catheter about twelve inches long in her vagina. After removing the catheter it showed blood on its end. He then gave her some white pills of quinine to take. Two days later he gave her some different pills containing ergot. A further discussion then occurred about the repeated use of the catheter and stronger medicine for the purpose of producing a miscarriage. Another appointment was tentatively made.

Later, the witness became alarmed at her feeling of illness, contacted her family doctor, was taken to a hospital and examined, the police were contacted, and a new appointment was made for the defendant to come to the victim's apartment to again use the catheter. Two officers were concealed in the apartment when he arrived. A conversation then occurred referring to the former use of the catheter and the drugs and two additional drugs, and to intended repetitive use of the catheter at that time. The victim then started to prepare for the use of the catheter by removing her clothing, and the officers stepped from hiding and arrested the defendant. At that time he had a catheter in his hand and a portion of another catheter in his pocket. Two bottles, one containing terramycin pills and one phenobarbital pills were on the coffee table in front of him, and were identified by him as his. He also identified the other two bottles previously given to the victim by him. He later admitted to an officer that he had placed the catheter in the witness and had given her the pills. The physician testified that the total procedure outlined would usually cause an abortion. A great deal of this evidence was corroborated by defendant's own testimony. He places the onus of affirmative inducement on the victim, and the essential elements of the victim's story of preparation, disinfecting the catheter, disrobing, the furnishing of medicines are all present except that he states that he only pretended to insert the catheter and that he did not know what a catheter was for, and that he did not intend to commit an abortion. A review of the whole testimony convinces us that the evidence was more than ample to sustain the conclusion of the jury.

[2] The defendant first complains that the cross-examination of the victim by defense counsel during the preliminary hearing was improperly and materially restricted and that, therefore, the trial court committed error in permitting such testimony of the victim to be read in evidence at the trial of the cause.

Without covering each question in full it may be said that these questions fall generally into two categories. First, the questions to which an objection was sustained on the ground they had been previously asked and answered. An example of these is the first one about which defendant complains of the ruling of the court: "When he manipulated (the catheter) did you feel any sensation?" On the previous day, different forms of this question were asked by defense counsel no less than eight times, to which on five occasions the witness gave affirmative answers directly responsive to the question asked. The court's refusal to allow a further question along the same line was well within the bounds of propriety and was not an abuse of discretion.

[3] The second category was that of questions which on their face do not appear to be material but which the court might well have allowed had counsel made some explanation of his purpose, or pointed out just how the question was material. The first of this type of questions, to which objection was sustained and of which complaint is made, is sufficiently exemplary of all. The victim had been asked why she had not gone to work on August 15th, and she had answered that she felt sore, had a headache and discomfort, and was not able to work. Thereupon, the following question was asked: "Q. Did you report this to your employer?" An objection thereto was sustained. The charge here was abortion. The question as to whether or not she told her employer at a later time that she felt ill or had a headache could have no obvious nor direct bearing on this charge nor on the veracity of the witness, and on its face would not be material. If counsel had explained his purpose in this questioning or how he thought it might later become material the magistrate may well have allowed the question, but counsel gave no such explanation nor assistance to the court in this respect. Error will not be predicated on the trial court's refusal to allow questions which have no apparent materiality unless counsel makes clear to

the trial court the purpose of such question and it does, in fact, have a legitimate purpose. The direct examination covered the inducement, conversation, the preparations, the act itself and the events directly pertaining to further contacts with the defendant, resulting in his arrest. It apparently occupied no more than an hour in time and it covers only 36 pages of transcript. On the other hand, the cross-examination covered substantial parts of two days, occupied 242 pages of transcript, and was searching, extensive and very repetitive. Relatively few objections were made by the prosecution and fewer were sustained. A review of the sustained objections of which defendant complains reveals no serious abuse of discretion and no prejudicial error.

[4] It is true that cross-examination should be allowed considerable latitude and freedom and should not be unduly restricted (People v. Flores, 15 Cal.App.2d 385, 401 [2–3], 59 P.2d 517; People v. Lain, 57 Cal.App.2d 123, 135[5], 134 P.2d 284; People v. Whitehead, 113 Cal.App.2d 43, 48 [1–2], 247 P.2d 717; People v. Little, 142 Cal.App.2d 513, 517[2], 298 P.2d 548), and that the transcript of a preliminary examination wherein the right of cross-examination has been unduly and improperly restricted should be rejected when offered under the provisions of Penal Code, § 686. People v. Redston, 139 Cal.App.2d 485, 496[8], 293 P.2d 880. But it is also true that:

> "The court has, however, discretionary power over cross-examination which will be disturbed on appeal only in case of an abuse thereof. Thus the court may confine an examination within reasonable limits, and *may curtail a cross-examination which is unduly protracted, frivolous, or which relates to matters which are irrelevant, admitted or have already been fully covered.* People v. Whitehead, supra, 113 Cal.App.2d at page 48[1–2], 247 P.2d at page 720; People v. Ormes, 88 Cal.App.2d 353, 358[3], 198 P.2d 690; People v. Serpa, 67 Cal.App.2d 327, 332[7], 154 P.2d 6; People v. Corlett, 67 Cal.App.2d 33, 46, 153 P.2d 595, 964; People v. Ashcraft, 138 Cal.App. 2d 820, 827[10–11], 292 P.2d 676.

As the supreme court stated in People v. Lyons, 50 Cal.2d 245, 261[11], 324 P.2d 556, 557; "Where the question does not show on its face whether or not it is material, the questioner, in order to claim error in sustaining an objection thereto, must reframe it or make offer of proof to show its materiality."

[5, 6] Defendant contends that the evidence that defendant indulged in oral copulation of the victim's sex organ during the preparations for and immediately preceding the insertion of the catheter, was improperly admitted as tending to unnecessarily degrade and prejudice defendant in the minds of the jury. The act spoken of was an incident of the preparations for the culminating act of the crime charged, and as such was clearly admissible as a part of the res gestae as well as tending to show motive, intent and a relevant circumstance. People v. Gibson, 107 Cal.App. 76, 80[1], 289 P. 937; People v. Albertson, 23 Cal.2d 550, 576[4], 145 P.2d 7. Evidence of an intermixed or blended detail of the whole criminal scheme is not rendered inadmissible merely because it tends to show the commission of a separate crime nor because it happens to degrade the defendant. People v. Knowles, 75 Cal.App. 229, 230[2], 242 P. 508; People v. Raucho, 8 Cal.App.2d 655, 668[18], 47 P.2d 1108; People v. Ciulla, 44 Cal.App. 719 722[2] 187 P. 46; People v. Hunt, 17 Cal.App.2d 284, 286[3], 61 P.2d 1208. The evidence referred to as inadmissible in the authorities cited by defendant was disconnected from the crime charged, both in fact and in time, and furnishes no analogy to facts referred to in the case at bar.

[7] Defendant complains that the foundation for the use, under authority of Penal Code, § 686, of the transcript of the victim's testimony at the preliminary examination was insufficient. The evidence showed that the victim had been placed under subpoena

by the prosecution; that she was notified by letters; that she told neighbors she was leaving for the state of New York; that she told a policewoman the same; that many calls were made by police officers to locate her; that she could not be found; and that she had in fact left by Transcontinental Air Lines. A bench warrant was issued and "returned unable to serve" before the close of the case. Under the circumstances, we are satisfied that the court's ruling permitting the reading of the transcript of the victim's testimony at the preliminary examination was correct. People v. Raffington, 98 Cal.App.2d 455, 458 [5], 220 P.2d 967; People v. Howard, 16 Cal.App.2d 349, 350[1], 60 P.2d 336.

[8] Lastly, the defendant contends that the court committed prejudicial error in failing to give an instruction that the prosecution must establish beyond reasonable doubt that the defendant did employ the instrument on the person of the victim in the belief that the employment of the instrument would procure a miscarriage. This objection was refused as covered and repetitive of instructions already given. A reading of the instructions actually given shows this objection to be without foundation. In addition to carefully detailed instructions on the various elements involved in the trial of criminal actions and the presumptions protecting the defendant, the court carefully detailed all of the varying elements and aspects of the crime of abortion, and in connection with the matter particularly complained of stated:

> "Thus, in the crime of abortion, a necessary element is the existence in the mind of the perpetrator of the specific intent to procure the miscarriage of the woman, and unless such intent so exists, that crime is not committed."

The trial court also instructed the jury that the prosecution has "* * * the duty and burden of proof to a moral certainty and beyond a reasonable doubt that the defendant either knew or believed that the woman was pregnant." "The gist of the offense of committing an abortion is the intent of procuring a miscarriage."

We have reviewed the entire transcript of the trial, and it appears that the cause was carefully and fairly tried and no prejudicial error was committed.

The judgment and the order denying the motion for a new trial are affirmed.

We concur.

GRIFFIN, P. J., and MUSSELL, J., concur.

171 Cal.App.2d 467

Dennis E. BOWMAN, Roger Whitman Hillis, Sue E. Irwin, Hunter McConnell, Sr., Gertrude P. Millikan, Marion M. Null and Florence B. Null, Petitioners and Appellants,

v.

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD of the State of California, Department of Alcoholic Beverage Control of the State of California and Martin N. Sousa, Defendants and Respondents.

Civ. 23358.

District Court of Appeal, Second District, Division 3, California.

June 23, 1959.

Hearing Denied Aug. 19, 1959.

Protestants brought mandamus proceeding against the Alcoholic Beverage Control Appeals Board, the Department of Alcoholic Beverage Control, and innkeeper to require the Board to set aside its order ruling that Department's decision denying innkeeper's application for on-sale liquor license for his inn located in unincorporated community established primarily as a religious community, on ground of issuance of license would be contrary to public welfare and morals, was without substantial support in the evidence, and to affirm Department's original order denying the application. The Superior Court of Los Angeles County, Bayard Rhone and John F. Aiso, JJ., entered judgment adverse to the protestants and an order respecting costs, and the protestants appealed. The District Court of Appeal, Shinn, P. J., held that evidence sustained Department's finding that issuance of license would be contrary to public welfare and morals.

Judgment reversed with directions to issue mandate to Board, and appeal from order dismissed.

1. Intoxicating Liquors ⚷75(7)

On appeal to Alcoholic Beverage Control Appeals Board from decision of Department of Alcoholic Beverage Control denying application for on-sale liquor license, sole question for decision of Board was whether there was substantial evidence before the Department to justify its finding that issuance of license would be contrary to public welfare and morals.

2. Intoxicating Liquors ⚷75(7)

On appeal to Alcoholic Beverage Control Appeals Board from decision of Department of Alcoholic Beverage Control denying application for on-sale liquor license, review was governed by rule that where there is room for a reasonable difference of opinion with respect to correctness of a finding of fact, it will not be disturbed by reviewing tribunal.

3. Intoxicating Liquors ⚷75(7)

Neither the Alcoholic Beverage Control Appeals Board nor the courts may disregard or overturn a finding of fact of the Department of Alcoholic Beverage Control in denying application for on-sale liquor license, for reason that it is considered that a contrary finding would have been equally or more reasonable.

4. Intoxicating Liquors ⚷70

Evidence sustained finding of Department of Alcoholic Beverage Control, in denying application for on-sale liquor license for inn located in unincorporated community established primarily as a religious community, that issuance of the license would be contrary to public welfare and morals.

Millikan & Montgomery, Pasadena, for appellants.

Stanley Mosk, Atty. Gen., Edward M. Belasco, Deputy Atty. Gen., for respondents Department and Appeals Board.

Kimball & Smith, San Diego, for respondent Sousa.

SHINN, Presiding Justice.

Martin N. Sousa made application to the Department of Alcoholic Beverage Control for an on-sale liquor license for his inn which is located in the unincorporated community of Idyllwild in the San Jacinto Mountains in Riverside County. Protests were filed by the Board of Supervisors of Riverside County and by seven residents of the community. An extensive hearing was had before a hearing officer who made findings and a recommendation against issuance of the license. These were adopted by the Department and the application was denied. The ultimate finding upon which the denial was predicated was that issuance of the license would be contrary to public welfare and morals. Sousa appealed to the Alcoholic Beverage Control Appeals Board which upon review of the record ruled that the decision of the Department was without substantial support in the evidence, and upon that ground reversed the order of the Department denying the application. Thereupon, the Department, without further evidence and upon the facts previously found, exclusive of the ultimate fact, vacated its previous order and entered a new one granting the application. Seven of the protestants sought mandate of the Superior Court to the Appeals Board requiring the Board to set aside its order and to affirm the original order of the Department. After a trial the court rendered its decision that the Appeals Board had properly exercised its powers and mandate was denied. The same protestants have appealed.

The respective powers of the Department and the Appeals Board were defined by the Supreme Court in the recent case of Martin v. Alcoholic Beverage Control Appeals Board, 52 Cal.2d ——, 340 P.2d 1.

[1] In the court trial the review was directed to the decision of the Board that issuance of the license would not be contrary to public welfare and morals. Due to the limitations of the powers of the Board the sole question for its decision was whether there was substantial evidence before the Department to justify its finding that issuance of the license would be contrary to public welfare and morals. Although the Board's decision of that legal question furnished the basis of its order of reversal there is nevertheless in the decision an implied finding of fact that issuance of the license would not be contrary to public welfare and morals. The effect of the judgment of the trial court is to sustain the determination of the Board that the evidence before the Department was legally insufficient to sustain the Department's finding of the ultimate fact which furnished the basis for the order of denial. We have concluded that the findings of the Department were well supported by the evidence and that it was the manifest duty of the Board to affirm the order of the Department.

Material facts developed by the evidence were stated in evidentiary findings of the Department, namely: Many years ago Idyllwild was established as primarily a religious community. This community proper is separated from two other nearby settlements, Pine Cove and Mountain Center, although the entire area is commonly known as Idyllwild. Liquor is sold at Pine Cove and Mountain Center. In the entire area there are some 1,500 permanent residents, most of them in the principal community of Idyllwild. There are three churches there, although none of them is close by the inn. There are extensive camp grounds of religious institutions, youth camps, cultural and educational institutions, the Idyllwild Arts Foundation with a yearly enrollment of 1,000 people, mostly young people. The Southern California Conference of Religious Education maintains camp grounds which are used by great numbers of persons, and a nearby Christian Endeavor Camp has an annual attendance of 5,000 persons. There is a proprietary school for eighth to twelfth grade pupils; there is a religious retreat known as "Center of Creative Living" which accommodates 1,000 overnight guests a year; there is a lodge commonly patronized by Girl Scout groups, Camp Fire Girl groups and religious fellowship camps. There was evidence of extensive use of special areas by Boy Scout troops and that many thousands of tourists, campers and lovers of the outdoors find recreation and rest in the community. There was also evidence that there is not to be found in Southern California a comparable religious community and that one of the factors that has led to its extensive development has been the absence of establishments for the sale of liquor in Idyllwild proper.

One finding of the Department reads as follows: "The community of Idyllwild, because of the retreats, schools, religious institutions, and children's camps located within the community and the persons attending these places, has as a community acquired the character as a place of religious observance and retreat and educational and cultural endeavor." This was followed by the finding of the ultimate fact.

The views of the Board were in striking contrast. They were stated in its decision as follows: "A careful reading of the facts found in the present proceeding does not reveal a single fact which warrants the determination that the issuance of this license would be contrary to public welfare and morals. In making this appraisal we have kept in mind the fact that the issue of public welfare and the morality of selling alcoholic beverages has been determined by the enactment of Section 22 of Article XX of the Constitution in the first instance, which brought to an end in the State of California the experiment of prohibition. * * * To sustain the present decision on the basis of the facts found would require that we recognize the right of a segment of the residents of the State of California to create exclusionary areas for the sole reason that they are opposed to the distribution and sale of intoxicating liquor. This may not be done under our present constitutional provisions and a decision to the contrary is not a reasonable exercise of discretion."

Among the witnesses were two members of the Board of Supervisors of Riverside County who expressed strong opposition and advanced cogent reasons in support of their objections to the issuance of the license. Many citizens present at the hearing expressed their opposition to the granting of the license although not a few were in favor of the application. The merits and demerits of the introduction of a barroom in the community were thoroughly explored. But there is no need for further statement of the evidence. On the one side there was to be considered the welfare of the citizens who value living in a long established religious and recreational community and who desire to see it maintained and available for numerous religious and cultural groups and organizations of young people free from the proximity of barrooms. The rights of these visitors deserve consideration. Upon the other hand, the Department had to consider and no doubt did consider the wishes of the drinking sect who, if they do not have well-stocked cellars of their own, would have to spend an estimated five minutes in seeking refreshment at Pine Cove, where liquor is sold. This inconvenience would not be an infringement upon their constitutional rights as Sousa contends, and the reasoning of the Board implies. The Board acted under a misinterpretation of the extent of the rights which may be exercised pursuant to Section 22, Article XX of the Constitution. The fact that the sale or purchase of alcoholic beverages is not per se contrary to public welfare and morals adds nothing to the rights that flow from compliance with requirements of the regulating authorities.

[2, 3] Since the power to determine the facts in licensing matters is vested in the Department and not in the Board, or the courts, a review of the action of the Department is governed by the familiar rule that where there is room for a reasonable difference of opinion with respect to the correctness of a finding of fact, it will not be disturbed by the reviewing tribunal. Neither the Board nor the courts may disregard or overturn a finding of fact of the Alcoholic Beverage Control Board for the reason that it is considered that a contrary finding would have been equally or more reasonable.

[4] We need only say that we believe that the Department could and did reasonably conclude from the evidence that the establishment of a barroom in the Sousa property would detract from the quiet character of the community and from its usefulness as a retreat for religious, cultural and youth groups and to a material extent deprive them of unique advantages which they now enjoy, and the like of which may not be found elsewhere.

The judgment must be reversed with directions to issue mandate to the Appeals Board. When that is done the order of the Department granting the license will necessarily be revoked by affirmance of the first order.

The judgment is reversed with instructions to enter new findings and conclusions of law and to issue a writ of mandate directing the respondent Appeals Board to vacate its previous order and to affirm the original order of the Department. The appeal from the order refusing to strike items of cost being moot, it is dismissed.

PARKER WOOD and VALLEE, JJ., concur.

171 Cal.App.2d 465

PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Ramsey Van B. HARDING, Defendant
and Appellant.
Cr. 6459.

District Court of Appeal, Second District,
Division 2, California.
June 23, 1959.

Rehearing Denied July 2, 1959.

Hearing Denied Aug. 19, 1959.

Prosecution for fraudulent issuance of bad checks. The Superior Court, Los Angeles County, Thomas L. Ambrose, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Herndon, J., held that judgment would not be reversed on theory that defendant's counsel, the public defender, failed to represent him competently and faithfully, where record showed that defendant was adequately represented and was accorded a fair trial.

Affirmed.

1. False Pretenses ⇨49(2, 4)

Intent to defraud and knowledge of lack of funds in an account on which a check is drawn may be proved by circumstantial evidence. West's Ann.Pen.Code, § 476a.

2. False Pretenses ⇨49(2)

Evidence was sufficient to sustain conviction for fraudulent issuance of bad checks, notwithstanding defendant's denial of fraudulent intent in issuance of the checks. West's Ann.Pen.Code, § 476a.

3. Criminal Law ⇨407(1)

Failure of a defendant, charged with fraudulent issuance of bad checks, to respond to an accusatory statement by a store manager as to why defendant had tried to pass a bad check at the manager's place of business, provided a basis for inferences adverse to defendant's pose of innocence of fraudulent intent in issuance of the checks. West's Ann.Pen.Code, § 476a.

4. Criminal Law ⇨1166½(1)

In criminal prosecution, defendant's conviction would not be reversed on theory that his counsel, the public defender, failed to represent him competently and faithfully, where it affirmatively appeared from the record that defendant was adequately represented and was accorded a fair trial.

5. Criminal Law ⇨1035(3)

Complaint of defendant, on appeal from a conviction, that certain exhibits were marked for identification and placed in evidence without having been shown to defendant and his counsel, was not available as a proper assignment of error, where record indicated there was no basis in fact for such complaint and where no objection was raised in the trial court upon such ground.

◆

Ramsay Van B. Harding, in pro. per.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Ernest E. Sanchez, Dep. Atty. Gen., for respondent.

HERNDON, Justice.

Convicted on five counts charging fraudulent issuance of bad checks (Pen.Code, § 476a), defendant has appealed from the judgment. Appearing in propria persona, he has presented briefs which appear upon analysis to constitute an argument that because the evidence is conflicting, and because defendant categorically denied any fraudulent intent in his issuance of checks against an admittedly overdrawn account, the judgment is not supported by the evidence. In other words, the argument proceeds upon the erroneous notion that this court may reweigh the evidence.

[1–3] It would serve no purpose here to set forth a detailed statement of the evidence. It is sufficient to note that defendant admitted writing and delivering the checks in question. It was proved by uncontradicted evidence that the checks were drawn against an account that was overdrawn, and that no credit arrangement existed. Despite defendant's testimony to the effect that he was innocent of fraudulent intent, the circumstances shown by the evidence are entirely sufficient to support a finding of the essential criminal intent. On January 25, 1958, the balance in defendant's account was $1.07. The account was overdrawn on February 1st and closed on February 4th. Between January 25th and February 19th, 1958, defendant made no deposit but drew five checks for a total of $85. On the last mentioned date defendant presented a $5 check to a cashier of a downtown store. The cashier gave the check to the store manager, who went upstairs and called the bank. After learning that the check was not good, the manager returned to the cashier's desk, handed the check back to the cashier, saying: "Just a moment, please" and went outside. Defendant, thereupon, took the check out of the cashier's hand and went out the opposite doorway. The cashier and manager followed defendant and asked a policeman to apprehend him. When the store manager asked defendant why he had tried to pass a bad check at his place of business, the defendant remained silent. It is well settled, of course, that intent to defraud and knowledge of the lack of funds may be proved by circumstantial evidence. People v. Oster, 129 Cal.App.2d 688, 691–692, 278 P.2d 39; People v. Lane, 144 Cal.App.2d 87, 89, 300 P.2d 321; People v. Leon, 163 Cal.App.2d 791, 793, 329 P.2d 996; People v. Croxton, 162 Cal.App.2d 187, 195, 327 P.2d 611; People v. Weaver, 96 Cal.App. 1, 4–7, 274 P. 361. The circumstances above recited were more than sufficient to support the inferences drawn by the trier of the facts. Defendant's failure to respond to the accusatory statement provided an additional basis for inferences adverse to his pose of innocence.

[4] Defendant's contentions to the effect that his counsel (the Public Defender) failed to represent him competently and faithfully in the trial court are wholly without support in the record. On the contrary, it affirmatively appears that defendant was adequately represented and that he was accorded a fair trial.

[5] Defendant's complaint that exhibits were marked for identification and placed in evidence without having been shown to appellant and his counsel is not available as a proper assignment of error. In the first place, the record indicates that there is no basis in fact for the contention; in the second place, no objection was raised in the court below upon any such ground. See Gantner v. Gantner, 39 Cal.2d 272, 277–278, 246 P.2d 923; People v. Ottey, 5 Cal.2d 714, 721, 56 P.2d 193; People v. Corrigan, 48 Cal.2d 551, 556, 310 P.2d 953.

Affirmed.

FOX, P. J., and ASHBURN, J., concur.

171 Cal.App.2d 508

Herbert FENOLIO and Dorothy Fenolio, jointly and severally, Plaintiffs and Respondents,
v.
James McDONALD and Dorothea McDonald, jointly and severally, Defendants and Appellants.

James McDONALD and Dorothea McDonald, jointly and severally, Plaintiffs and Cross-Defendants,
v.
Herbert FENOLIO, Dorothy Fenolio and Circle DBF Dude Ranch, Inc., a California corporation, Defendants and Cross-Complainants.
Civ. 9524.

District Court of Appeal, Third District, California.
June 25, 1959.

Consolidated actions. The Superior Court, Shasta County, Albert F. Ross, J., entered judgment for plaintiffs and the defendants appealed. The District Court of Appeal, Peek, J., held that where plaintiff owned all the stock of corporation which had on-sale liquor license and which engaged in the bar and restaurant business, and plaintiff agreed to sell the license and the liquor business and the furniture, fixtures, and liquor and food inventories to defendants for designated amount, and defendants gave plaintiff two notes in that amount and plaintiff and defendants entered into an interim agreement which provided that corporation should purchase plaintiff's stock at rate of $125 per month until such amount had been paid to plaintiff, the stock purchase and transfer was merely incidental to the sale and delivery of the liquor business from plaintiff to defendants, and consequently the fact that interim agreement violated statute prohibiting corporation from purchasing its own stock and fact that stock was issued contrary to provisions of permit issued by division of corporations and was not issued in compliance with statute did not provide a basis for vitiating the entire contract of sale.

Affirmed.

1. Sales ⚷49

Where plaintiff owned all the stock of corporation which had on-sale liquor license and which engaged in the bar and restaurant business, and plaintiff agreed to sell the license and the liquor business and the furniture, fixtures, and liquor and food inventories to defendants for designated amount, and defendants gave plaintiff two notes in that amount and plaintiff and defendants entered into an interim agreement which provided that corporation should purchase plaintiff's stock at rate of $125 per month until such amount had been paid to plaintiff, the stock purchase and transfer was merely incidental to the sale and delivery of the liquor business from plaintiff to defendants, and consequently the fact that interim agreement violated statute prohibiting corporation from purchasing its own stock and fact that stock was issued contrary to provisions of permit issued by division of corporations and was not issued in compliance with statute did not provide a basis for vitiating the entire contract of sale. West's Ann.Corp.Code, §§ 1705, 26100.

2. Contracts ⚷105

Where it is urged that a contract is illegal and unenforceable as being in violation of a statute, the court should examine with care the statute involved so as to give effect to the fundamental purpose of the Legislature and to a wise public policy.

◆

William J. Mahaney, Menlo Park, and Ira M. Shadwell, Redding, for appellants.

Vladimir Vucinich and William Berger, San Francisco, for respondents.

PEEK, Justice.

The present controversy arises out of the sale of a bar and restaurant business which in turn resulted in actions being filed by both parties. The plaintiffs, by their action, sought to recover from defendants on two promissory notes which formed a part of the consideration, while the defendants, in their action, sought to rescind the agreement upon the ground of fraud. By stipulation the actions were consolidated. The court found in favor of plaintiffs in both actions and entered judgment accordingly. Defendants appeal solely from the judgment in favor of plaintiffs in their action on the two promissory notes, no appeal having been taken from the judgment in the action instituted by defendants.

The record shows that plaintiffs, under the name of the Circle DBF Dude Ranch, Inc., operated a bar and restaurant business in Fall River Mills. All of the stock of the corporation stood in the name of plaintiff Herbert Fenolio. He testified that he operated the business as an individual. The defendants had purchased a building and bar business in the town of Burney known as the Park Club. In order to obtain an "On-Sale General Liquor License" they called upon plaintiffs and entered into negotiations for the purchase of plaintiffs' business and license. Subsequently plaintiffs agreed to sell and defendants agreed to buy the license and tangible assets of the corporation for the sum of $40,000, plus whatever the inventory was worth. Pursuant to this agreement, two promissory notes were executed—one in the sum of $12,000 and the other in the sum of $28,875, the $875 being the value of the inventory. Additionally, an "interim agreement" was prepared and signed by both of the parties. Thereafter all of the physical assets and the liquor license were moved to the defendants' place of business at the Park Club.

The defendant James McDonald stated that he desired to keep the corporation alive since the license was in its name and hence no transfer would be required. The defendants also desired to keep the corporation alive so that they might revaluate the stock certificates after transferring the assets of the Park Club to the corporation. It was further suggested by defendant James McDonald to plaintiff Fenolio that he remain as president of the corporation with the defendants being named as new directors. This was represented to Fenolio as being an additional protection to him in receiving the balance of his money. While Fenolio did participate to a degree in the conduct of the business of the corporation following the transaction, he testified that whatever acts he did were performed at the request of and as a favor to the defendant McDonald.

[1] The primary contention of defendants is predicated upon section 1705 of the Corporations Code which provides in part as follows: "A corporation shall not purchase directly or indirectly any shares issued by it * * *" except under certain circumstances not involved herein. Therefore, they argue, since the interim agreement specifically provides for the doing of the very act denounced by said section, the agreement is void and the court should not aid in the enforcement of such a contract and the parties should be left where the court finds them.

The agreement reads as follows:

"This Agreement entered into this first day of April, 1955, by and between Herbert J. Fenolio and his wife, Dorothy, and James McDonald and his wife, Dorothea, hereinafter known as the McDonalds and the Fenolios.

"Whereas: The Fenolios are the sole owners of the stock in the Circle DBF Dude Ranch, Inc., which stock represents the on-sale liquor license, furniture, fixtures, and liquor and food inventory.

"Whereas: It is contemplated that the said corporation will purchase and retire the stock held by the Fenolios at the rate of $125.00 per month, plus 6% interest per annum on said liquor license worth $12,000.00 to be retired first, after which subsequent payments be applied to furniture and fixtures at the rate of $125.00 per month with no interest until the total of $40,000.00, plus liquor inventory, has been paid, except that any balance due said Fenolios, above payments hereinafter made, after an eight year period shall become due and payable by said McDonalds.

"Whereas: In consideration of Fenolios selling their stock to the corporation, McDonalds agree to guarantee payments.

"Now, Therefore, it is mutually agreed as follows:

"1. Fenolios hereby agree to sell their stock in the Circle DBF Dude Ranch, Inc. to the corporation at a rate of $125.00 per month at an interest rate of 6% per annum on $12,000.00 to be paid monthly, interest on the unpaid balance to be reduced annually.

"2. The Fenolios hereby accept and recognize a cash payment of $2,500.00 to be applied in part to liquor inventory and the balance of which sum shall be applied toward the reduction of said $40,000.00 capital.

"3. In the event of default of the corporation to make any payment, or payments, which are required under the terms of this agreement, the McDonalds shall make payment and the said stock shall be issued to the Mc-

Donalds in place and stead of the corporation.

"4. The McDonalds herewith agree that at the end of eight years, upon the signing of this agreement, to purchase from the Fenolios the remaining stock of the corporation still held by the Fenolios.

"5. The Fenolios agree to furnish the corporation with a closing statement of the Circle DBF Dude Ranch, Inc., as of March 31, 1955, to be rendered not later than December 31, 1955."

[2] Where it is urged that a contract is illegal and unenforceable as being in violation of a statute, the court should examine with care the statute involved so as to give effect to the fundamental purpose of the Legislature and to a wise public policy. Ferguson v. Schuenemann, 167 Cal.App.2d 413, 334 P.2d 668. In Hammond v. Haskell, 14 Cal.App. 522, 112 P. 575, a factual situation similar to that posed in the instant case was presented to the court which enunciated the further rule that: "Conceding that such interpretation would render the contract invalid, nevertheless, this contract is susceptible of the construction that under its terms the defendants were making a purchase of the stock upon their own account and directing the delivery to the corporation for their benefit. 'Where a contract is capable of two constructions, the one making it valid and the other void, * * * the first ought to be adopted.' [Case cited.]" 14 Cal.App. at page 526, 112 P. at page 577.

And in the case of Norwood v. Judd, 93 Cal.App.2d 276, 288–289, 209 P.2d 2431, the court held: "The rule that the courts will not lend their aid to the enforcement of an illegal agreement or one against public policy is fundamentally sound. The rule was conceived for the purposes of protecting the public and the courts from imposition. It is a rule predicated upon sound public policy. But the courts should not be so enamored with the Latin phrase '*in pari delicto*' that they blindly extend the rule to every case where illegality appears somewhere in the transaction. The fundamental purpose of the rule must always be kept in mind, and the realities of the situation must be considered. Where, by applying the rule, the public cannot be protected because the transaction has been completed, where no serious moral turpitude is involved, where the defendant is the one guilty of the greatest moral fault, and where to apply the rule will be to permit the defendant to be unjustly enriched at the expense of the plaintiff, the rule should not be applied."

The precise question here involved was also discussed in the case of Tiedje v. Aluminum Taper Milling Co., 46 Cal.2d 450, at page 455, 296 P.2d 554, 557, and the court held that: "* * * the restriction on the corporation's purchase of its own shares was enacted for the benefit of the corporation as a whole, its creditors and stockholders other than the participating stockholder."

Certainly defendants do not occupy the position of those who belong to a class for whose protection the statute here in question was enacted. They were not stockholders nor creditors of the corporation at the time the interim agreement was made, nor could the financial structure of the corporation have been misrepresented to them as a result of the agreement, since the purchase price had been determined prior to the execution of the agreement. Defendants were dealing with a "one man corporation." "It has been repeatedly held that in such a case, the sole owner may do what he will with the assets and credit of the corporation and no one but creditors may complain." Scales v. Holje, 41 Cal.App. 733, 737, 183 P. 308, 309.

Defendants further urge that the corporate stock was issued contrary to the provisions of the permit issued by the Division of Corporations, and being void could not furnish the basis for the judgment. It is argued that the stock was not issued in compliance with the provisions of section 26100 of the Corporations Code. However, the findings of the trial court, as explained by its memorandum decision, show clearly that the court considered the stock as incidental to the overall transaction. As was explained by the court, the consideration for the two notes was the actual sale and delivery of possession of the liquor business, its assets, license, stock in trade, fixtures, etc. It would thus appear to follow that even conceding that the transfer was void, the agreement as the court noted was not such an integral part of the entire transaction as to provide a basis for vitiating the contract. See Tevis v. Blachard, 122 Cal. App.2d 731, 738, 266 P.2d 85; Swinney v. Legg, 129 Cal.App. 476, 477–478, 18 P.2d 970.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY J., concur.

171 Cal.App.2d 559

Steffana PREISS, Plaintiff and Appellant,
v.
GOOD SAMARITAN HOSPITAL, a corporation, Defendant and Respondent.
Civ. 23454.

District Court of Appeal, Second District, Division 3, California.
June 29, 1959.
Hearing Denied Aug. 26, 1959.

Action wherein the defendant filed a motion to dismiss the case because of failure to bring the action to trial within five years after it was filed. From a judgment of the Superior Court, Los Angeles County, Walter C. Allen, J., dismissing the action, the plaintiff appealed. The District Court of Appeal, Vallée, J., held that statute providing for dismissal of action after five years without trial except where parties file a stipulation in writing that the time may be extended is mandatory, that a minute order showing that attorney for defendant was present and that on motion of plaintiff the cause was ordered continued was not a stipulation within the statute, that, in absence of any stipulation entered by the clerk in the minutes, dismissal of action was required on defendant's motion after expiration of the five-year period, that presence of defendant's counsel in court when matter of stipulation was being considered did not estop the defendant from relying upon the statute and that an oral stipulation was not permissible under the statute.

Judgment affirmed.

1. Dismissal and Nonsuit 🔑60(1)

Statute providing for dismissal of action not brought to trial within five years unless parties have filed a written stipulation that time may be extended is mandatory when applicable. West's Ann.Code Civ.Proc. § 583.

2. Stipulations 🔑7

A stipulation of parties in open court which is entered by clerk in minutes of the court is a sufficient stipulation of parties in writing under statute authorizing extension by stipulation of time of trial beyond the five-year period. West's Ann.Code Civ. Proc. § 583.

3. Appeal and Error 🔑662(1)

Minutes of trial court import absolute verity and cannot be collaterally attacked in a reviewing court.

4. Dismissal and Nonsuit 🔑60(6)

A minute order showing that attorney for defendant was present and stating that on plaintiff's motion the cause was ordered continued and notice waived was inadequate as a "stipulation" extending time of trial beyond five-year period, and, in absence of a written stipulation of parties entered by clerk in the minutes, defendant was entitled to have action dismissed after expiration of the five-year period without trial. West's Ann.Code Civ.Proc. § 583.

See publication Words and Phrases, for other judicial constructions and definitions of "Stipulation".

5. Dismissal and Nonsuit 🔑50

Where defendant's counsel and plaintiff's counsel were not in agreement as to whether an oral stipulation had been entered into for continuance of case beyond five-year statutory period for trial, presence of defendant's counsel in court at time matter of a continuance was considered did not estop defendant, after expiration of five-year period, from moving for dismissal, in absence of entry by the clerk of any stipulation in the minutes. West's Ann. Code Civ.Proc. § 583.

6. Dismissal and Nonsuit ⟹60(6)

An oral stipulation does not extend five-year period under statute providing for dismissal of case not brought to trial within five years in absence of stipulation extending the time. West's Ann.Code Civ. Proc. § 583.

7. Appeal and Error ⟹1008(1)

An appellate court will not disturb implied findings of fact made by trial court in support of an order any more than it will interfere with express findings.

8. Appeal and Error ⟹973

Dismissal and Nonsuit ⟹60(1)

Determination of whether plaintiff has been diligent in prosecution of his action is in discretion of trial court, and its determination will not be disturbed in absence of clear abuse of discretion. West's Ann. Code Civ.Proc. § 583.

◆

Phi O. Clough, Los Angeles, for appellant.

Dryden, Harrington, Horgan & Swartz and Vernon G. Foster, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by plaintiff from a judgment of dismissal entered pursuant to section 583 of the Code of Civil Procedure for failure to bring the action to trial within five years after it was filed.

The action was filed March 9, 1953. It was not brought to trial. On April 29, 1958 it was dismissed on defendant's motion.

Plaintiff's contention is that on February 17, 1958 the parties stipulated in open court to a continuance beyond the five-year period, that the stipulation was spread on the minutes of the court, and such record constitutes compliance with section 583.

Section 583 in pertinent part provides:

> "Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended * * *."

A declaration of one of defendant's counsel filed in support of the motion to dismiss stated: "That upon February 17th, 1958, the matter was again continued on the request of plaintiff's attorney to July 24th, 1958; that there is no stipulation on file, or otherwise, extending the five year period under Section 583 to include any date beyond March 9th, 1958, the time when the original five year period did expire." An affidavit of plaintiff's counsel, filed in opposition to the motion, stated that about a week before February 17, 1958 he called the office of the attorneys for defendant and informed "them" he would be unable to try the cause on that date because plaintiff was confined in a hospital with a serious injury and asked if they would agree to a continuance; that counsel stated they would be glad to stipulate to a further continuance and would appear on February 17 "and enter into a stipulation for continuance." The affidavit further stated that on February 17 counsel for plaintiff and counsel for defendant did appear and in open court stipulated that the cause might be continued to the first open date on the court's calendar; that the court stated the first open date was July 24, 1958, to which both he "and counsel for the defendant agreed to continue said case for purpose of trial."

The minute order referred to by plaintiff is dated February 17, 1958, shows that the attorney for defendant was present, and reads: "On motion of plaintiff cause ordered continued to July 14, 1958 at 9 A.M., notice waived."

[1, 2] Section 583 is mandatory when applicable. Andersen v. Superior Court, 187 Cal. 95, 97, 200 P. 963. Govea v. Superior Court, 26 Cal.App.2d 27, 78 P.2d 433, holds that a stipulation of the parties in open court which is entered by the clerk in the minutes of the court is a sufficient stipulation of the parties in writing under section 583 for extension of the time of trial beyond the five-year period. In addition to so holding, the court stated (26 Cal. App.2d at page 31, 78 P.2d at page 434):

> "[I]f such a stipulation entered in the minutes of the court does not literally comply with the language of section 583, supra, it does estop the petitioner from thereafter making a motion to dismiss the cause for want of prosecution under said section; that a party to an action cannot be allowed in such manner to play fast and loose with the court, either proposition of which is a bar to the granting of the petitioner's motion to dismiss."

This language was quoted with approval in Woley v. Turkus, 51 Cal.2d 402, 334 P. 2d 12.

[3] In the case at bar no stipulation of the parties was entered by the clerk in the minutes; consequently the Govea case has no application. Other than the claimed minute order, there is no written stipulation in the record that the five-year period be extended. This court has no power to disregard the minutes of a trial court. In other words, the minutes of the trial court import absolute verity, and cannot be collaterally attacked in a reviewing court. People ex rel. Galvin v. Judge of the Tenth Judicial Dist., 9 Cal. 19, 20; Willson v. Broder, 24 Cal. 190, 191–192; In re Connor, 16 Cal.2d 701, 708, 108 P.2d 10.

[4] Since there was no stipulation of the parties entered by the clerk in the minutes extending the five-year period and since there was no other stipulation, plaintiff's contention that defendant stipulated in writing to an extension beyond the five-year period cannot be sustained.

[5] Plaintiff also contends defendant is estopped from relying on section 583 by reason of the asserted conduct of its counsel in appearing in court for the purpose of a continuance and that he waived his right to move to dismiss by stipulating to a continuance.

Hunt v. United Artists Studio, 79 Cal. App.2d 619, at page 625, 180 P.2d 460, at page 464, says that the appearance of "counsel at the times noticed for the setting of the case beyond the expiration of the five years did not operate to forfeit respondent's right to a dismissal for appellant's failure to bring the cause to trial within the statutory period."

"Before estoppel can arise here there must have been a duty to act and a failure to act in accordance with the duty; some act in the nature of prevention." Continental Pacific Lines v. Superior Court, 142 Cal.App.2d 744, 754, 299 P.2d 417, 423. "The established doctrine in this state is that it is the plaintiff upon whom rests the duty to use diligence at every stage of the proceeding to expedite his case to a final determination. It is true that the defendant may bring about a trial of the case, but he is under no legal duty to do so. His presence in the case is involuntary, and his attitude toward it is quite different from that of the plaintiff; he is put to a defense only, and can be charged with no neglect for failing to do more than meet the plaintiff step by step." Oberkotter v. Spreckels, 64 Cal.App. 470, 473, 221 P. 698, 699.

[6] An oral stipulation does not have the effect of extending the five-year period. As said in Berger v. McMahan, 116 Cal. App.2d 328, at page 329, 253 P.2d 543, at page 544: "Plaintiff first raises the question, 'Do oral stipulations have the effect of stopping the defendant from enforcing Section 583, C.C.P.?' The plaintiff has not pointed out the oral stipulations referred to

and none are disclosed by the record. However, the code section itself provides for the mandatory dismissal of the action upon motion either of counsel or the court where such action has not been brought to trial within five years after the plaintiff has filed his action except upon the written stipulation of counsel extending the time or where the defendant has been absent from the state or has been concealed within the state." The statute does not provide that the period may be extended by a written stipulation "or its equivalent." Bank of America Nat. Trust & Savings Ass'n v. Moore & Harrah, 54 Cal.App.2d 37, 43, 128 P.2d 623, 626.

[7] We cannot say as a matter of law that counsel for defendant stipulated to the continuance and that defendant is thus estopped from making the motion to dismiss, or that defendant waived its right to so move. There is a conflict between the declaration of defendant's counsel and the affidavit of plaintiff's counsel as to whether any oral stipulation had been entered into for a continuance beyond the five-year period. In granting the motion to dismiss, the court impliedly found that no such stipulation had been entered into. "'An appellate court will not disturb the implied findings of fact made by a trial court in support of an order, any more than it will interfere with express findings upon which a final judgment is predicated. When the evidence is conflicting, it will be presumed that the court found every fact necessary to support its order that the evidence would justify. So far as it has passed on the weight of the evidence, its implied findings are conclusive. This rule is equally applicable whether the evidence is oral or documentary.' [Citation.] 'When an issue is tried on affidavits, the rule on appeal is that those affiavits favoring the contention of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom, and when there is a substantial conflict in the facts stated, the determination of the controverted facts by the trial court will not be disturbed.'" Bailey v. County of Los Angeles, 46 Cal.2d 132, 137, 293 P.2d 449, 452; People v. Bannister, 153 Cal.App.2d 480, 484, 314 P.2d 577.

[8] The determination of whether the plaintiff has been diligent in the prosecution of his action is in the discretion of the trial court. Wisler v. California State Board of Accountancy, 136 Cal.App.2d 79, 81, 288 P.2d 322; Ojeda v. Municipal Court, 73 Cal.App.2d 226, 231, 166 P.2d 49. Its determination will not be disturbed on review unless there has been a clear abuse of discretion. Gurst v. San Diego Transit System, 119 Cal.App.2d 51, 55, 258 P.2d 1109.

There was no showing that it was impossible, impractical, or futile to proceed to trial within the five-year period. See Woley v. Turkus, 51 Cal.2d 402, 334 P.2d 12.

Having found that there was no written stipulation to a continuance it was mandatory for the trial court to grant the motion to dismiss.

Affirmed.

PARKER WOOD, J., concurs.

SHINN, Presiding Justice.

I concur. Section 583 declares a salutary rule. It is designed to prevent unseemly conflicts between counsel with respect to claimed oral stipulations and it creates a mandatory duty on the part of the court. But if it were an open question I would say that when a defendant's attorney appears in court upon a plaintiff's motion for a continuance, hears the motion made and granted, waives notice of the order of continuance and otherwise remains mum, his conduct, which has been relied upon to the prejudice of his adversary, should estop him and his client from urging a dismissal under section 583.

Hearing denied; McCOMB, J., not participating.

171 Cal.App.2d 565

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Max RAMIREZ, Defendant and Appellant.

Cr. 6436.

District Court of Appeal, Second District, Division 3, California.

June 29, 1959.

Defendant was convicted in the Superior Court of Los Angeles County, Thomas L. Ambrose, J., of second degree robbery, and he appealed. The District Court of Appeal, Shinn, P. J., held that police officer's statement, in response to inquiry as to whether he had ever stated that he would "get" defendant some day, that the only statement officer had ever made was that "after so many complaints we had about you about robbing people when they were drunk, that maybe this time you were finally going to get caught" was improper, and it was error to deny defendant's motion to strike such statement; but in view of convincing nature of evidence, error was not prejudicial to extent that would call for reversal.

Affirmed.

Criminal Law ⚿696(3), 1168(4)

In prosecution culminating in conviction for second degree robbery, police officer's statement, in response to inquiry as to whether he had ever stated that he would "get" defendant some day, that the only statement officer had ever made was that "after so many complaints we had about you about robbing people when they were drunk, that maybe this time you were finally going to get caught" was improper and it was error to deny defendant's motion to strike such statement; but in view of convincing nature of evidence, error was not prejudicial to extent that would call for reversal.

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Bertram H. Ross, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Marvin L. Part, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

In a jury trial, Max Ramirez was convicted of an offense of second degree robbery and was sentenced to state prison. He appeals from the judgment.

Juan Maciel was the complaining witness. He testified that on the evening of March 15, 1958, he entered a barroom in Los Angeles and sat down at the bar. After drinking one or two bottles of beer he went to the restroom which was at the rear of the premises. He met appellant and they exchanged a few words, whereupon appellant hit him on the mouth. Maciel then noticed that his wallet was missing; it contained about $40. He seized appellant's hands and told him to return the wallet. The next thing he remembered was the arrival of two police officers; one of the officers said that he had found the wallet. When asked whether he let go of Ramirez before the officers arrived Maciel said: "I don't know if he got away from me. I don't remember that well."

Officer Frank T. Estrada entered the establishment while on routine patrol duty and went to the rear of the premises upon being informed of a fight in the restroom. He saw Maciel pointing out the back door; Maciel was bleeding from the mouth. The officer went out the back door and saw Ramirez jumping over a fence. He called out to appellant who ducked down on the opposite side of the fence. A minute later Ramirez jumped back over the fence. After placing appellant in the custody of a fellow officer, Estrada went to the spot where Ramirez had ducked down and found a wallet; it was identified as the one belonging to Maciel. The two antagonists were taken to the hospital where Maciel was treated for a cut mouth and Ramirez for a cut hand.

Appellant represented himself at the trial. He testified in his own behalf that he saw Maciel in the barroom earlier in the evening. He went to the restroom and encountered Maciel and another man, who were shooting dice. He rolled the dice once whereupon Maciel picked up the dice and the other man left. He asked to see the dice but Maciel refused. During the ensuing argument Maciel swung at him and cut his (Ramirez) hand with a sharp instrument. They were still fighting when the officers entered the restroom. He did not jump over the back fence or attempt to leave the premises.

It was brought out during the cross-examination of Estrada that the officer had previously met appellant in court, on which occasion Ramirez had been acquitted by a jury of a plain drunk charge. When asked whether he resented the acquittal, the officer denied feeling any resentment. Appellant then asked: "Did you at one time make the statement to me that you would get even some day?" Estrada replied: "No. The only statement I made was right there to you. I said that after so many complaints we had about you about robbing people when they were drunk, that maybe this time you were finally going to get caught." Ramirez said: "Just a moment, Your Honor, that isn't the question. I move that it be stricken from the record." The court stated: "I think you rather called for it" and denied appellant's motion.

The sole contention on the appeal is that appellant's motion to strike should have been granted and the jury admonished to disregard the officer's voluntary statement.

We agree with Ramirez that the statement was improper and that the court erred in denying his motion to strike. But the further question is whether the error was of so serious a nature as to deprive appellant of a fair trial and result in a miscarriage of justice. People v. Watson, 46 Cal.2d 818, 836, 299 P.2d 243. Appellant's guilt of robbery was clearly shown by the testimony of Estrada and Maciel. The court accorded it full credit and we can do no less. In view of the convincing nature of the evidence presented by the People we are unable to say that the error was prejudicial to an extent that would call for a reversal.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

Peter G. FLOREZ, Plaintiff and Respondent,

v.

GROOM DEVELOPMENT CORP., a corporation, Glenn L. Groom et al., Defendants and Appellants. *

No. 18233.

District Court of Appeal, First District, Division 1, California.

June 10, 1959.

Rehearing Denied July 2, 1959.

Hearing Granted Aug. 5, 1959.

Action by subcontractor's employee against general contractor to recover for injuries sustained when he fell from plank across trench in subdivision being constructed by general contractor and in which employee was working under the direction of his employer. The Superior Court, County of Alameda, Richard H. Chamberlain, J., entered judgment for employee, and general contractor appealed. The District Court of Appeal, Hanson, J. pro tem., held that where general contractor loaned employee to painting subcontractor to help erect staging for painters and in process a plank was placed across ditch to rest legs of sawhorse on and after completion of painting staging and plank were removed but plank was apparently replaced by unknown person, there was no notice to general contractor that plank continued to rest across ditch if such were the fact, or if it did, that it constituted a hazard to any employee of subcontractor, and employee in using plank having dimensions which were apparent to him as being either too short or too narrow to support his full weight was contributorily negligent.

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* Opinion vacated 1 Cal.Rptr. 840, 348 P.2d 200.

Reversed.

1. Negligence 🔑134(7)

In action by subcontractor's employee against general contractor for personal injuries sustained when he fell from plank across trench in subdivision being constructed by general contractor and on which employee was working under direction of his employer, where testimony disclosed that general employer had loaned an employee to painting subcontractor to help in erecting staging to be used by painters and during such work a plank was placed across trench in order to support sawhorse but staging and plank were removed by painters and apparently some other person replaced plank across trench, there was no evidence that general contractor had any knowledge or notice that plank continued to rest across ditch if such were the fact, or that if it did, it constituted a hazard to any employee of subcontractor.

2. Negligence 🔑32(2.10)

An employee of a subcontractor occupies relationship of an invitee to main contractor.

3. Negligence 🔑32(1), 52

General principle is that owner of property, in so far as an invitee is concerned, is not an insurer of safety, but must use reasonable care to keep his premises in a reasonably safe condition and to give warning of latent or concealed perils, but he is not liable for injury to an invitee resulting from danger which was obvious or should have been observed in the exercise of reasonable care.

4. Negligence 🔑67

Where subcontractor's employee wishing to obtain water at subdivision being constructed by general contractor attempted to cross plank bridging trench, in the exercise of ordinary care for his own safety such employee should have determined if the plank was safe for his intended use, and in failing to ascertain whether or not plank was in a position of safety and would support his weight, employee clearly failed in duty imposed upon him for his own self-protection.

5. Negligence 🔑67

Where subcontractor's employee wishing to use water at subdivision being constructed by general contractor attempted to cross a plank bridging trench while carrying water pails and there was nothing hidden or concealed from employee, who fell from board which from the dimensions known to him was either too short or too narrow to support his weight or too thick to be used safely, employee was contributorily negligent, barring any recovery against general contractor.

6. Negligence 🔑141(1)

In subcontractor employee's action against general contractor for injuries sustained when he fell from plank bridging trench at subdivision being constructed by general contractor which raised issue of employee's contributory negligence in its answer, instructions on defense of assumption of risk should have been given by trial court when requested by general contractor.

7. Negligence 🔑141(1)

Where defense of plaintiff's contributory negligence is pleaded, evidence of assumption of risk by injured party and instructions relative thereto are proper.

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Carroll, Davis, Burdick & McDonough, San Francisco, for appellants.

Naphan & Harbaugh, Oakland, Lewis F. Sherman, Berkeley, of counsel, for respondent.

HANSON, Justice pro tem.

This is an action brought by the respondent Florez, an employee of Paul W. Johnson, Inc., a subcontractor of the appellant Groom Development Company, Inc., against the general contractor only, and Glenn L. Groom, individually, to recover damages for injuries he sustained while engaged in furthering the work assigned to him by his own employer and not by the appellants.

The main question presented by the appeal is whether the evidence presented discloses any legal liability on the part of the appellants (the general contractor and Glenn L. Groom, individually) to the plaintiff-respondent. A subsidiary question is whether the instructions given to the jury were prejudicial.

The facts necessary to be stated which are most favorable to the plaintiff are the following:

Defendant Groom Development Company, Inc., was the general contractor for constructing houses in a subdivision located in Oakland, California. Other than the carpentry work, all work in the tract was performed by several subcontractors over whose employees defendants-appellants had no control.

Plaintiff is a sheet rock finisher and taper and was at the time in question in the employ of Paul W. Johnson, Inc., which had the subcontracts for painting and sheet rock installation in the houses to be built in the above mentioned subdivision. Plaintiff at the time of the accident had been employed by the subcontractor for about a year, 90% of this time having been spent working at the subdivision.

Plaintiff testified that on Monday, January 7, 1957, he arrived at the construction project at approximately 8:30 a. m. and immediately started working in one of the houses under construction. He stated that he had not worked on this particular house before, but that all of the houses in the tract were similar, and that he had worked on other houses there.

With the exception of a common laborer employed by appellants by the name of Palmer, plaintiff was the only person working on the particular house at which the accident occurred. The plaintiff had seen Palmer working inside the house during the morning but did not see him working around the house thereafter.

At noon on the day of the accident, Florez had lunch in the driveway of the house in which he was working with several other employees who were working on an adjoining house. At this time, he observed a water faucet at the corner of the garage. However, he did not observe anyone using the water faucet either then or thereafter.

In performing his work, plaintiff was required to use a paste—a dry material furnished to him which had to be mixed with water before it could be used. On the morning in question, before going to the job site, he had mixed a batch of paste, which he took with him, but between 3:00 and 3:30 that afternoon, he ran out of the paste, and it became necessary for him to mix some more. Accordingly, plaintiff took two five-gallon containers, one in each hand, and walked along the trench to where the faucet was, at which place he found a plank laid across the trench which was about five and one-half feet deep, and 24 or 25 inches across.

The plaintiff described the plank extending over the ditch as being approximately six inches wide, four inches thick, and four or four and one-half feet long. Without further investigation, he placed one of the cans he was holding on the ground and, in order to get water from the faucet into the other can he was carrying, he proceeded to place both feet on the plank which was so narrow that he had to place one foot in front of the other. As he reached down to turn on the faucet with his left hand, he suddenly fell.

His testimony on the fall was as follows: "I had two pails of water [*sic,* waterpails] with me. I put one down, and carried one with me, and I stepped on the plank to reach over to open the spigot, and as I stood on the plank I had both feet on it, it just—I don't know whether I fell right straight through, and I had a sharp blow on my forehead, and I didn't come to for a few seconds later. So actually as I stepped on the plank I didn't have a chance to get to the spigot."

He had fallen into the trench and the board had fallen into the trench with him. In falling into the trench, he had been hit in the face by one end of the plank.

Leon Palmer, called as a witness under Code of Civil Procedure, section 2055, by the plaintiff, stated that he was employed by the Groom Development Company as a laborer on the subdivision project where plaintiff was injured; that on the Friday prior to the date of the accident he was directed by his own foreman to assist two painters—coemployees of the plaintiff—to help the painters put up a staging. The staging consisted of two six foot high sawhorses with planks on top for a flooring; that it was necessary, because of the trench, to place a plank across the trench so two of the feet of one of the sawhorses could rest thereon. He used a plank belonging to the defendant Groom Company, which he designated as a "header" and stated it was four by six. He testified that he knew the board was not safe, but that he had declined to use either a two by ten or a two by twelve, both of which were available, under fear of being fired; that he had found it necessary on Friday to shovel dirt out of the bank to make a cradle for the plank which when placed over the trench was level with the foundation across which it extended about four inches. After he had finished helping to erect the staging, he left to do other work and had nothing further to do with the painters. He further testified that when he returned on Monday, after the accident, to take plaintiff to the hospital, he saw the board which he had placed over the trench the Friday before the accident lying in the trench.

That Friday afternoon upon completing their painting at the house in question the painters removed the staging and then proceeded to another house to paint it.

Mr. Merlin Smith Groom was called as a witness under Code of Civil Procedure, section 2055, and his testimony showed that two by tens or two by twelves are the standard size planks used for walking over whether on scaffolds, over ditches, or otherwise and are safer than six by sixes or four by sixes to use because of their added width. He also testified that laborers were employed by the general contractor to clean up around the area and that it was *defendants' policy to let their laborers "give a hand" to the various subcontractors* whenever the latter were short of help, and that it would not have been unusual had Mr. Palmer been allowed to assist the painters in putting up the scaffold.

Werner Feldhaus, one of the painters mentioned above, testified that after the staging had been erected, the painters worked on it most of the day Friday, but before the work day ended, the two painters removed all of the staging. Feldhaus testified that when the staging had been removed by them, there was no plank of any kind left lying across the ditch.

The jury returned a verdict against defendants for $32,500 on which judgment was entered and from which judgment this appeal has been taken.

[1] From the foregoing recital of all the material facts stated most favorably for the plaintiff it appears that Palmer, the employer of the general contractor, was loaned to the painting employees of the subcontractor—and as a consequence to the subcontractor—to assist in erecting the staging to be used by the painters in the furtherance of the subcontractor's business. It was the duty of the subcontractor and not of the general contractor to erect and remove such staging as was necessary for the use of the painters. Palmer was loaned to assist the subcontractor's painters *to erect the staging only* and not to remove it when it had served its purpose. The plank was placed by Palmer across the ditch to serve as a base for two legs of a sawhorse and for no other purpose. It is not claimed, and indeed it could not be, that the plank was too short or too narrow to serve the

purpose for which it was used, as it in fact served that purpose until the painters removed the staging. If the testimony of the painter that the staging and the plank were removed from the trench on Friday is not true, then the negligence, if any, in not removing the plank was that of the painters employed by the subcontractor and not the contractor's; as the facts clearly indicate Palmer was not loaned to assist in removing the staging. Assuming then that the jury could have found the plank was not removed on Friday or at any time prior to the accident, the basis of any recovery by the plaintiff must be predicated on the theory that the general contractor was negligent in not removing the plank. On that point there is no evidence that the general contractor had any notice or knowledge that the plank continued to rest across the ditch, if such was the fact, or that, if it did, it constituted a hazard to any employee of the subcontractor.

The question whether on the facts the appellants were or were not legally liable to the plaintiff turns not only on the issue of their negligence, if such there was, but on the plaintiff's contributory negligence, if any, as well. Accordingly, we proceed to discuss both points together.

[2, 3] The rule of law which applies to the case at bar is as set forth in Pauly v. King, 44 Cal.2d 649, 653, 284 P.2d 487, 489: "An employee of a subcontractor occupies the relationship of an invitee to the main contractor. [Citations.] 'The applicable general principle is that the owner of the property, insofar as an invitee is concerned, is not an insurer of safety but must use reasonable care to keep his premises in a reasonably safe condition and give warning of latent or concealed perils. He is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed in the exercise of reasonable care.' [Citations.]"

[4] It is readily apparent that the plaintiff knew that he would have to put his full weight upon the plank in order to get the water. He was aware of the plank's dimensions, and the condition of the ditch over which it lay. In the exercise of ordinary care for his own safety, plaintiff should have determined if the plank was *safe for* his intended use, and he was in the best position to make such a determination. Mula v. Meyer, 132 Cal. App.2d 279, 287, 282 P.2d 107. In failing to ascertain whether or not the plank was in a position of safety and would support his weight, the plaintiff had clearly failed in the duty imposed upon him for his own self-protection.

The instant case is comparable to the situation discussed in King v. Griffith, 65 Cal.App.2d 114, 150 P.2d 8. In that case it should be noted that the appellate court affirmed a nonsuit, and the Supreme Court denied a hearing. The plaintiff attempted to step across a sewer ditch approximately two feet wide while carrying a bucket of cement in his hand. A cave-in occurred at the edge of the ditch. *The court held that the plaintiff should have taken precaution to see if the soil was loose or there was danger of a landslide before stepping across the ditch, saying that the plaintiff was actually in a better position than anyone else to know whether or not the condition was safe.* The court also said that the plaintiff should have taken time either to have filled in the loose dirt or to have walked around the ditch if his own safety was involved.

The witness Palmer, as stated above, assisted the two painters in setting up the so-called staging, and in the course of completing that act he placed the plank in question across the ditch so two legs of the sawhorse would rest upon it. He then left and never saw the plank again until after the accident. One of the two painters testified he and his copainter removed the staging and the plank on the same day it was put up and that when they left the plank was no longer over the ditch. This testimony was not contradicted. Who then replaced the plank, if it was replaced, over the ditch? We cannot speculate as to the answer. As there is a complete want of evidence on the subject, the plaintiff failed to show any liability on the part of the defendants.

In Clyde v. Mitchell, 14 Cal.App.2d 365, 58 P.2d 205, in which case a judgment of nonsuit in favor of the defendants was affirmed, the plaintiffs had leaned against a guard rail on the roof of the building which collapsed resulting in their fall to the ground below. The court stated: "While the owner or occupant of premises is bound to use ordinary care for the protection of an invitee, it is stated in Shanley v. American Olive Company, 185 Cal. 552, 197 P. 793, 794, that such owner is entitled to assume that the invitee 'will perceive that which would be obvious to him upon the ordinary use of his own senses.'"

[5] There is no testimony that there was anything about the condition of the plank or the ditch which was hidden or concealed from the plaintiff. The situation is like that discussed in Mautino v. Sutter Hospital Association, 211 Cal. 556, 296 P. 76, 77, in which a judgment for plaintiff was reversed, the court stating: "If it was negligence for the defendant to maintain the floor in the condition described by the plaintiff, there appears to be no escape from the conclusion that it was negligence for the plaintiff, with full knowledge of such condition, to continue in the use thereof."

In Anderson v. Western Pacific R. Co., 17 Cal.App.2d 244, 61 P.2d 1209, we reversed a trial court judgment in favor of the plaintiff on the grounds that the evidence produced by the plaintiff, as well as his own testimony, established that he failed to exercise ordinary care for his own safety and that his conduct constituted contributory negligence as a matter of law.

The plaintiff in the instant case has offered no explanation as to how he actually fell into the ditch. If it be inferred from the evidence that the board was too narrow to support his weight or was too short to support his weight across the ditch, these facts were not concealed or hidden. The dimensions of the plank were clearly observable to the plaintiff and he was well aware of the width of the ditch. See also Nagle v. City of Long Beach, 113 Cal.App.2d 669, 248 P.2d 799, in which a judgment of nonsuit was affirmed by the District Court of Appeal on the ground that the established rule in California is that an invitee to an incompleted building in process of construction is invited to use such building in its condition then existing, and that where the dangerous condition of the premises is obvious, the owner is entitled to assume that an invitee will perceive that which would be obvious to him upon ordinary use of his own senses.

The case is almost identical to the facts in Dingman v. A. F. Mattock Company, 15 Cal.2d 622, 104 P.2d 26, wherein a trial court judgment for the plaintiff was reversed by the Supreme Court. In that case the plaintiff stepped on a 2 x 4 board laid across an open stairwell which broke, causing him to fall and incur injuries. In the Dingman case there was evidence that there had been a similar board across the stairwell for several days prior to the day of the accident and the same had been used by the defendant's employees and by the plaintiff. Even though the court concluded that this plank might have been observed by the employer's foreman, it held: "* * * As the appellant [employer] had no greater opportunity to observe the condition of said board than the respondent [plaintiff], and respondent failed to observe its dangerous condition, we are compelled to hold that the appellant did not know of the dangerous condition of said board. In this connection the following language found in Slyter v. Clinton Const. Co., 107 Cal.App. 348, 355, 290 P. 643, 646, appears to be pertinent: 'From the facts it is clear that the plaintiff, as readily as the appellant, * * * by the exercise of his faculties of sight and judgment * * * could have observed and known of the danger * * *' In like manner the opportunities of the respondent in this action to observe the condition of the plank across the open stair-well were equal to those of the appellant contractor, or his foreman, or any of the appellant's employees, and, as the respondent failed to observe the dangerous condition in the board over said stair-well, the only rational conclusion to be drawn from these facts is that the contractor was likewise ignorant of such dangerous condition." 15 Cal.2d at page 626, 104 P.2d at page 29.

It should also be noted in Dingman v. A. F. Mattock Company, supra, that the court discussed the obvious danger inherent in walking on a narrow plank: "* * It is true that on account of the width of the board it might be apparent to anyone attempting to walk over it that there was danger of falling from it and into the stair-well below, but that was not what happened to respondent." 15 Cal.2d at page 625, 104 P.2d at page 28.

In the instant case that is exactly what happened to the plaintiff. He fell from a board which, from the dimensions known to him, was either too short or too narrow to support his weight, or too thick to be used safely.

[6] The defendants next contend that the trial court erred (1) in refusing them permission to amend their answer so as to set up assumption of risk as a defense, (2) in refusing to give instructions tendered by defendants with respect to assumption of risk, and (3) in giving an instruction which read as follows: "During the trial of this case you may have heard something said about 'assumption of risk.' I instruct you that, under the evidence in this case, the doctrine of assumption of risk is not involved in any way. I have instructed you concerning the defense of contributory negligence, and those instructions will govern your deliberations on that issue."

[7] It appears that the trial court based his ruling refusing to permit the answer to be amended on the ground that the issues were settled at the pretrial hearing, which issues did not include the issue of assumption of risk, and hence the request came too late. On the theory then that the doctrine of assumption of risk was out of the case, the trial judge not only refused to give any instructions on the subject, but, as stated above, specifically warned the jury the doctrine could not be considered by them. We think that instructions on the subject should have been given. In the case of Covely v. C. A. B. Construction Co., 1952, 110 Cal.App.2d 30, 242 P.2d 87, the trial court had given an instruction on assumption of risk similar to the one proposed by defendants here. Plaintiff on appeal argued that this constituted prejudicial error. In affirming judgment for defendants, the court, speaking through Mr. Justice McComb, 110 Cal.App.2d at page 34, 242 P.2d at page 89, held that it was not prejudicial error and stated: "* * * plaintiffs contend it was error to give an instruction on assumption of risk in the absence of a pleading of such doctrine in a special defense. Such is not the law. Where the defense of plaintiff's contributory negligence is pleaded, as in the instant case, evidence of assumption of risk by the injured party and instructions relative thereto are proper. [Citation.]" Petition for a hearing by the Supreme Court was denied.

In the case of Mula v. Meyer, 1955, 132 Cal.App.2d 279, 282 P.2d 107, on which the respondent relies, the court was dealing with a specific situation in making the statement relied upon by respondent and it is not necessarily applicable to situations where violations of safety orders or statutes are not involved. In Ury v. Fredkin's Markets, Inc., 1938, 26 Cal.App.2d 501, 79 P.2d 749, 750, the court said: "It is contended that this instruction is erroneous because the answer of the defendants contained no specific plea of assumption of risk.

"The point is not well taken for the reason that the defense of plaintiff's contributory negligence was pleaded, under which the evidence upon which the instruction is based was admissible. [Citations.]" Three further instructions dealing with the negligence of someone not a party to the action and the subject of imputation of negligence requested by the defendants were refused. It was error to deny the requests.

For the reasons stated the judgment must be and it is hereby reversed.

BRAY, P. J., and FRED B. WOOD, J., concur.

171 Cal.App.2d 430

BRATTON & MORETTI et al., Plaintiffs and Respondents,
v.
FINERMAN & SON, etc., et al., Defendants, Harry Finerman, Defendant and Appellant.
Civ. 5849.

District Court of Appeal, Fourth District, California.
June 18, 1959.

Action on open book account for fertilizer sold and delivered. Defendant filed cross complant naming plaintiffs and third persons as cross-defendants and alleging that such third persons were solely liable for fertilizer used upon their lands. The Superior Court, Imperial County, Elmer W. Heald, J., granted motion for separation of issues under cross complaint, entered judgment for plaintiffs, and, on a motion for a new trial, dismissed action as to other defendants, and defendant appealed. The District Court of Appeal, Griffin, P. J., held that where plaintiffs were not fully informed of the nature of agreements between defendant and cross-defendants and were not interested in nor relying upon any contract between them for a recovery, and issues under cross complaint were purely personal between defendant and cross-defendants, separation of issues did not prejudice substantial rights of parties.

Judgment affirmed.

1. Sales 🔑87(3)

In action on open book account for fertilizer sold and delivered, trial court was justified in finding that fertilizer was sold and delivered upon individual credit of buyer and not on credit of a partnership or joint venture.

2. Joint Adventures 🔑7
Partnership 🔑139

A joint venturer or partner may contract on his own account and may make himself individually liable if seller chooses to accept such individual liability and in reliance thereon delivers goods.

3. Appeal and Error 🔑1046(1)

Where plaintiffs were not fully informed of the nature of agreements between defendant and cross-defendants and were not interested in nor relying upon any contract between them for a recovery, and issues under cross complaint were purely personal between defendant and cross-defendants, separation of issues did not prejudice substantial rights of parties. West's Ann.Code Civ.Proc. § 1048.

4. Sales 🔑351

Plaintiffs who sold fertilizer to buyer on his own account without knowledge of terms of contracts between buyer and third persons or that plaintiffs may have been third-party beneficiaries thereunder were not required to bring action, for recovery for fertilizer sold, against defendant and such third persons as claimed third-party beneficiaries. West's Ann.Civ.Code, § 1559.

5. Trial 🔑3

Where plaintiffs were not fully informed of nature of agreements between defendant and cross-defendants and were not interested in nor relying upon any contract between them for a recovery, and issues under cross complaint were purely personal between defendant and cross-defendants, court did not abuse its discretion in ordering separation of issues. West's Ann.Code Civ.Proc. § 1048.

6. Appeal and Error 🔑173(1)

Court on appeal is not required to determine defense not raised by pleadings nor at trial, but raised for first time on appeal.

7. Frauds, Statute of ⚷23(3)

Where fertilizer was ordered by, sold to, and delivered to defendant according to instructions, agreement could not be interpreted as an oral agreement to pay debt of another.

8. Evidence ⚷376(1)

In action on open book account for fertilizer sold and delivered, testimony of bookkeeper and the method of accounting were adequate foundation for admission of book entries and ledgers.

9. Evidence ⚷383(8)

In action on open book account for fertilizer sold and delivered, where adequate foundation was made for admission of book entries and ledgers, court could fully consider them and render judgment based upon them.

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Ernest R. Utley, Los Angeles, and Robert B. Whitelaw, El Centro, for appellant.

Russell Yeager, El Centro, for respondents.

GRIFFIN, Presiding Justice.

In an amended complaint plaintiffs seek to recover from defendants Finerman & Son, a copartnership, et al., and from defendant and appellant Harry Finerman individually, $4,510.28 on an open book account for fertilizer sold and delivered to them. Defendants and appellant answered and denied generally the allegations of the complaint. Appellant admitted indebtedness in an approximate sum of $872.79. Therein they set up certain provisions of two written contracts between appellant, as shipper, and one M. C. Evans and Cecil Allen, growers, in which the latter two agreed with appellant that they would pay all charges incurred in connection with growing crops on the grower's property and that appellant shipper, who was to participate in the net profits, would assist in the financing of the undertaking. Appellant filed a cross-complaint setting up these two contracts and named plaintiffs, as well as Evans and Allen, as cross-defendants. They alleged Evans and Allen were solely liable for fertilizer used upon their lands. The prayer is that judgment be entered in favor of Bratton & Moretti, et al., against Evans and Allen for said sums found due, and to hold that cross-complainant was not indebted to plaintiffs in any amount for the furnishing of said fertilizer to them.

Evans answered the cross-complaint, admitted the execution of the contract, but denied generally the other allegations. An answer was filed by cross-defendant Allen. He likewise admitted signing the contract, alleged appellant had never rendered a true accounting under it, and appellant was indebted to him, and asked the court not to determine the obligations of this cross-defendant, if any, to pay any of the other parties to the action until such an accounting had been ordered.

The evidence, generally speaking, shows that plaintiffs' main business was the sale of anhydrous ammonia in Imperial Valley. In June, 1955, Moretti, a partner in plaintiffs' firm, had a conversation with appellant Finerman in which Finerman stated "he had melons, some under contract and some he was growing himself" and that he, Finerman, would like to give plaintiffs his fertilizer business; that about April, 1955, he and appellant made a tour of certain ranches appellant himself was farming, and pointed out other ranches where he had deals with the growers (including Allen and Evans, as well as one Singh); that he had a deal with Evans and Allen to take care of the bill for fertilizer used by them on their land; that he owed them money and he would guarantee plaintiffs would get their money and "see that you get all of your money for the fertilizer"; that either he or these other persons would take care of the ordering of the fertilizer; that he gave plaintiffs the gate number of their premises; that thereafter he placed orders with plaintiffs for such fertilizer and, relying upon this agreement, it was delivered according to instructions and charged on plaintiffs' books directly and personally to appellant Finerman; that statements of said account were regularly mailed to appellant and he made a payment of $1,000 on it without any objection as to the items or method of billing until after this action was instituted. Invoices and ledger sheets of plaintiffs' books were received in evidence and verified this statement, and the accuracy of these accounts is not questioned.

Cross-defendants Allen and Evans each testified that they heard appellant Finerman promise to pay plaintiffs for fertilizing the crops grown on their respective farms and said deliveries of the fertilizer, as indicated by the invoices, were made.

At the conclusion of plaintiffs' evidence, counsel for Evans and Allen moved the court, under section 1048 of the Code of Civil Procedure, that the issues raised by the cross-complaint be separated and severed from the issues raised by the amended complaint and the answer thereto, and that they be tried separately. The motion was granted and those issues are now pending before the trial court. This ruling is the main subject of this appeal which we will hereafter discuss.

Thereafter, appellant testified he had not ordered fertilizer for either Allen or Evans and had not authorized anyone to place orders for fertilizer. He admitted a conversation with plaintiff Bratton, in which he told Bratton he owed about $1,800 for fertilizer furnished his ranch and he then gave him $1,000 on account ($570.85 to apply on fertilizer furnished to the Singh ranch, which account he said he guaranteed to pay); that he told Bratton he would have to wait for the balance and Bratton agreed to do this. He said he had not authorized his bookkeeper to place any orders for fertilizer and did not receive the invoices indicated at the time but saw them about June, 1955. Appellant's bookkeeper was called and she said copies of invoices and statements were not received until June, 1955, and she never placed any orders for fertilizer.

The court found that between June 1, 1955, and June 21, 1955, appellant became indebted to plaintiffs for fertilizer sold and delivered to him by plaintiffs at his special instance and request in the sum of $4,331.80, and since the institution of this action he paid $1,000 on said account, leaving a balance due in the sum of $3,331.80. Judgment was entered accordingly. On a motion for a new trial under section 662 of the Code of Civil Procedure the court ordered an additional finding that the defendant partnership and the other individually named defendants, excluding appellant Finerman, were not indebted to plaintiffs, and dismissed the action as to them. The judgment was modified accordingly in their favor. This appeal is by appellant Finerman, individually, from the original judgment and the judgment as amended.

[1, 2] Appellant first argues that the trial court erred in granting the motion for severance and separation of the issues presented by the cross-complaint and refusing to receive in evidence the written contracts aforementioned and pleaded between appellant and the two growers, Allen and Evans. One argument is that by these agreements a joint venture was shown and accordingly Allen and Evans were jointly liable for their indebtedness and the court should have allowed such evidence to be admitted and should have made a determination of that issue. The trial court was justified in finding that the fertilizer delivered by the plaintiffs was sold and delivered upon the individual credit of the defendant Finerman and not on the credit of a partnership or joint venture. Shapiro v. Greenberg, 94 Cal.App. 241, 270 P. 1008. Even a joint venturer or partner may contract on his own account and may make himself individually liable if the seller chooses to accept such individual liability and in reliance thereon delivers goods. Brown v. Fresno Raisin Co., 101 Cal. 222, 35 P. 639. The evidence fully supports the finding made and the findings support the judgment entered.

[3] Section 1048 of the Code of Civil Procedure authorizes a separation of the issues whenever it can be done without prejudice to a substantial right. Here, it

appears that plaintiffs were not fully informed of the nature of the agreements between appellant and Allen and Evans and were not interested in nor relying upon any contract between them for a recovery in their complaint. The issues, as presented by the cross-complaint, were purely personal between appellant and those cross-defendants, and their respective rights thereunder would require an accounting between them. Plaintiffs should not be saddled with this added burden and cost of trial. They would not be benefited by the result. Those proceedings are still pending. It does not appear that the separation of issues ordered prejudiced the substantial rights of the parties.

[4] The argument that plaintiffs were required to bring this action against Finerman, Allen and Evans, under Civil Code, § 1559, as claimed third-party beneficiaries, is untenable. More v. Hutchinson, 187 Cal. 623, 203 P. 97. For all that appears, plaintiff had no knowledge of the terms of the contracts or that they may have been third-party beneficiaries thereunder or that they accepted their terms. The election of remedies was reserved to plaintiffs. Furthermore, it does not affirmatively appear from the contracts that there was any intent of the contracting parties that such agreement was to inure to plaintiffs' benefit. Shutes v. Cheney, 123 Cal.App.2d 256, 262, 266 P.2d 902; Bogart v. George K. Porter Company, 193 Cal. 197, 223 P. 959, 31 A.L.R. 1045.

[5] Appellant claims his cross-complaint was in effect an action for declaratory relief and this summary disposition of those issues was erroneous, citing Kessloff v. Pearson, 37 Cal.2d 609, 233 P.2d 899. It is further argued that the filing of a cross-complaint was authorized under section 442 of the Code of Civil Procedure and should have been considered, citing Atherley v. MacDonald, Young & Nelson, Inc., 135 Cal.App.2d 383, 287 P.2d 529. Considering the cross-complaint and answers thereto, an accounting and a judgment on the merits was sought between appellant and Evans and Allen. This would in no way affect the rights of these plaintiffs. Appellant's rights and liabilities under the agreement are yet to be determined. No dismissal of the cross-complaint was effected, as argued by the appellant. No prejudice has resulted to him or to those cross-defendants. No abuse of discretion in ordering a separation of the issues appears. McArthur v. Shaffer, 59 Cal.App.2d 724, 139 P.2d 959; Fisher v. Nash Building Co., 113 Cal.App.2d 397, 248 P.2d 466.

[6, 7] Next, it is claimed that the evidence only showed appellant agreed to an oral *guaranty* of payment of these accounts which was not enforceable under the statute of frauds. Such defense was not raised by the pleadings nor at the trial but was raised for the first time on appeal. We are not compelled to determine this point. Livermore v. Stine, 43 Cal. 274. However, the finding of the trial court, supported by the evidence, was that the fertilizer was ordered by, sold to, and delivered to appellant according to instructions. This could not be interpreted as an oral agreement to pay the debt of another. Shapiro v. Greenberg, 94 Cal.App. 241, 270 P. 1008; Coulter Dry Goods Co. v. Wentworth, 171 Cal. 500, 153 P. 939.

[8, 9] The final contention is that the book entries and ledgers received in evidence were inadmissible because of lack of showing of proper foundation. We have examined the voluminous record in this respect. The testimony of the bookkeeper and the method of accounting were adequate to allow them in evidence. The trial court fully considered them and properly rendered judgment based upon them. Wright v. Loaiza, 177 Cal. 605, 171 P. 311; Code of Civil Procedure, § 1953f.

Judgment affirmed.

MUSSELL and SHEPARD, JJ., concur.

171 Cal.App.2d 483

PEOPLE of the State of California, Plaintiff and Respondent,

v.

John L. ADAMS, Defendant and Appellant.

Cr. 6618.

District Court of Appeal, Second District, Division 2, California.

June 24, 1959.

Prosecution for issuing checks without sufficient funds. From orders of the Superior Court, Los Angeles County, Edward R. Brand, J., granting probation after conviction and denying the defendant's motion for new trial, the defendant appealed. The District Court of Appeal, Ashburn, J., held that evidence of numerous instances in which defendant's checks were returned by various banks for insufficient funds sustained defendant's conviction and that failure of the deputy district attorney to discuss one of the counts in his argument did not constitute an abandonment or dismissal of that count.

The probation order and order denying motion for new trial affirmed.

1. Criminal Law ⚷260(11)

Reviewing court was required to assume in favor of trial court's finding the existence of every fact which court could have reasonably deduced from the evidence and then to determine whether such facts were sufficient to support finding.

2. Criminal Law ⚷317

Defendant's failure to testify fortified adverse inferences flowing from evidence produced by prosecution.

3. False Pretenses ⚷49(1)

Evidence of numerous instances in which defendant's checks drawn on various banks were returned for insufficient funds sustained conviction for issuing checks without sufficient funds. West's Ann.Pen.Code, § 476a.

4. False Pretenses ⚷49(2, 4)

In prosecution for issuing checks without sufficient funds, knowledge of lack of sufficient funds and intent to defraud may be proved by circumstantial evidence. West's Ann.Pen.Code, § 476a.

5. False Pretenses ⚷42, 44

In prosecution for issuing checks without sufficient funds, where charges were based on numerous instances in which defendant's checks were returned from various banks for insufficient funds, the different checks were competent to establish defendant's knowledge of lack of sufficient funds and intent to defraud. West's Ann. Pen.Code, § 476a.

6. Criminal Law ⚷302(4)

In prosecution on five charges of issuing a check without sufficient funds, failure of deputy district attorney to discuss one of the counts in his argument did not constitute an abandonment or dismissal of that count, since count could have been dismissed only through motion addressed to the court and granted by it. West's Ann. Pen.Code, § 476a.

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Joseph T. Forno, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Ernest E. Sanchez, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

Defendant was convicted of five charges of fraudulently issuing a check without sufficient funds in the bank to meet the same, thus violating § 476a, Penal Code. Granted probation, he appeals from that order (Pen. Code, § 1237, subd. 1), and from an order denying his motion for new trial. Counsel makes two points, insufficiency of the evidence and error in finding defendant guilty upon all five counts. There is no merit in either contention.

[1, 2] In testing the first argument we "must assume in favor of the [finding] the existence of every fact which the [court] could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the [finding]." People v. Tom Woo, 181 Cal. 315,

326, 184 P. 389, 393; People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. Defendant did not testify and that fact fortifies the adverse inferences flowing from evidence produced by the prosecution. "A defendant's failure to take the stand 'to deny or explain evidence presented against him, when it is in his power to do so, may be considered by the jury as tending to indicate the truth of such evidence, and as indicating that among the inferences that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable.' People v. Adamson, 27 Cal.2d 478, 489, 165 P.2d 39. * * * In criminal cases, after the prosecution has made a prima facie case, the failure of the defendant to testify is not affirmative evidence of any fact, and any inference that can, in the circumstance, be justly drawn therefrom is persuasive rather than probative, lending weight to the evidence presented by the prosecution." People v. Ashley, 42 Cal.2d 246, 268–269, 267 P.2d 271, 285.

[3] The first charge relates to a check for $91.86 drawn by defendant on Bank of Los Angeles, on October 18, 1957. This check was entirely in defendant's handwriting except the amount; it was presented by some woman to a rug cleaner, Truman Doyle Method, in payment for work done in an apartment formerly occupied by defendant. The check was returned for want of sufficient funds. On said date defendant's account at that bank was overdrawn to the extent of $62.54. The account had been opened on September 24 by deposit of a check for $660 which was returned about five days later. Meantime, another deposit of $450 had been made but on the same day defendant wrote a check for $550. The dishonor of the $660 check resulted in the overdraft of $62.54. No credit had been extended by the bank to defendant. The account was closed on November 6, 1957.

Counts II and III relate to checks for $20 and $63.15, drawn by defendant upon Gilmore Commercial & Savings Bank. The $20 check was dated March 25, 1958, and delivered by a waiter in the Corsican Restaurant to Rosario Rizzo, one of the owners. Rizzo accepted it and it was returned by the bank unpaid. At that time defendant's bank balance was 35¢. The check had no address upon it, only a box number. Rizzo had extended no credit to defendant and he reported the dishonor of the check to the police. The account was closed on March 26th. In the 19 days that that account was in existence (March 7 to March 26), four of defendant's checks were returned for insufficient funds.

The check for $63.15, drawn on the Gilmore Bank, is dated April 26, 1958, and was delivered by defendant to Phil Phillips, Manager of Largo Night Club and Restaurant in payment for food and beverages. Defendant had no line of credit there or at the bank and the check was returned unpaid. At the time it was drawn defendant had no account at the Gilmore bank.

Checks for $40 and $35 constitute the subject matter of Counts IV and V of the information. They were drawn on Santa Monica Bank under the respective dates of June 5, 1958 and June 7, 1958. Both were delivered by defendant to Miss Jean Lumpkin, an employee of Turner Drugs, in exchange for merchandise and cash. They were dishonored by the bank and defendant then ceased to be a customer of that drug store. He had no credit arrangement with the bank and his account was overdrawn on June 5th and 7th to the extent of $191.20. The bank's record shows that from June 2 to July 2, inclusive, checks drawn by defendant upon that bank were returned by it unpaid in 24 instances,—some being presented for payment several times, perhaps.

That defendant wrote all five checks mentioned in the information was admitted by counsel, except the amount of $91.86 which was inserted in the check given to Peterson for cleaning the apartment. On July 8, 1958, at 12:40 a. m. Deputy Sheriff Ostraff interviewed defendant, showed him the five checks and defendant said that "[h]e knew that the checks were no good when he had written them, but he anticipated getting some money." Also, "that he was trying to pick them up." Ostraff said, "Well, there is one of them that goes back over a year" and defendant replied, "Yes, I know."

[4, 5] Knowledge of lack of sufficient funds and intent to defraud, like any other fact, may be proved by circumstantial evidence (People v. Oster, 129 Cal.App.2d 688, 692, 278 P.2d 39; People v. Lane, 144 Cal. App.2d 87, 89, 300 P.2d 321; People v. Leon, 163 Cal.App.2d 791, 793, 329 P.2d 996), and in a case like this that is usually necessary. The combined effect of the checks placed in evidence and the other testimony was to show inferentially the existence of such knowledge and intent. That the different checks were competent for this purpose is well established. See, People v. Bercovitz, 163 Cal. 636, 639, 126 P. 479, 43 L.R.A.,N.S., 667; People v. Bernstein, 88 Cal.App.2d 522, 525, 199 P.2d 22. The fact that some of them were the subject of charges in the instant information does not detract from their persuasive force. See, 125 A.L.R. 1036, 1037, Annotation. Appellant's testimonial silence emphasizes the inference of knowledge and intent deducible from the foregoing evidence. We hold that evidence to be sufficient to support the finding of guilt upon each of the five charges.

[6] Appellant's second point seems to be a claim that the prosecutor abandoned or dismissed two counts relating to checks drawn upon Bank of Los Angeles. Incidentally, there was but one such count. The claim is based upon the alleged failure of the Deputy District Attorney to discuss the Bank of Los Angeles count in his argument. He did not undertake to dismiss any count and could not have done so except through motion addressed to the court and granted by it. People v. Smith, 76 Cal.App. 105, 111–112, 243 P. 882.

The judgment (probation order) and order denying motion for new trial are affirmed.

FOX, P. J., and HERNDON, J., concur.

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171 Cal.App.2d 362

PEOPLE of the State of California, Plaintiff and Respondent,
v.
Johnnie Carey HUGHES, Defendant and Appellant.
Cr. 2916.

District Court of Appeal, Third District, California.
June 16, 1959.

Homicide prosecution. The Superior Court, Butte County, J. F. Good, J., entered judgment declaring defendant guilty of murder of the first degree and fixing his punishment at life imprisonment. The defendant appealed therefrom and from an order denying a new trial. The District Court of Appeal, Van Dyke, P. J., held that where jury's verdict was that defendant was guilty as charged in the information and jurors were then released, such verdict was a verdict of second-degree murder in view of statute providing that when the crime is distinguished into degrees and the jury fails to find the degree of the crime of which the defendant is guilty, such degree shall be deemed to be the lesser degree, and on the following morning when the same jury returned to consider the issue of penalty, the jury could not, after hearing evidence which was admissible only on issue of penalty and which would have been inadmissible on issue of guilt, retry the issue of guilty under the guise of correcting the verdict by finding the defendant guilty of first-degree murder.

Judgment reversed with directions, and order denying new trial affirmed.

1. Criminal Law ⚷412(1), 736(2)

In homicide prosecution, record disclosed that trial court properly ruled that defendant's extrajudicial statements were admissible and that trial court properly left the issue of freedom from duress to the jury.

2. Criminal Law ⚷781(4)

In homicide prosecution, the instruction as to when a confession is not voluntary was a sufficient and proper instruction, even though there was no discussion therein of the matter of psychological coercion and duress and it might have been well to mention such matters in view of defendant's background and his testimony concerning his fear of what might be done to him.

3. Criminal Law ⚷781(1)

In homicide prosecution, where defendant's extrajudicial statements were admitted into evidence and the issue of freedom from duress was presented to the jury, defendant was not entitled to instruction on the factor of fear duration once fear is induced, since fact that fear endures for a time is a matter of common knowledge.

4. Criminal Law ⚷304(2)

It is common knowledge that fear endures for a time once fear is induced.

5. Criminal Law ⚷889

Homicide ⚷315

In homicide prosecution, where jury's verdict was that defendant was guilty as charged in the information and jurors were then released, such verdict was a verdict of second-degree murder in view of statute providing that when the crime is distinguished into degrees and the jury fails to find the degree of the crime of which the defendant is guilty, such degree shall be deemed to be the lesser degree, and on the following morning when the same jury returned to consider the issue of penalty, the jury could not, after hearing evidence which was admissible only on issue of penalty and which would have been inadmissible on issue of guilt, retry the issue of guilty under the guise of correcting the verdict by finding the defendant guilty of first-degree murder. West's Ann.Pen.Code, §§ 190, 190.1, 1157.

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Robert W. Anderson, Oroville, for appellant.

The Attorney General, by Lloyd Hinkelman, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment declaring appellant guilty of murder of the first degree, and fixing his punishment at life imprisonment, and from an order denying a new trial. Appellant contends: (1) That the court erred in admitting his extrajudicial statements into evidence; in giving an instruction offered by the People; in refusing to give an instruction requested by him; and (2) that the verdict of the jury found him guilty of second-degree murder only. He asks a reversal and a new trial or, in the alternative, a reduction to a judgment of second degree.

It is unnecessary to give a detailed statement of the facts surrounding the killing. It will suffice to say that appellant killed one Frances Grubbs, by shooting her through the chest with a pistol during a dispute between them wherein he had demanded that she go with him to his home, which demand she refused. On the evidence the jury could have found either first or second-degree murder.

[1] As to duress and coercion which he contends were used in extracting statements the record shows the following: Appellant, a 24-year-old Negro, raised in Georgia, and educated through the eleventh grade in its schools, testified on voir dire as follows: He was arrested about 3 or 3:30 on the morning of May 3d shortly after the killing of Frances Grubbs. He was taken to the Butte County jail and kept in the company of one or more deputy

sheriffs until 6 o'clock that night. Most of the time he was not allowed to smoke. He was questioned up to 1:30 in the afternoon and had been given no rest during that period. About 1:30 he was taken to the morgue where deceased's body was and was kept there about an hour and a half. Over his protest the officers insisted that he be in the same room with the body and look at it. When he refused to look at the body, a deputy sheriff took his head and twisted it so that he was directly facing the corpse. (This was admitted by the deputy.) He first closed his eyes but later looked at the body. He was questioned continuously at the morgue and was kept there until about 5:30 P.M. He was scared because he did not know what the officers were going to do to him. He was tired and did not know what he had told them or what he was saying. On May 5th he was taken to the district attorney's office and there in the presence of a police captain his statement was taken on a tape recorder. He was still scared. If he had not been treated as he was, he would not have made a statement and the statement he gave was not given of his own free will. The district attorney more or less put words in his mouth, asking him, "Now ain't that right?" and "Now ain't that right what I am telling you?" He could not remember everything that he said to the district attorney. No one forced him to give the statement but he was led into making it and got no chance to say anything to the district attorney because that official would say to him, "Ain't that right?" He was scared throughout the interview and did not know but what he was going to be subjected to the same treatment as in the morgue. He did not know whether or not the officers were going to take him out and beat him up and was afraid that if he did not talk something would happen to him. It appears from the record that on the element of premeditation and motive for killing, his statements were largely suggested in such manner as to leave him little to say save to affirm the wording of the questions addressed to him. For example:

"Q. Were you pretty much in love with this girl? A. Yes, I was.

"Q. And actually, was your whole thought one that when you pulled the trigger you said well if she is not going to go with me she is not going to go with anybody, was that, I mean, I want to know the truth, is that the truth? A. That's right."

As opposed to appellant's testimony on voir dire there was ample testimony from the several officials involved that all statements he made were free and voluntary; that he was not subjected to denial of food, rest, or smoking; that no force or threats of any sort were used against him nor inducive promises made to him.

The situation presented by the record is one where the preliminary ruling of the trial court that the statements were admissible is sufficiently supported. The court properly left the issue of freedom from duress to the jury under appropriate instructions. The record does not support the assignment of error charged. People v. Gonzales, 24 Cal.2d 870, 151 P.2d 251; People v. Crooker, 47 Cal.2d 348, 354–355, 303 P.2d 753.

[2] Appellant charges error in the giving of the following instruction offered by the People: "A confession is not voluntary when it has been obtained by any kind or degree of violence, abuse or threat, or by any coaxing, cajoling, or menacing influence which induces in the mind of the defendant the belief or hope that he will gain some advantage by making a confession, provided that any such inducement by which the confession is obtained originates either from a law enforcement officer or in the presence of such an officer, under circumstances from which the accused might reasonably be expected to assume that the inducement is authorized by the officer." Appellant challenges this instruction because it omitted any reference to "psychological coercion or duress." Appellent cites People v. Baldwin, 42 Cal.2d 858, 867, 270 P.2d 1028, and People v. Loper, 159 Cal. 6, 20, 112 P. 720, wherein

the importance and effect of psychological coercion and duress is discussed. In view of appellant's background and his testimony concerning his fear of what might be done to him it might have been well to mention the matter of psychological coercion and duress but we think that the jury were sufficiently and properly instructed. Instructions given were taken from California Jury Instructions (CALJIC).

[3, 4] Appellant contends that the court erred in rejecting his proposed instruction, reading as follows: "If you find from the evidence that the defendant gave a statement to the Sheriff of Butte County on May 3, 1958, that for about 10½ hours before giving such statement he was subjected to coercion and duress by said Sheriff's deputies; that he gave such statement because of such coercion or duress; that on May 5th, 1958, he gave another statement to the District Attorney, that at the time of giving such statement to the District Attorney he was still acting under the coercion and duress to which he was subjected on May 3, 1958, then you will find that the latter statement was not a voluntary statement, and you will disregard it in arriving at your verdict." Appellant points out that this instruction emphasizes the factor of fear duration once fear is induced and no instruction given did so. But that fear endures for a time is matter of common knowledge. The jury needed no instruction on that matter.

[5] The remaining assignment of error has to do with the form of the verdict first returned by the jury. The verdict found appellant guilty "as charged in the information." Section 1157 of the Penal Code reads as follows:

> "Whenever a defendant is convicted of a crime which is distinguished into degrees, the jury, or the court if a jury trial is waived, must find the degree of the crime of which he is guilty. Upon the failure of the jury or the court to so determine, the degree of the crime of which the defendant is guilty, shall be deemed to be of the lesser degree."

Appellant contends that by the jury's verdict, read and construed with the code section, he was convicted of second-degree murder and the judgment must be modified accordingly; that all proceedings after receipt of the verdict were nullities. The People argue that the verdict received was merely informal, was intended to be and was a verdict of first-degree murder and was properly corrected to so show.

In order to properly discuss this issue we must refer to the record. Agreeably to Sections 190 and 190.1 of the Penal Code the court first tried the issue of guilt. The evidence addressed to that issue was closed, the case was argued, and the jury was instructed. The following then occurred:

> "The Court: You will be given five separate verdicts. You will return only one of them. I think they are self explanatory. In the order in which they are in my hand, and I can assure you it is not the order of significance, and frankly, I have no opinion as to what your verdict should be, but you have—the first one here is a verdict of guilty as charged in the information, which is a charge of first degree murder. If after considering the evidence and the law that should be your verdict you would use that form. The second one is a verdict of guilty of murder in the second degree. If he was not guilty of murder in the first degree and your deliberation indicated, under the definitions of the law, the evidence proved him guilty as required by law of second degree murder, you would use that form. The other two are voluntary manslaughter which has been defined and involuntary manslaughter which has been defined and of course a verdict of not guilty. As I say of the five you will use only one of those verdicts."

After a period of deliberation the jury returned to the courtroom and requested that the court read again the definitions of first and second-degree murder and of manslaughter. This was done. The jury then returned a verdict reading as follows: "We, the Jury in the above entitled action, find the defendant Johnnie Carey Hughes guilty as charged in the information." They were polled and their answers indicated that the verdict was unanimous. The verdict was received and entered in the minutes. Thereupon they were released and told to return the next morning. Said the court: "Ladies and Gentlemen of the Jury, we have completed one stage of the trial. We will reconvene tomorrow morning at 10:00 o'clock and there will be further evidence and further instructions concerning the verdict on penalty." The next morning and before beginning the hearing addressed to the question of penalty, the court said:

> "Mr. Neal [the Foreman], in the forms of verdict that were handed you yesterday it was explained that there were five verdicts being handed to you and the verdict of 'Guilty as charged in the information' was a charge of murder in the first degree; and that was your understanding?
>
> "Foreman Neal: Yes, sir.
>
> "The Court: Did any juror have a different understanding? There is no question as to the degree of guilt insofar as it is reflected in your verdict. Very well. We are ready to proceed with the second stage of the proceedings."

Evidence addressed to the question of penalty was then received. When both sides had closed the following occurred:

> "The Court: * * * Ladies and Gentlemen of the Jury, because of certain technicalities of law the forms of verdict had been submitted to the attorneys and the particular first degree form, alterations having been suggested, I frankly didn't have time to examine the matter. It is required that the verdict be in writing and that the degree be fixed by the jury. In view of the fact that the degree was not specifically fixed by the Jury, I am going to ask you at this time to retire, and submit to you this form of verdict as supplementing and completing yesterdays verdict, 'We the Jury in the above entitled action having heretofore returned a verdict of guilty do hereby fix the degree of the crime as murder in the blank degree.' Your foreman will fill in the first or second and sign it. I don't think it will take you very long, however if there is any question in any juror's mind or any hesitancy as to the degree of guilt you will require further time for that. You may retire at this time to the jury room.
>
> "Mr. Anderson [Attorney for defendant]: Your Honor, at this point, Your Honor, we object to the submission of another verdict. The verdict has been returned. It cannot thereafter be touched by anyone.
>
> "The Court: Your objection is noted and I don't think it needs to be made. If it is irregular it is irregular. You may proceed."

The jury retired and within a few minutes returned. The following then occurred:

> "The Court: Mr. Neal, you have signed the supplemental verdict?
>
> "Foreman Neal: Yes.
>
> "The Court: Very well, if you will hand it to the Bailiff please. Without waiving any objection Mr. Anderson, it may be stipulated it may be read?
>
> "Mr. Anderson: Yes, Your Honor, so stipulated.
>
> "The Court: 'In the Superior Court of the State of California, in and for the County of Butte. The People of the State of California, Plaintiff, v. Johnnie Carey Hughes, Defendant, No. 33211. Verdict of the Jury. We, the Jury, in the above entitled action, hav-

> ing heretofore returned a verdict of guilty do hereby fix the degree of the crime as murder in the first degree. * * *' It will be ordered that the verdict be filed as a supplemental verdict, Madam Clerk. You may proceed, Mr. Lyde."

Thereafter the issue of penalty was argued to the jury, instructions addressed to that issue were given and a verdict was returned, fixing the penalty at life imprisonment.

Under Penal Code section 190.1 there may be one, two or even three stages of a trial for murder. Prior to the enactment in 1957 of an amendment to Penal Code section 190, and of section 190.1 as new legislation, such a trial had two possible stages. In the first or "guilt" stage the jury determined guilt or innocence and if that determination was that the defendant was guilty of murder of the first degree the jury fixed the penalty at life imprisonment or death as a part of the verdict. A plea of insanity, if made, was determined in the second stage by the same or another jury. People v. Wells, 33 Cal.2d 330, 202 P.2d 53. By amending section 190 of the Penal Code and enacting section 190.1 the Legislature provided for another stage where guilt had been determined as constituting first-degree murder. Section 190 as amended directed that "the matter of punishment shall be determined as provided in Section 190.1." That section provided as follows:

> "The guilt or innocence of every person charged with an offense for which the penalty is in the alternative death or imprisonment for life shall first be determined, without a finding as to penalty. If such person has been found guilty of an offense punishable by life imprisonment or death, there shall thereupon be further proceedings on the issue of penalty, and the trier of fact shall fix the penalty. Evidence may be presented at the further proceedings on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty. * * *"

It is apparent that on the issue of penalty much evidence, inadmissible, or not presented, on the issue of guilt, may properly be received to aid the trier of fact in determining penalty. In the instant case much evidence of that sort detrimental to appellant was received.

In this case, as permitted by statute, the same jury which passed upon the issue of guilt was retained to try the issue of penalty. Nevertheless another jury might have been called in upon that issue for the section provides that, "If the defendant was convicted by a jury, the trier of fact on the issue of penalty and the issue of sanity, if any, shall be the same jury unless, for good cause shown, the court discharges that jury in which case a new jury shall be drawn to determine the issue of penalty, or the issue of sanity or both such issues, as the case may be." And the section provides that whether the same jury or another jury be called to try the issue of penalty "the issue of guilt shall not be retried by such jury." It is thus made apparent that, although the trial of the issue of guilt may be one of a series of stages in a trial for murder, nevertheless it is required to be complete within itself and in that sense has the aspects of a single trial.

With respect to the form of the verdict returned by the jury during the "guilt" stage of the trial the Attorney General argues that we are dealing with a mere informality, that since the same jury was retained to try the issue of penalty the court was still in control of the jury and had power and discretion to cause the informal verdict to be corrected. We think that what was actually done discloses that the correction of the verdict by the so-called supplementary verdict cannot be approved. When during the trial of the issue of penalty the court endeavored to "correct" the verdict on "guilt" what was done was, in point of fact, a resubmission to the jury of the issue of degree. In a very essential way this was a retrial of the issue of guilt in violation of the specific provision of Penal Code section 190.1 that, "the issue of guilt shall not be retried by such jury." Furthermore, it was a retrial of the issue of guilt after the jury had heard much evidence, inadmissible on that issue, and damaging to appellant. If, as the Attorney General argues, we were to consider the verdict of "guilty as charged" to have been formally defective and should further consider that the court was empowered to have the jury correct its verdict, we would still be compelled to say that by reason of the way in which that was done the judgment would have to be reversed.

However, in our view, section 1157 of the Penal Code, heretofore quoted, was applicable to the verdict returned by the jury. After that verdict had been received and the jury had been released that verdict under the provisions of the code section was a verdict of second-degree murder. Of that crime and of that crime only has appellant been convicted and by that verdict he had been acquitted of first-degree murder. That verdict was not an informal verdict but, read in the light of the statute, was complete and definite. So far as the jury was concerned it ended the trial on the issue of guilt. That being so, it results that all proceedings thereafter were nullities. There was no issue of penalty for the jury to determine and no plea of insanity had been interposed. Therefore the trial of the appellant was complete and the court had no jurisdiction to recall the jury for further proceedings.

It is ordered that the judgment appealed from be reversed, with directions to the trial court to pronounce and enter a judgment of conviction of second-degree murder. The order denying a new trial is affirmed.

SCHOTTKY and PEEK, JJ., concur.

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171 Cal.App.2d 331

PEOPLE of the State of California, Plaintiff and Respondent,
v.
Genora Rangel VALENZUELA, also known as Prospero Dorame, Defendant and Appellant.
Cr. 1256.

District Court of Appeal, Fourth District, California.
June 15, 1959.

Defendant was convicted in Superior Court, Kern County, Norman F. Main, J., of assault with a deadly weapon, and of escape from custody of officer, and he appealed. The District Court of Appeal, Griffin, P. J., held that evidence sustained jury's determination that defendant acted with criminal intent in seizing officer's gun and aiming it at officer, and that, where arrest by officer was authorized and lawful, defendant's actions in seizing gun, pointing it at officer and running away, sufficiently supported conviction for escape.

Judgment affirmed.

1. Assault and Battery ⚿92

In prosecution for assault with a deadly weapon, evidence sustained jury's determination that defendant acted with criminal intent in obtaining gun and aiming it at police officer, and such determination could not be disturbed on appeal. West's Ann.Pen.Code, § 245.

2. Arrest ⚿68

Fact that police officer may have failed to expressly announce his intention to arrest defendant before taking him into custody, or to expressly notify him of nature of charge, did not invalidate arrest, where circumstances should have made it apparent to defendant that he was in fact under arrest for an offense committed in presence of officer, and where evidence indicated that defendant knew he was under arrest. West's Ann.Pen.Code, § 841.

3. Escape ⟹10

Where defendant's arrest by police officer was authorized and lawful, defendant's actions in seizing officer's revolver, pointing it at officer, and running away, warranted conviction for escape from custody of officer. West's Ann.Pen.Code, § 4532(a).

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Kenneth N. Hastin, Bakersfield, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and David B. Allen, Deputy Atty. Gen., for respondent.

GRIFFIN, Presiding Justice.

A jury convicted defendant of assault with a deadly weapon (38 caliber revolver) in violation of section 245, Penal Code, and escape from the custody of an officer (violation of section 4532(a), Penal Code).

The testimony shows a police officer (Shinault), while patrolling the streets in a police car, saw defendant lying on the ground on the north or sidewalk part of a street in Delano at about 4:25 p. m. He went over to defendant, examined him, and smelled the odor of alcohol on his breath. To him defendant appeared to be unconscious. He shook him twice and awakened him. He arose to a sitting position and the officer told him to stand up. He refused and the officer then helped him to his feet. Each recognized the other because of a fracas in which defendant was involved the night before after which the officer arrested defendant, placed him in a car, but after explanation by the assembled crowd, he released him. Defendant, on the occasion here involved, said: "You let me go last night, let me go again." The officer replied: "No, you had your chance last night". Defendant had bruises on his face. The officer testified he was of the opinion defendant was under the influence of intoxicating beverages. He moved defendant toward the car, searched him, opened the door of the car, and told him to enter it. Defendant resisted. After placing defendant in the car, defendant lodged his foot in the door to prevent its closing on three separate occasions. Finally, the officer struck the sole of defendant's shoe with his flashlight. Defendant kicked open the door and got out. The officer attempted to handcuff him and the defendant began to struggle with him and grabbed a 38-caliber S & W loaded revolver from the holster worn by the officer, broke away from him and stepped about 10 feet back and pointed the gun at the officer (about midsection) and cocked the hammer. Near-by witnesses yelled at defendant and begged him not to shoot the officer. The officer suddenly jumped behind his car and defendant ran away through a near-by yard. A shot was fired and defendant encountered a neighbor and ordered him to convey him to McFarland, a near-by town. Officers were called. They approached this car with guns pointed at defendant's head, told him he was under arrest, handcuffed him, and then ordered him to step out. Under the seat was found the officer's revolver. On the way to the police station the officers asked the defendant what had gotten into him and he replied he had been on wine for two or three days; that he did not know why he had taken the officer's gun, but said the officer was "not fair".

Defendant, at the trial, said he was lying under a tree because he was "kind of sick" and "too tired to walk"; that he started drinking wine at 8:30 that morning; that he remembered the officer kicking him and waking him up and telling him to get into the car because he was going to put him in jail; that he asked him "what for" and the officer said: "Oh, just get in the car" and he did so. He related in detail about putting his foot in the door on three occasions and said a struggle ensued and he "didn't grab for the gun—the gun come automatically to me"; that he walked away, pulled back the hammer, and witnesses told him not to shoot the officer; that he then started to thinking and he realized what he was doing and ran; and that he thought it best to go to McFarland and turn in the gun.

[1] Defendant contends on this appeal that the evidence was insufficient to show he acted with criminal intent in obtaining the gun and aiming it at the officer. We see little merit to this argument. This was a factual question for the determination of the jury and its determination cannot be disturbed on appeal. People v. Schwab, 136 Cal.App.2d 280, 286, 288 P.2d 627; People v. Pitullo, 116 Cal.App.2d 373, 253 P.2d 705; People v. Laya, 123 Cal.App.2d 7, 14, 266 P.2d 157.

[2] The next contention is that the arrest was invalid since Officer Shinault did not announce his intention to arrest the defendant before taking him into custody, and did not notify him of the nature of the charge, citing section 841 of the Penal Code, reading:

> "*Formalities in making arrest; exceptions*
>
> "*Arrest, How Made.* The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, or is pursued immediately after its commission, or after an escape."

The facts show that defendant was lying near the street or sidewalk in a public place, apparently in a state of intoxication, which was a violation of the law. An instruction to this effect (citing Ordinance No. 248) was read to the jury. While the evidence does not directly show that the officer told the defendant he was under arrest and the reason for his arrest, it should be quite apparent to the defendant, in the face of the circumstances related, that he was in fact under arrest for an offense committed in the presence of the officer. Apparently defendant knew he was under arrest. He testified the officer so told him and ordered him to get in the car. In the examination of the officer on the witness-stand the prosecutor asked him why he arrested the defendant. Defendant's counsel objected, and the objection was sustained. Defendant should not now complain because he shut out the evidence which would have established that fact. It might well have appeared to the officer when he aroused the defendant that he would be incapable of understanding him if he had then told him he was under arrest for intoxication.

In People v. Herman, 163 Cal.App.2d 821, 329 P.2d 989, it was held that under section 841 of the Penal Code it is not necessary for the officer to inform the person to be arrested of the cause of his arrest when the person making the arrest has reasonable cause to believe that the person to be arrested is actually engaged in the commission of an offense.

In Willson v. Superior Court, 46 Cal.2d 291, 294 P.2d 36, it was held where it may be inferred from the fact that petitioner was arrested in a public bar, but made no outcry or objection, that she realized that the arresting officer was a police officer whose purpose was to make an arrest, it is immaterial that petitioner was not expressly informed of the officer's authority and purpose.

[3] Under the circumstances, we are convinced the arrest by the officer in the first instance was authorized and lawful, and an escape thereafter, by the means indicated, sufficiently supported the conviction on the remaining count.

Judgment affirmed.

MUSSELL and SHEPARD, JJ., concur.

171 Cal.App.2d 513

PEOPLE of State of California, Plaintiff and Respondent,

v.

Edward Neal MACKEY and Kinnon Wilks, Defendants and Appellants.

Cr. 2943.

District Court of Appeal, Third District, California.

June 25, 1959.

Hearing Denied Aug. 19, 1959.

Defendants were convicted of burglary in the first degree. The Superior Court, Mendocino County, Hale McCowen, J., entered judgment, and the defendants appealed. The District Court of Appeal, Peek, J., held that in prosecution for burglary of sport shop, from which four rifles and other articles were taken, admission in evidence on rebuttal of two of the rifles, which had been found in home of cousin of one of the defendants, over objection that proper rebuttal evidence does not include a material part of the case in the prosecution's possession tending to establish commission of the crime, was not error, where the two rifles from the cousin's home were not crucial to the prosecution's case, and their primary value was impeachment of testimony of one of the defendants that he had not taken the two rifles to the home of the cousin of one of the defendants.

Judgment affirmed.

1. Criminal Law ⚷684

In prosecution for burglary of sport shop, from which four rifles and other articles were taken, admission in evidence on rebuttal of two of the rifles, which had been found in home of cousin of one of the defendants, over objection that proper rebuttal evidence does not include a material part of the case in the prosecution's possession tending to establish commission of the crime, was not error, where the two rifles from the cousin's home were not crucial to the prosecution's case, and their primary value was impeachment of testimony of one of the defendants that he had not taken the two rifles to the home of the cousin of one of the defendants.

2. Criminal Law ⚷404(4)

In prosecution for burglary of sport shop, from which four rifles and other articles were taken, proper foundation was laid for introduction in evidence of two of the rifles, which were found in home of cousin of one of the defendants, where one of the defendants admitted on cross-examination that he went to the home of his cousin and that the other defendant accompanied him there.

3. Criminal Law ⚷594(1), 1151

Power of trial court to grant defendant continuance because of absence of material witness is discretionary, and trial court's determination will not be reversed on appeal unless there has been a clear abuse of discretion.

4. Criminal Law ⚷595(4)

Denial of motion of defendants for continuance in order that defendants might bring in witnesses to give evidence, which would have related to the weight of impeaching evidence, and which did not relate to any elements of the crime charged, was not an abuse of discretion.

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Rudolf H. Binsch, Sacramento, for appellants.

Stanley Mosk, Atty. Gen., by Doris H. Maier and Robert K. Puglia, Deputy Attys. Gen., for respondent.

PEEK, Justice.

This is an appeal by defendants from a judgment of conviction following a jury verdict finding them guilty of burglary in the first degree. Both defendants represented themselves at the trial although counsel was appointed by the court for the purpose of consultation and advice. On appeal, pursuant to their request, counsel was appointed to represent them.

No question is raised on appeal concerning the sufficiency of the evidence to support the judgment. The errors alleged relate to the introduction of rebuttal evidence by the prosecution and the denial of defendants' motion for a continuance.

The record shows that on the night of August 18, 1958, Boomer's Sport Shop in Laytonville was burglarized. Entrance was gained through a window which had been broken. Missing from the shop were four rifles, five other guns, a metal box containing fishing and hunting licenses, and a roll of pennies. Several persons identified defendants and a third man as having been in the vicinity of Laytonville and the sport shop on the day of the burglary. On August 23, 1958, defendant Mackey was arrested in Tucson, Arizona. On his person was found a .38 caliber revolver, and in the rear seat of his car were two new rifles. Defendant Wilks was present at the time of the arrest and stated to the officers that the rifles were his. He was later arrested when it was found that the rifles had been reported stolen by the California authorities. The two rifles stated by Wilks to have been his, and the revolver found in Mackey's possession were all identified as having been among those stolen from the sport shop.

On cross-examination Mackey testified that he and Wilks had gone to the home of his cousin, R. J. Rucker, but denied that he had taken the rifles to Rucker's house. Wilks testified that they had gone to the cousin's home but that no one was there and that Mackey had gotten out of the car but that he, Wilks, had not. In rebuttal the prosecution offered in evidence the two rifles which were identified as having been stolen from the sport shop and had been found in Rucker's house in a closet together with some of Mackey's clothes. These rifles were admitted into evidence against both defendants and over the objection of Mackey that it was improper rebuttal evidence and that there was insufficient foundation to tie the evidence into the case, and over the objection by Wilks that there was not sufficient foundation to connect him with the evidence. Both objections were overruled.

[1] Defendants' first contention is that the court erred in admitting into evidence on rebuttal the two rifles taken from Rucker's home. It is argued that the rifles were properly a part of the prosecution's case in chief and that it was therefore error to admit them into evidence on rebuttal under the guise of impeachment. In support of such contention defendants rely primarily upon the case of People v. Carter, 48 Cal.2d 737, 312 P.2d 665, wherein the court stated the rule to be in part that "* * * proper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt." 48 Cal.2d at pages 753–754, 312 P.2d at page 675.

Here however the prosecution in its case in chief had introduced ample evidence to establish the commission of the offense charged and that defendants were at the scene of the crime shortly before it was committed. There was further evidence that defendants were in possession of some of the stolen goods. The two rifles from Rucker's house were not crucial to the prosecution's case. While the evidence so introduced was cumulative to that already introduced which showed possession of the stolen articles, its primary value was the impeachment of the testimony of Mackey that he had not taken the rifles to Rucker's house. Such evidence, therefore, was not subject to the rule set forth in the Carter case. In this regard the case is factually more similar to People v. Avery, 35 Cal.2d 487, 218 P.2d 527. There the prosecution in the case in chief elicited testimony from a witness that he gave the defendant some shotgun shells. The defendant testified in his own behalf and denied this. On rebuttal the prosecution produced a second witness who testified that he heard defendant ask the first witness for the shells. In answer to defendant's contention on appeal that the testimony of the second witness was improper rebuttal evidence, the court held (35 Cal.2d at page 492, 218 P.2d at page 530): "Although his testimony might properly have been part of the prosecution's case in chief, it was allowable as additional evidence upon a point put into dispute by * * * [the defendant's] testimony. See 6 Wigmore on Evidence, 3d ed. p. 516."

[2] Defendants further argue that a proper foundation was not laid for the introduction of the two rifles found in Rucker's home. The relevancy and materiality of the challenged evidence had previously been established by the testimony of the defendants themselves; that is, Mackey testified on cross-examination that on the evening he arrived in Tucson he went to the home of his cousin Rucker where he remained for about 15 to 30 minutes and that Wilks and a third man accompanied him there. Wilks' testimony was that he and Mackey drove by Rucker's home on the evening they arrived in Tucson; that no one was there at the time; that Mackey got out of the car but that he, Wilks, did not. Additionally the rifles found in the search of Rucker's home had previously been identified as those taken from the sport shop in Laytonville. Under such circumstances, the rifles were properly introduced into evidence. Section 2051, Code of Civ.Proc. See also People v. Higgins, 18 Cal.App.2d 595, 64 P.2d 454.

It is also argued that the two rifles were improperly admitted as against both defendants. From the record before us it would appear that the rifles were properly admitted as against Mackey as tending to impeach his testimony and for the same reasons were properly admitted as against Wilks. In connection with this argument defendants contend the court committed prejudicial misconduct by pointing out that both of them had stated that they had gone to Rucker's home. The record in this regard shows testimony by Wilks that they had gone to a house which belonged to a cousin of Mackey and which was on the same street as the house which Mackey stated was the Rucker home. Mackey had testified that his cousin's name was Rucker. To now claim that the court misstated the evidence is but to split hairs and is wholly without substance.

[3, 4] Defendants' final contention is that the court erred in denying their motion for a continuance in order that they might bring in witnesses from Arizona to testify that Mackey had not left rifles at Rucker's house and that Mackey had not lived there. As noted by the court, these were matters to which defendants themselves could have testified. The power of the court to grant a continuance because of the absence of a material witness is discretionary and its determination will not be reversed on appeal unless there has been a clear abuse of discretion. No affidavits were submitted in support of the motion. The evidence sought would have related to the weight of the impeaching evidence. It did not relate to any of the elements of the crime. Under such circumstances it cannot be said that the court abused its discretion in denying the defendants' motion.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

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171 Cal.App.2d 551

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Tony Gracia HERRERA, Donald Grant Booth and Victor Armendo Encisco, Defendants.

Donald Grant Booth, Defendant and Appellant.

Cr. 6426.

District Court of Appeal, Second District, Division 1, California.

June 29, 1959.

Prosecution for unlawful possession of narcotics. From a judgment of conviction of the Superior Court of Los Angeles County, Edwin L. Jefferson, J., and from the sentence and an order denying a new trial, the defendant appealed. The District Court of Appeal, White, P. J., held that conflicting evidence as to whether decoy who was given money by deputy sheriff to procure narcotics had induced defendant to obtain the narcotics or whether defendant had first discussed the matter with the decoy, was insufficient to establish defense of entrapment, and that failure to call the decoy as a witness did not necessarily require inference that his testimony, if called, would have corroborated the defendant, in absence of any showing of any willful suppression of evidence.

Appeal from the "sentence" dismissed, and the judgment and order affirmed.

1. Criminal Law ⚷1023(10)

Attempted appeal from the "sentence", not being authorized, was subject to dismissal.

2. Criminal Law ⚷569

In prosecution for unlawful possession of narcotics, where decoy had been given currency dusted with fluorescent powder to deliver to defendant to obtain narcotics and defendant when subsequently apprehended admitted possession of narcotics and no longer had possession of the money, conflicting evidence as to whether decoy had induced defendant to endeavor to obtain narcotics or whether defendant first raised the matter with decoy was insufficient to establish defense of entrapment. West's Ann.Health & Safety Code, § 11500.

3. Criminal Law ⚷37

"Entrapment"[1] is the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer.

See publication Words and Phrases, for other judicial constructions and definitions of "Entrapment".

4. Criminal Law ⚷37

If criminal intent originates in mind of accused and the offense is completed, fact that an opportunity was furnished or that accused is aided in commission of crime in order to secure evidence necessary to prosecute him therefor constitutes no defense.

5. Criminal Law ⚷330

The defense of entrapment is a positive defense imposing upon an accused the burden of showing that he was induced to commit the act for which he is being prosecuted.

6. Criminal Law ⚷739(1)

Whether unlawful entrapment is established in a given case is a question of fact for duly constituted arbiter of facts, who is sole judge of credibility of witnesses and intrinsic value of the evidence.

7. Criminal Law ⚷260(11)

An appellate tribunal will not draw an inference contrary to that drawn by trial court on question of entrapment if there is sufficient substantial evidence to support the latter's determination.

8. Criminal Law ⚷317

In narcotics case, failure of prosecution to call as witness the decoy who was given money to procure narcotics did not compel inference that if he had testified he would have corroborated the defendant, in absence of any showing of a willful suppression of evidence. West's Ann.Code Civ.Proc. § 1963, subd. 5; West's Ann. Health & Safety Code, § 11500.

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Minsky, Garber & Rudof, B. W. Minsky, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Norman L. Epstein, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

[1] The District Attorney of Los Angeles County filed an information wherein appellant, together with defendants Herrera and Encisco, were accused of unlawfully having in their possession heroin, a narcotic, in violation of Section 11500 of the Health and Safety Code, a felony. The information also alleged prior felony convictions of Burglary and Robbery suffered by appellant. A plea of not guilty was en-

tered by appellant who also denied the prior convictions. Trial by jury was duly waived and the People's case was submitted on the transcript of the testimony adduced at the preliminary examination, with appellant reserving the right to offer evidence in his behalf. He was adjudged guilty as charged in the information (defendant Encisco was also found guilty while defendant Herrera was acquitted). As to appellant, the prior convictions were found to be true. His motion for a new trial was denied and he was sentenced to state prison. From the judgment of conviction, from the "sentence", and from the order denying his motion for a new trial, appellant prosecutes this appeal. Since an appeal from the "sentence" is not authorized, the attempted appeal therefrom must be dismissed (People v. Gallardo, 41 Cal.2d 57, 60, 257 P.2d 29).

We regard the following as a fair epitome of the evidence presented in this prosecution. On February 17, 1958, one Wally Fisher contacted Everett Jones, a Deputy Sheriff of Los Angeles County, attached to the Narcotics Detail, and told the latter that appellant had been talking to him about narcotics. On the afternoon of February 19, 1958, Deputy Sheriff Jones provided Fisher with $250 of county funds which had been dusted with fluorescent powder, and the serial numbers of which currency had been recorded. Deputy Jones observed Fisher enter a home on Maywood Avenue, north of Slauson, in Los Angeles. The appellant was observed entering the same home about ten minutes thereafter. Later, the appellant was seen leaving the home. Deputy Jones observed appellant go to a lumber yard on the corner of Maywood Avenue and Slauson Boulevard, enter a pickup truck, and drive to a house located at 7120 Miles Avenue in Huntington Park. Appellant entered this house.

At approximately 9:17 p. m. Deputy Jones observed a 1957 white convertible pull up across the street from this house. There were two persons seated in this vehicle. The driver, one Victor Armendo Encisco, codefendant with appellant in the trial below, got out of the car and entered the house. Approximately five minutes later appellant and Encisco were seen to leave the house, enter the car Encisco had been driving, and drive away. The car was followed by Deputy Jones and Deputy Frank Vacio.

The car was followed south on Miles Avenue, thence east on Florence Avenue for about two and one-half blocks, at which point it was seen to turn around and drive into a gasoline service station on Florence Avenue and Alameda Boulevard. The car was parked next to a telephone booth in the service station. The three occupants alighted and "milled around" the area. Approximately fifteen minutes later the three re-entered the car and drove away. The car was followed to the corner of Firestone and Alameda Boulevards where it stopped. Two of the occupants alighted from the vehicle including one Avila. Avila and another person in the area were seen close to each other. Appellant testified that on Avila's returning to the car, appellant asked him if he had obtained the narcotics. Avila answered that he had. Appellant stated that he then gave Avila the $250 he had received from Fisher.

The car was next observed by Deputies Jones and Vacio and a Deputy Smith as it pulled up in front of the house at 7120 Miles Avenue. This was approximately one hour and fifteen minutes after the deputies had last seen it.

As appellant was alighting from the vehicle, he was observed to lean over and make a "throwing motion under the side of the car". Shortly thereafter, Deputy Jones walked to the passenger side of the car and picked up a condom from the street under the car. A chemist, whose expert qualifications were stipulated to, testified that the condom contained heroin. Appellant, defendant Encisco, who was driving the car, and Avila, another codefendant with appellant at the preliminary examination though not present thereat, were placed under arrest.

An examination of the hands of appellant, Encisco and Avila under a quartz light indicated the presence of fluorescent powder. No part of the $250, given Fisher by Deputy Jones, was found in their possession.

In a conversation with Deputy Jones at the sheriff's station, appellant admitted placing the condom under the car as he alighted. He stated that it had been received on the corner of Manchester and Alameda Boulevards. These statements were freely and voluntarily made.

Sworn as a witness in his own behalf, appellant testified that he had known the informant Fisher for some time, that the latter owned a boat business across the street from where appellant worked at a lumber yard. That prior to the date here in question, Mr. Fisher had asked appellant if he could obtain a typewriter for him, and had asked appellant "* * * if he (appellant) could get him (Fisher) different things, such as white walls and different items". Appellant further testified that the question of narcotics was first brought up by Fisher about three weeks prior to February 19 at Fisher's place of business. Fisher asked appellant if he could buy Fisher some narcotics. Appellant replied that he could not.

For three weeks prior to appellant's arrest Fisher talked to him "(j)ust about every day" about narcotics. Fisher asked appellant "to make a buy for him", telling appellant that he had $250 for the purchase and a man who "wanted to buy narcotics regular". On February 19 Fisher gave appellant $250 and again asked him to try and obtain some narcotics. Fisher also told appellant that he knew the latter was an ex-convict. Finally, appellant agreed to try to obtain some narcotics for Fisher.

With regard to his activity in the instant case, appellant testified:

> "Q. (Mr. Finnerty, Deputy District Attorney) Now, let me make sure that I understand what you are saying to the Court. Are you telling the judge that you had no notion of dealing in narcotics at all until you met this Willie Fisher; is that right? A. That's right.
>
> "Q. Then Willie Fisher planted a seed, or an idea, in your mind and you carried out this narcotic buy after he had planted the idea in your mind; is that it? A. Yes, sir, that's about exactly it.
>
> "Q. Now, after this idea of—What was there in it for you if you went along with getting some narcotics for Willie Fisher? A. Actually, I was just trying to get him off my back. He kept coming over there to the lumber yard every day and he asked me every day for almost three weeks.
>
> "Q. This man, who apparently knew you were an ex-convict, had been pestering you to deal in narcotics, and in order to put a stop to this pestering you decided that you would get some for him; is that it? A. Yes, sir."

When questioned as to how he knew "* * * where or how to go about getting them (narcotics)", after he had decided to procure some for Mr. Fisher, appellant replied, "I didn't, at first * * *. I just asked a couple of people * * *. I asked a few people and I couldn't find anybody with any, and I just finally ran into somebody that could * * *. I knew Ernie (Avila) before". When asked, "Then, after you heard that maybe Ernie could do something for you, why you called him up?", appellant answered, "Yes".

[2] The sole ground urged by appellant for a reversal of the judgment and order herein is that the court erred in adjudging him guilty because the evidence, as a matter of law, clearly established the defense of entrapment.

The law of entrapment was defined by this court in People v. Schwartz, 109 Cal.App.2d 450, 454, 455, 240 P.2d 1024, 1027, as follows:

> [3] "Entrapment is the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer. In other words, persuasion or allurement must be utilized to entrap. People v. Hall, 133 Cal.App. 40, 45, 23 P.2d 783."

[4] It is firmly established, however, that: "* * * if the criminal intent originates in the mind of the accused and the offense is completed, the fact that an opportunity was furnished, or that the accused is aided in the commission of the crime in order to secure the evidence necessary to prosecute him therefor, constitutes no defense * * * If the officer uses no more persuasion than is necessary to an ordinary sale, and the accused is ready and willing to make the sale, there is no entrapment." People v. Braddock, 41 Cal.2d 794, 802, 264 P.2d 521, 525 and cases therein cited.

[5] It is our understanding of the law that the defense of entrapment is a positive defense imposing upon an accused the burden of showing that he was induced to commit the act for which he is being prosecuted, for, as was stated by this court in People v. Schwartz, supra, 109 Cal.App.2d at page 455, 240 P.2d at page 1027: "It is not the entrapment of a criminal upon which the law frowns, but the seduction of innocent people into a criminal career by its officers is what is condemned and will not be tolerated. Where an accused has a pre-existing criminal intent, the fact that when solicited by a decoy he committed a crime raises no inferences of unlawful entrapment (citing cases)". In other words, where a law enforcement officer, or his agent, merely provides "the occasion for one engaged in illegal activities to ply his trade" there can be no unlawful entrapment (People v. Ramos, 146 Cal.App.2d 110, 112, 113, 303 P.2d 783, 785).

Appellant concedes, "* * * that where there is a conflict in the evidence as to whether there was an entrapment, the conflict will be resolved in favor of the trial court's decision * * *". In the case at bar there is a direct conflict. During the cross-examination of Deputy Sheriff Jones there was testimony that appellant "had been talking to him (Fisher) about narcotics", which is directly contrary to appellant's testimony that Fisher made the approach to him "that he had this guy that wanted to buy some narcotics", and that appellant told him, "I couldn't buy any". As was said, in People v. Braddock, supra, 41 Cal.2d at page 803, 264 P.2d at page 526, "Where the record shows a conflict in the evidence, the judgment will not be reversed."

Appellant urges that, "The lure or persuasion was that Fisher indicated to appellant that there would be large profits. Fisher knowing that appellant had a prior criminal record, exploited this weakness in appellant by originating this transaction and then persuading and luring him with the expectation of large profits * * *. Further, it is an obvious inference that appellant expected to share these large profits with Fisher in that when he was apprehended, he had only the narcotics and none of the money given him by Fisher which was obtained from the Police."

However, the evidence offered by the prosecution at the trial established that Mr. Fisher just informed the sheriff's office of conversations concerning narcotics between appellant and himself two days before appellant's arrest. Fisher was given $250 of county funds which had been dusted with fluorescent powder. Appellant gave these funds to one Avila on learning that Avila had obtained some narcotics. Shortly thereafter, appellant was seen throwing narcotics under an automobile immediately before his apprehension. The foregoing clearly supports the inference that appellant used the $250 to buy and possess narcotics, in violation of Section 11500 of the Health and Safety Code.

[6, 7] Had the trial court believed appellant's testimony the defense of entrapment might well have been established.

However, it is inherent in the decision rendered that the trier of facts did not believe appellant's version of the transaction. And whether unlawful entrapment is established in a given case is a question of fact for the duly constituted arbiter of the facts, who is the sole judge of the credibility of witnesses and the intrinsic value of the evidence (People v. Gutierrez, 128 Cal.App.2d 387, 390, 275 P.2d 65). An appellate tribunal will not draw an inference contrary to that drawn by the trial court on this question if there is sufficient substantial evidence to support the latter's determination (People v. Braddock, supra, 41 Cal.2d at page 803, 264 P.2d at page 526).

In the instant case, the trial court could reasonably infer that the formation of the intent and purpose to violate the law existed before the officers became aware of the situation through the information furnished by the aforesaid Mr. Fisher, and that the arrangements made by the officers were designed only to apprehend appellant in the furtherance of his criminal enterprise (Stein v. United States, 9 Cir., 166 F.2d 851; People v. Cherry, 39 Cal.App.2d 149, 152, 102 P.2d 546).

[8] Appellant's final contention that the failure of the prosecution to call the decoy, Mr. Fisher, as a witness leads "to the only inference that if Mr. Fisher would have testified, he would have corroborated appellant", is unavailing. The record contains no evidence or showing of a *wilful* suppression of evidence as required by Subdivision 5 of Section 1963 of the Code of Civil Procedure, which provides that it is to be rebuttably presumed, "5. That evidence *wilfully* suppressed would be adverse if produced". In Re Estate of Moore, 180 Cal. 570, 585, 586, 182 P. 285, 292, wherein the trial court gave the familiar instruction with respect to the presumption of law that evidence wilfully suppressed would be adverse if produced, the Supreme Court said, "This was error because the record fails to disclose any instance of suppression of evidence or anything that could be properly construed as such withholding of facts in defendant's possession".

Why Mr. Fisher was not subpoenaed by the prosecution does not appear. While this was a matter that could properly be argued to the trial judge "* * * it is entitled to but little consideration on appeal" (People v. Burnette, 39 Cal.App.2d 215, 223, 224, 102 P.2d 799, 803) and to this might be added the observation that appellant could have subpoenaed Mr. Fisher had he desired.

The unauthorized appeal from the "sentence" is dismissed. The judgment and the order denying defendant's motion for a new trial are, and each is affirmed.

FOURT and LILLIE, JJ., concur.

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171 Cal.App.2d 437

In the Matter of the ESTATE of Opal Mae SWANSON, Deceased.

Esther L. GRAMLING, Individually, and as Administratrix with the Will Annexed, and F. W. Powell, Individually, and as Attorney for Esther L. Gramling, Appellants,

v.

Jane Swanson ANDERSON, Guardian of the Estate of Jon Brent Dulong, a Minor, Objector and Respondent.

Civ. 5867.

District Court of Appeal, Fourth District, California.

June 18, 1959.

Rehearing Denied July 14, 1959.

Hearing Denied Aug. 12, 1959.

Proceeding in the matter of the estate of the deceased. From an order of the Superior Court of San Diego County, L. N. Turrentine, J., the deceased's sister individually and as administratrix with the will annexed and another appeal. The District Court of Appeal, Shepard, J., held that allowing to the guardian of the estate of a minor step-grandson entitled to share in the decedent's estate from the funds of the estate their expenses for attorneys' fees in protecting the funds of the estate from improper depletion was proper as against contention that such allowance could not be made unless new money was brought into the estate and that the probate court properly used the net income from operation of the motel of the estate instead of the gross income as the basis of calculating fees.

Order affirmed.

1. Executors and Administrators ⚿216(2)

Probate court may make an allowance of attorneys' fees for services rendered to a party successfully objecting to charges against an estate in an executor's account based on the equitable rule that fees for legal services rendered in preserving a common fund for the benefit of heirs or persons interested in estate are proper charges against such a fund.

2. Executors and Administrators ⚿216(2)

Allowing to the guardian of the estate of a minor step-grandson entitled to share in the decedent's estate from the funds of the estate their expenses for attorneys' fees in protecting the funds of the estate from improper depletion was proper as against contention that such allowance could not be made unless new money was brought into the estate.

3. Executors and Administrators ⚿496(2)

Generally, where property of estate subject to encumbrance is sold, the executor is entitled only to commissions on the net purchase price in excess of the encumbrances.

4. Executors and Administrators ⚿216(2), 496(1)

Probate court properly used as its basis of calculation of ordinary statutory administratrix and attorneys' fees the net value of motel property owned by the estate, arrived at by deducting from the appraised value thereof the amount of outstanding encumbrances at the time of the sale as against the contention that the fee should have been calculated on the total gross purchase price.

5. Executors and Administrators ⚿216(2)

Probate court properly used the net income from the operation of the motel property owned by the estate instead of the gross income as the basis for calculating attorneys' fees.

6. Executors and Administrators ⚿111(8)

Denying administratrix on accounting, credit on account of interest, court costs and expenses in litigation was proper where such items resulted from the fault of the administratrix in including in the sale of motel property of the estate certain property which did not belong to the estate, and because her pursuit of litigation was without just cause and resulted in a serious loss to the estate from the reduction in the sale price to a new purchaser. West's Ann. Prob.Code, § 719.

7. Executors and Administrators ⚿511(3)

It is within the discretion of the probate court to assess costs against the executor personally without making any particular finding of mismanagement or bad faith. West's Ann.Prob.Code, § 719.

8. Judgment ⚿219

Oral comments of the trial judge do not form a part of the final judgment and cannot be used to impeach the finding and the judgment.

◆

F. W. Powell, La Mesa, for appellants.

John R. Hellen, San Diego, for respondent.

SHEPARD, Justice.

Opal Mae Swanson died testate on June 8, 1954. Esther L. Gramling, her sister, was appointed special administratrix of her estate on June 11, 1954, and administratrix of the estate (with the will annexed) on July 23, 1954. She is one of the appellants herein. The legatees are Mrs. Bertha Sweeney, mother, $100; Helen N. Sweeney, sister, as to one-eighth; Robert Francis

Ellis, a stranger, as to one-eighth; Jon Brent Dulong, a step-grandson, as to three-eighths; and Marcia Ann Gramling, a niece, as to three-eighths; each of the fractions used above referring to the interest in the residuary estate. F. W. Powell, one of the appellants herein, is attorney for said administratrix. Jane Swanson Anderson is the guardian of the estate of Jon Brent Dulong, a minor, above named, and is an objector to certain items of the final account of said administratrix, and is the respondent herein.

Appellant Gramling on July 23, 1957, filed her final account, report and petition for distribution, and her amendment and supplement thereto on August 27, 1957. Appellant Powell filed a separate petition for attorney fees on August 30, 1957. Respondent Anderson filed her objections to the final account on August 8, 1957, and her amended objections on August 20, 1957.

Respondent by her objections asked the disallowance of all trial and appellate court costs, fees and other expenses in connection with certain estate litigation arising out of an attempted sale of the motel property (the principal asset of the estate) to one Springgate. This sale of the property the court refused to confirm because there was attempted to be included therein certain personal property belonging to the estate of John Swanson, the predeceased husband of the testatrix herein. Respondent also asked the disallowance of $306.26 interest plus $20.65 and costs awarded to Springgate when the sale was set aside; $22.15 for flowers to the mausoleum; $6499.50 alleged to have been lost to the estate through the later sale at a reduced price from that offered by Springgate; $3294.49 expenses of sale; $239 on claim of F. W. Powell's attorney fees for services to decedent, and $115.30 paid to creditors without the filing of a claim; $28.52 refund to ultimate buyer of the motel because of error in escrow calculations; $1000 alleged to have been improperly claimed for extraordinary services in managing the motel; $5700 plus certain office expenses alleged to have been improperly claimed for attorney services, and a portion of the ordinary statutory administratrix and attorney fees alleged to have been improperly calculated.

After trial of the objections and hearing of the account the court made its order surcharging the account of the administratrix in the sum of $489.89, trial and appellate court costs, fees and other expenses involved in the Springgate sale, excepting therefrom $43.65 not involved in the Springgate litigation; disallowing $115.30 paid on debts not justly due from the estate; reducing the gross income figure of $6824.26 from motel operation to $2865.21 as the net income from motel operation, and deducting $41,359.20 secured indebtedness assumed by the purchasers on the sale of the motel, thus bringing the total estate accounted for, for the purpose of calculating ordinary statutory fees of the administratrix and attorney, to the sum of $24,008.99, with the resultant ordinary fee to each in the sum of $850.27; allowance of $1000 to the administratrix for extraordinary services instead of the ultimate claimed amount of $1750; allowance of $1500 to administratrix' attorney for extraordinary services instead of the ultimately claimed amount of $3500; and allowing to the objector for her attorney's fee in preventing the improper depletion of the funds of the estate the sum of $852.21.

The appeal is taken from portions of the order hereinafter set out. 1. Allowing to objector-respondent $852.21 from the funds of the estate as her expense for attorney's fees in protecting the funds of the estate from improper depletion. 2. Order allowing the sum of only $850.27 to appellant Gramling as her ordinary statutory commissions for administration. 3. Order allowing the appellant Powell only the sum of $850.27 as his ordinary statutory commissions as attorney for the administratrix. 4. Order surcharging appellant Gramling with $487.89 claimed on account of court costs and expenses on Springgate sale and litigation connected therewith.

[1] Appellants contend that the equitable rule referred to in Re Estate of Reade, 31 Cal.2d 669, 671[3], 191 P.2d 745, that a

party litigant who preserves, protects or increases the fund for the benefit of himself and others should receive compensation from the common fund for the services of his attorney in order that all who receive the benefit should bear their just share of the expense of the litigation, ought not to be applied in probate cases except where new money is brought into the estate. This question is squarely passed upon in Re Estate of Lundell, 107 Cal.App.2d 463, 464 [1], 237 P.2d 62, 63, in which the precise problem of executors seeking excessive fees and being prevented from receiving same by objections was presented. The court there said:

> "The probate court may make an allowance of attorneys' fees for services rendered to a party who successfully objects to charges against an estate in an executor's account. Such allowance is predicated upon the equitable rule that fees for legal services rendered in preserving a common fund for the benefit of all heirs or persons interested in an estate are proper charges against such fund. Each beneficiary should bear his proportionate share of expenses of litigation as a result of which he derives a benefit. (In re Estate of Reade, 31 Cal.2d 669, 671 et seq. [2], 191 P.2d 745.)"

[2] The equitable rule referred to in Re Estate of Reade, supra, has been recognized and repeated in many cases and applied or rejected in accordance with the particular facts there before the court. Farmers' & Merchants' Nat. Bank of Los Angeles v. Peterson, 5 Cal.2d 601, 607[8], 55 P.2d 867 (applied because a single beneficiary bore the brunt of expense to preserve the common fund for all); Winslow v. Harold G. Ferguson Corp., 25 Cal.2d 274, 285[12], 153 P.2d 714 (applied because a single beneficiary bore the expense of aiding the assets of the trust for the benefit of all beneficiaries); In re Estate of Marre, 18 Cal.2d 191, 114 P.2d 591 (not applied because each contending beneficiary was represented by counsel); In re Estate of Witting, 130 Cal.App.2d 521, 525[1], 279 P.2d 180 (not applied because the court was unable to affirmatively find that the action directly resulted in a benefit to the estate); In re Estate of Bullock, 133 Cal.App.2d 542, 546[1–2], 284 P.2d 960 (not applied because each beneficiary was represented by his own attorney in same litigation). We agree with the opinion in Re Estate of Lundell, supra. We see no rational distinction between the case of bringing in new property into an estate and the case of protecting the common fund from depletion by excessive claims that the lawful protector of the estate, to wit, the executor or administrator, seeks improperly to have allowed. In our opinion, the order of the trial court in the case at bar was correct.

[3, 4] In the second point of the appeal the appellants contend that the probate court was in error in using, as its basis of calculation of ordinary statutory administratrix and attorney fees, the *net* value of the motel property, arrived at by deducting from the appraised value thereof the amount of the outstanding encumbrance at the time of sale. Appellants further contend that the fees should have been calculated on the total *gross* purchase price as "estate accounted for". The record before us is not entirely complete but it indicates that the holder of the encumbrance did not file a claim against the estate; that the appellant Gramling did not *receive* the gross purchase price; that she did not *pay* the encumbrance; that she received *only* the difference between the purchase price and the outstanding encumbrance. In our opinion, this state of facts places it in line with the decision in Re Estate of Lampman, 15 Cal.2d 212, 218[3], 100 P.2d 488, 491 where the court, quoting from In re Estate of Pease, 149 Cal. 167, 171, 85 P. 149, says:

> " 'The general rule appears to be that where property subject to an encumbrance is sold, the executor is entitled only to commissions on the net purchase price in excess of the encumbrances.' "

The court there further discusses the entire matter at length and recognizes the possibility that in some instances the enforcement of the quoted rule might work an injustice. It then goes on to say:

> "In this connection it may be noted that both the executrix and the attorney herein received additional fees for extraordinary services in connection with the management and sale of the apartment house and the administration of the estate. This power of the court to grant additional fees for extraordinary services is one which may be used to equalize any injustice which may result when the estate upon which the commissions are allowed is small, and the services involved are extra onerous."

On the facts as they appear on the record before us the trial court was correct.

[5] As a part of this same point on appeal, appellants complain that the probate court was in error in using the *net* income from the operation of the motel instead of the *gross* income as the basis for calculating fees. In Re Estate of Reinhertz, 82 Cal.App.2d 156, 185 P.2d 858, 862, 186 P.2d 755, the court was confronted with the identical situation here presented, to wit, whether or not the *gross* receipts or the *net* receipts from an apartment house operation should be used in calculating fees. It there stated:

> "The operation of an apartment house is not in the same class as the ordinary rental of real property and partakes more of the nature of the operation of a business. * * * In the operation of a business the executor is bound to, and should, only account to the estate for the net income or profits."

We are in accord with the opinion in Re Estate of Reinhertz, supra. The action of the trial court was not an abuse of discretion. It is undoubtedly true that trial courts may at times be confronted with close questions as to whether or not the income from certain properties should be treated as ordinary rentals or as the operation of a business. But where, as here, it awards extraordinary fees in substantial amount to compensate for possible inequities we can see no impropriety.

What we have said above applies equally well to the third point of appeal presented by appellant Powell and disposes of that issue.

[6-8] In their fourth point of appeal, appellant Gramling claims the court was in error in denying her credit in the amount of $487.89 on account of interest, court costs and expenses on the Springgate litigation. Again, the record is not entirely complete but it clearly indicates, and the evidence is sufficient to support the opinion of the trial judge, that these items resulted from her legal fault in including in the sale of the motel property certain property which did not belong to the estate, and that her pursuit of litigation in the Springgate matter was "without just cause." This resulted in a serious loss to the estate from the reduction in the sale price to a new purchaser (for which loss no surcharge was made). The delays caused by her unsuccessful appeal compelled the payment from estate funds of substantial interest for a $7000 deposit which appellant refused to return in the interim to the unsuccessful buyer. This makes up about three-fifths of the total surcharge.

> "When a judgment is recovered, with costs, against any executor or administrator, he shall be individually liable for such costs, but they must be allowed him in his administration accounts, unless it appears that the suit or proceeding in which the costs were taxed was prosecuted or defended without just cause." Probate Code, Sec. 719.

"It is within the discretion of the court to assess these costs against the executor personally, without making any particular finding of mismanagement or bad faith." Title Ins. & Trust Co. v. Gould, 47 Cal.App. 533, 536[4], 191 P. 556, 557. The oral comments of the trial judge do not form a part of the final judgment and cannot be used to impeach the finding and judgment. In re Estate of Bullock, supra, 133 Cal.App.2d at page 549[4], 284 P.2d at page 965. In the present state of the record before us, we cannot say as a matter of law that the court's action in disallowing the credit referred to was incorrect.

The order appealed from is affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.

171 Cal.App.2d 405

Virginia MORALES, a Minor, by her Guardian Ad Litem, Maria H. Morales, Plaintiff and Appellant,

v.

Else Elizabeth THOMPSON, Defendant and Respondent.

Civ. 18308.

District Court of Appeal, First District, Division 2, California.

June 17, 1959.

Rehearing Denied July 17, 1959.

Hearing Denied Aug. 12, 1959.

Action for injuries sustained by a child, one day less than 4 years of age, in collision with automobile driven by defendant, while child was crossing street, and for hospital and medical expenses incurred by child's mother in treatment of injuries. The Superior Court, Monterey County, James Jeffery, J. pro tem., rendered judgment on a verdict for defendant, and plaintiff appealed. The District Court of Appeal, Kaufman, P. J., held that refusal of proffered instruction that a child of the age of injured child was, as a matter of law, incapable of contributory negligence constituted error prejudicial to plaintiff.

Judgment reversed.

1. Witnesses ⚷216

In action for injuries sustained by minor child in collision with automobile driven by defendant, a police report, offered in evidence by plaintiff to rehabilitate the testimony of injured child's mother, was properly excluded under statute prohibiting use of required accident reports as evidence. West's Ann.Vehicle Code, § 488.

2. Automobiles ⚷246(22)

In action for injuries sustained by minor child as a result of collision with automobile driven by defendant, while child was crossing street at or near intersection, giving of instruction on unavoidable accident was confusing and misleading.

3. Appeal and Error ⚷1067
Automobiles ⚷246(35)
Negligence ⚷141(10)

In action for injuries sustained by a child, one day less than 4 years of age, as a result of collision with automobile driven by defendant, while child was crossing street at or near intersection, refusal of plaintiff's proffered instruction that a child of the age of injured child was, as a matter of law, incapable of contributory negligence was error prejudicial to plaintiff.

Theodore H. Cominos, Lawrence Shostak, Salinas, for appellant.

Hoge, Fenton, Jones & Appel, Monterey, for respondent.

KAUFMAN, Presiding Justice.

This is an appeal from a judgment rendered on a jury verdict in favor of the defendant, in an action brought by Virginia Morales, a minor, through her guardian ad litem, her mother Maria Morales, for personal injuries sustained when Virginia came in contact with an automobile driven by the defendant. Maria Morales joined in the suit, her cause of action being for the medical and hospital expenses incurred in the treatment of her daughter's injuries. On appeal, it is argued that the evidence does not support the verdict, and that the trial court erred in rejecting certain evidence and erred in its instructions to the jury.

The facts as revealed by the record are as follows: The accident occurred on February 5, 1957 about 6:30 P.M. at the northeast corner of the intersection of West

Market and Vale Streets in the City of Salinas. Vale Street runs north and south and is 51 feet wide. West Market Street runs east and west and is 72 feet and 7 inches wide with two lanes for east-bound traffic and two lanes for west-bound traffic, separated by a double line. There is a cross-walk 12 feet 7 inches wide from the northeast corner of Vale and West Market to the South curb of West Market. The Morales home is located on the South side of West Market opposite the intersection of West Market and Vale Streets and somewhat southwest of the cross-walk.

At the time of the accident it was dark. There were two street lights, one at the southeast corner of the intersection and one about 50 feet from the northwest corner of the intersection. There is a stop sign on Vale Street at the northwest corner.

Plaintiff's mother, Maria Morales, testified that on the day of the accident, plaintiff Virginia Morales was one day short of being four years old. Plaintiff and her mother left their home and proceeded northward across West Market in the cross-walk. They were going to a grocery store across the street. Plaintiff was wearing a light green dress. Plaintiff held on to her mother's hand until they got to the curb in front of the cross-walk where they stopped. Mrs. Morales "looked to the right and to the left, told her daughter to go ahead and let go of her hand to fix her bandanna." Plaintiff began to cross the street about 5 to 6 feet ahead of her mother. Plaintiff's mother did not see the car hit the child, as she was looking to the right for traffic. She testified, however, that her daughter was definitely in the cross-walk when she was hit. Three witnesses testified that Mrs. Morales did not arrive until a few moments after the accident occurred. There was also a showing that Mrs. Morales had made prior inconsistent statements to a police officer at the scene of the accident and at the time her deposition was taken. Neither the plaintiff nor her mother spoke or understood English, and some of the inconsistencies may have been due to language difficulties.

Defendant was driving west on Market Street in the inside lane, at an approximate speed of 25 miles per hour. As she passed through the intersection of Vale and Market Streets she felt a bump in the front of her automobile, but did not see anything. She had her lights on low beam. She thought the impact occurred past the cross-walk, but was not exactly sure where the child was. Defendant pulled to the side of the road and stopped.

An eye-witness testified that after the accident both plaintiff's mother and the defendant were hysterical. The police officer who arrived at the scene of the accident about 6:40 p. m. testified that the child was found at a point 54.6 feet from the northeast corner of Vale and Market and 34.2 feet from the northwest corner. One of the plaintiff's socks was found some 30 feet 8 inches from the plaintiff, and her shoes and another sock within a ten-foot radius. Defendant's automobile showed damage to the upper front portion of the hood.

[1] Having concluded that the judgment must be reversed because of certain fatal errors in the instructions, it is not necessary to discuss the remaining contentions in detail, except to note that the trial court properly excluded a police report plaintiff's attorney sought to introduce, to rehabilitate the testimony of Maria Morales. Vehicle Code, § 488.

[2] The trial court here gave an instruction on "unavoidable accident." Such an instruction, except in special circumstances not present here, was recently disapproved in Butigan v. Yellow Cab Co., 49 Cal.2d 652, 320 P.2d 500. See also Amar v. Union Oil Co., 166 Cal.App.2d 424, 333 P.2d 449, and Perrotti v. Sampson, 163 Cal.App.2d 280, 329 P.2d 310. We think that under the circumstances of this case the giving of such an instruction was confusing and misleading.

[3] Furthermore, the trial court erred in refusing plaintiff's proffered instruction

that a child of the age of the plaintiff is, as a matter of law, incapable of contributory negligence. The jury was given only general instructions that a child is held to exercise only that quantum of care which a person of like age, experience and development would ordinarily exercise in a similar situation. The uncontroverted evidence established that the accident occurred on the day before Virginia's fourth birthday.

In Ellis v. D'Angelo, 116 Cal.App.2d 310, 253 P.2d 675, we indicated that a 4-year-old child is, as a matter of law, incapable of negligence. We said at pages 315 and 316, of 116 Cal.App.2d at page 678, of 253 P.2d:

> "So far as the count charging the infant defendant with negligence is concerned the question presented to the court is whether as a matter of common knowledge we can say that a child four years of age lacks the mental capacity to realize that his conduct which is not intended to bring harm to another may nevertheless be reasonably expected to bring about that result. In the absence of compelling judicial authority to the contrary in the courts of this state we are satisfied that a four year old child does not possess this mental capacity. In the case of Crane v. Smith, 23 Cal.2d 288, 301, 144 P.2d 356, 364, the court said of a three year old child: 'And since Janice was too young to be guilty of contributory negligence, the appellant's liability to her is established.' In support of this holding the court cited Gonzales v. Davis, 197 Cal. 256, 240 P. 16, which involved a five year old child.
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> "No purpose will be served by reviewing all the authorities. None has been found in this State which we feel compels us to hold that a four year old has the mental capacity for negligent conduct. It is stated in a note collecting the cases from other jurisdictions in 107 A.L.R. 102 et seq.: 'In a majority of the cases it seems that the courts have regarded a child between the ages of four and five years as incapable of personal negligence, the rule of conclusive incapacity applying to a child of such an age.'[*] (See further cases collected in the supplement to this note in 174 A.L.R. 1119.) We are satisfied from our own common knowledge of the mental development of four year old children that it is proper to hold that they have not at that age developed the mental capacity for foreseeing the possibilities of their inadvertent conduct which would rationally support a finding that they were negligent."

The same test is applied in determining the contributory negligence of a child of such tender years. We think the refusal of the instruction in the instant case was prejudicial to the plaintiff.

In view of the foregoing, the judgment must be and is hereby reversed.

DOOLING and DRAPER, JJ., concur.

Hearing denied; SCHAUER and McCOMB, JJ., dissenting.

BRAY, P. J., and TOBRINER, J., sitting pro tem.

171 Cal.App.2d 377

Arthur H. LUCHS, Plaintiff, Cross-Defendant and Respondent,

v.

Arwin E. ORMSBY, Defendant, Cross-Complainant and Appellant.

No. 17717.

District Court of Appeal, First District, Division 1, California.

June 17, 1959.

As Amended on Denial of Rehearing July 15, 1959.

Action for dissolution of a partnership and for an accounting. The Superior Court, Alameda County, A. T. Shine, J., entered judgment adverse to defendant and he appealed. The District Court of Appeal, Bray, P. J., held that where defendant stated at the trial that he would accept the accountants' report and their integrity, and any incompleteness in their report was either through the negligence of the keeping of the partnership books or through defendant's refusal to have his other businesses looked into, and it did not appear that a better accounting job could possibly have been done under such circumstances even with the use of a referee, accounting would not be deemed inadequate at defendant's insistence.

Judgment affirmed.

1. Partnership 🔑335

Where defendant in an action for dissolution of a partnership and for an accounting stated at the trial that he would accept the accountants' report and their integrity, and any incompleteness in their report was either through the negligence of the keeping of the partnership books or through defendant's refusal to have his other businesses looked into, and it did not appear that a better accounting job could possibly have been done under such circumstances even with the use of a referee, accounting would not be deemed inadequate at defendant's insistence.

2. Partnership 🔑336(3)

In action for dissolution of a partnership and for an accounting, evidence supported findings generally in favor of plaintiff, including findings that defendant appropriated certain partnership moneys to his own use, kept certain discount moneys, wrongfully paid his wife partnership money, wrongfully expropriated partnership funds by way of rentals, expropriated a certain sum as an interest charge, and that plaintiff had not overdrawn and was entitled to half of moneys expropriated by defendant and to interest thereon. West's Ann.Civ.Code, § 3287.

3. Partnership 🔑71

In an action for dissolution of a partnership and for an accounting, a court cannot create a new agreement for the parties.

4. Partnership 🔑75

A partner is not entitled in the absence of a special agreement among the partners to interest on his capital expenditures.

5. Partnership 🔑75

A partner may collect interest where partnership funds have been wrongfully withheld or where a partner in charge of firm books wrongfully makes an overdraft.

6. Partnership 🔑308

Where a partner was guilty of wrongful diverting, expropriating, and receiving to himself of partnership moneys, interest was allowable to the other partner from the time he filed his complaint for dissolution and for an accounting. West's Ann. Civ.Code, § 3287.

7. Partnership 🔑325(1)

In an action for dissolution of a partnership and for an accounting, assessment of receiver's costs, fees and expenses is within the sound discretion of the trial court, and an assessment imposed on the party whose conduct made the appointment of a receiver necessary is proper.

8. Judgment 🔑326

In action for dissolution of a partnership and for an accounting, trial court did not err in amending nunc pro tunc its judgment based on the fact that in the original judgment there were certain mistakes consisting of clerical errors and omissions. West's Ann.Code Civ.Proc. § 473.

9. New Trial 🔑104(1)

Where the allegedly newly discovered evidence upon which a motion for new trial was based would have been cumulative only, trial court would not be deemed to have abused its discretion in denying such motion.

10. New Trial 🔑99

On a motion for new trial based on newly discovered evidence, much must be left to the discretion of the judge who tried the case, since he is the best judge as to whether or not the proffered testimony, had it been received, would have changed the decision, and as to whether or not if a new trial were to be granted, its receipt would probably result in a different termination of the litigation.

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Koford, Macleod & Koford, Oakland, for appellant.

Clark, Heafey & Martin, Edwin A. Heafey, Oakland, Richard P. Lyons, South San Francisco, for respondent.

BRAY, Presiding Justice.

In an action for dissolution of a partnership and for an accounting, plaintiff was awarded judgment against defendant for $47,371.93. Defendant appeals.

Question Presented.

1. Adequacy of the accounting.

2. Sufficiency of the evidence to support the findings:

(a) that Blue Heron Crane Company[1] was solely owned by defendant;

(b) that Company should receive $4.50 per hour for labor performed on subcontracts received from Blue Heron Cranes, Limited;[2]

(c) that certain expenditures charged against Limited were properly those of Company;

(d) that defendant appropriated to his own use $17,306.25 of Limited's moneys;

(e) that $11,900 discount moneys were kept by defendant;

(f) that defendant wrongfully paid his wife $5000 in partnership money;

(g) that defendant wrongfully expropriated partnership funds by way of rentals;

(h) that defendant expropriated $420 as interest charge;

(i) that plaintiff had not overdrawn and is entitled to half of moneys expropriated by defendant and to interest thereon.

3. Did the court err in imposing costs and fees of receiver on defendant?

Facts.

In August of 1950, plaintiff and defendant formed a partnership under the name of Blue Heron Cranes, *Limited*, pursuant to an oral agreement for the purpose of fulfilling government contracts for certain forged metal items. The business of the partnership, Blue Heron Cranes, *Limited*, was conducted in Oakland, California, on the premises of another company, called Blue Heron Crane *Company*. The defendant was found to be the sole owner of Blue Heron Crane *Company*, although at the trial it appeared that there was some sort of "family partnership" in *Company* between defendant, his wife and children. It should be noted that the firm named Blue Heron Cranes, *Limited*, is the partnership between plaintiff and defendant under consideration on this appeal, whereas the firm named Blue Heron Crane *Company* is the firm which defendant either completely owned or completely controlled.

On May 27, 1952, the oral partnership between defendant and plaintiff was formalized by a writing, which was retroactive to January 1, 1952.

The partnership shared the offices, salaries and expenses with defendant's company, including the salaries of the defendant's sisters who worked in defendant's company's office shared by the partnership. The *company* did much of the work for the *partnership*, on a subcontract basis, but the terms of the agreement for compensation were in dispute.

Defendant, during 1950 and 1951, was the principal manager of the partnership, plaintiff being employed full time as vice president of another firm in South San Francisco. In about March of 1952, plaintiff resigned his position with the South San Francisco firm, and spent about half his time on partnership business, where he had a desk "for a few hours" which he occupied every day or every other day, where he remained until sometime in the spring of 1953.

The bookkeeping of the partnership was done by a firm called the "Accounting Car Bookkeeping Service" and more particularly by one Givich, a member of that firm. This accountant could only make entries in the firm's books as they were reflected by the firm's transactions; since many of the transactions were not reflected Givich was asked by defendant on December 22, 1953, to include certain transactions on the partnership books and on defendant's personal income tax, which were not shown by any records of Company. (This request led to Givich's quitting the job.) Because of this sort of thing the accountants who prepared the tentative account for the receiver in this action stated in their cover letter: "The bookkeeping was quite inadequate for the operations involved and in some cases entries were made on the books which were contrary to fact."

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[1] Hereinafter called "Company."

[2] Hereinafter called "Limited."

On April 29, 1953, plaintiff sent defendant a letter notifying him that the plaintiff wished to dissolve the partnership within the sixty-day period as provided by the written agreement. The winding-up process continued through November of 1953. Plaintiff became suspicious that the defendant had been defrauding him and withdrew $9,500 as his half share of the partnership assets, at which time he also sent a letter to defendant informing him of his purpose in so doing. When the parties could not agree to a settlement of accounts, this litigation followed.

[1] 1. Was the Tentative Accounting Prepared for the Trial Herein by Arrangement of the Receiver Adequate, or if Inadequate, was it Acquiesced in by the Defendant and His Trial Counsel?

Defendant throughout his brief appears to be attacking the tentative accounting made by D. A. Sargent & Co. at the request of the receiver, Charles R. Ringo. Defendant lays much stress on the fact that it was a "tentative accounting." It would seem that it was "tentative" only in the sense that it depended upon final determination of the assets in the possession of the partnership and the findings of the trial court.

The receiver's accountants stated that "It apparently would be possible to make a complete accounting for the Blue Heron Crane, Ltd., *if at all, only* by examining the personal *records of the two partners and the records of the other companies in which they have interests.*" (Emphasis added.) Defendant refused to make Company's books available to the accountants.

Another reason why the accounting was not as it might have been was the slip-shod manner in which the books of the partnership were kept. "The records made available to us for examination were incomplete. Many of the partnership's transactions indicated by the records were not accounted for on the books. The bookkeeping was quite inadequate for the operations involved and in some cases entries were made on the books which were contrary to fact." The defendant would appear to have no one but himself to blame for the inadequacy of the books, since defendant was certainly the principal manager of the partnership's affairs. This is apparent from the fact that the partnership's business was carried on from the defendant's business premises, the books of the partnership were kept in Company's office, and the accountants for the partnership were hired by defendant and were the same as those employed for Company.

Defendant stated at the trial that he would accept the accountants' report and their integrity. Defendant's counsel stated in his trial brief that the receiver and his accountants did a "splendid and impartial job."

The accounting report appears to be as complete as possible under the circumstances. Any incompleteness was either through the negligence of the keeping of slip-shod partnership books, or through defendant's refusal to have his "other businesses" looked into. It does not appear that a better job could possibly have been done under these circumstances even with the use of a referee.

In his contention that the accounting was inadequate defendant has cited cases such as Mosher v. Helfend, 7 Cal.App.2d 48, 44 P.2d 1050, and Sausser v. Barrack, 123 Cal. App.2d Supp. 948, 266 P.2d 231, which hold in effect that a personal judgment cannot be rendered against a partner for unliquidated claims without a full accounting. Here, as full an accounting was had as the circumstances and the position taken by defendant would permit. Moreover, defendant acquiesced in the account as presented. The trial court here followed the procedure set forth in Steinberg v. Goldstein, 129 Cal.App.2d 682, 278 P.2d 22, in that after a trial, it rendered its interlocutory decree subject to the final accounting and sale of the partnership assets. After receiving the final account and after all the assets had been converted into cash, it rendered its decree after plaintiff had waived his rights to certain undetermined items held by the receiver.

2. Sufficiency of Evidence.

[2] (a) Blue Heron Crane Company.

The court found that Company was solely owned by defendant. Defendant testified that it was a family partnership owned by his wife, his seven children and himself. Plaintiff testified that defendant told him that defendant was the owner. Moreover, defendant was the sole manager and it clearly appears that Company was completely in his control. The trier of the fact had the right to choose between defendant's statement and that of plaintiff backed up by defendant's complete control. Whether Company was "solely owned" or "solely controlled" would make no difference in the determination of this case.

(b) Subcontracts.

[3] The court found that it was orally agreed that, for labor performed by Company on subcontracts received from Limited, Company would bear the cost of the overhead. Defendant contends that the agreement found by the court was not that testified to by either party. There was considerable conflict between the parties. Plaintiff testified that a temporary rate of $4.50 per man per hour was agreed to be paid Company but that it was to be in effect only temporarily until the costs could be determined so that a basic rate of cost plus ten per cent arrangement could be worked out. Defendant on the other hand vehemently insisted that the rate was $4.50 per hour, although later he contended that Limited was to bear the cost of the overhead. Introduced in evidence by defendant was a writing by plaintiff which indicates that the agreement was as found by the court. Plaintiff, however, while admitting making the writing, claimed that it was not meant as an agreement but merely as a "conversational note." Of course, the trial court could not create a new agreement for the parties. See Vierra v. Shaffer, 113 Cal.App.2d 768, 772, 248 P.2d 992. However, it did not do so. In the light of the conflicting evidence the court's conclusion as to what the parties agreed, is supported.

(c) Company expenditures were charged against Limited.

The court found that expenditures totaling $34,974 charged to Limited by defendant were properly charged against Company. Defendant's contention that they were Limited's obligations is based primarily upon his contention that on the subcontract work Limited was to pay the overhead. As we have pointed out, the trial court's finding that this was not the agreement is supported; therefore, the court was correct in charging these expenses to defendant. This finding is based on some 291 checks drawn by either defendant or his sisters on Limited's bank account in order to pay Company's expenses.

The trial was recessed for briefing. Thereafter, in open court, plaintiff's counsel stated that his brief itemized these checks and that defendant's counsel was "willing to stipulate with us that the checks itemized in our brief * * * are in custody of the receiver and that they may be referred to by the Court if the Court seeks to check further than our briefs." Defendant's counsel so stipulated. Thus, no attack was made upon the correctness of the itemizations as they appear in plaintiff's brief. He now attacks their correctness by attempting to show discrepancies between the itemizations in the brief and the invoices in payment of which the various checks were issued. In view of the stipulation it is too late to do that.

Moreover, the so-called discrepancies in most instances would not change the situation as, if defendant's version of the items is correct, they would still be chargeable to overhead; for example, one item shows payment for a "welding rod" and defendant claims it was "payment on rental purchase plan of a portable welder." Another shows a mistake in the correct number of a check; another shows an expenditure for "shipping labels and packing envelopes" instead of "purchase orders, envelopes and invoices." Included are various items of fuel expense which defendant claims plaintiff agreed that Limited should pay. Plaintiff denied such an agreement, and the court believed plaintiff. Defendant claims that the fact that plaintiff O.K.'d many of the items shows that they were to be charged to Limited. Plaintiff testified that he O.K.'d them for later adjustment and that as to one transaction his O.K. was inadvertent. Again, the effect of plaintiff's action in this respect was a matter for the trial court to weigh in connection with the other circumstances.

(d) Defendant appropriated to his own use $17,306.25.

The court found that that sum was properly moneys of Limited. Some of the items making up this amount were shown by checks admittedly cashed by defendant. As to them and all the other items, some of the items were not shown on the partnership books. As to all of them defendant claimed their amounts had been divided between himself and plaintiff. Plaintiff denied ever receiving any portion of them. There was clearly a conflict in the evidence which the court resolved. Defendant contends that plaintiff's testimony concerning these amounts is unbelievable. It appears that it is just as believable as is defendant's, who admittedly cashed the various checks. There were numerous cash transactions between the partners which did not go through the partnership accounts. In many of these defendant deposited the proceeds in his personal account, writing plaintiff a personal check for half the amount. Plaintiff acknowledged receipt of these checks. Defendant had no check stubs or cancelled checks for the other amounts. Plaintiff denied defendant's claim that some of the divisions of money were made in cash. It was the duty of the trial court to resolve these conflicts and it did. For computing interest the court took the dates on the various checks cashed by defendant.

(e) Discount moneys.

The court found that defendant wrongfully expropriated $11,900 representing payment of discount moneys by Womack for the performance of partnership subcontract work. Womack was hired by the partnership to do some subcontracting work for it for which he received $42,134.52. He agreed with *Company* to pay the latter a certain fee for the use of *Company's* premises. The total amount paid by Womack under the agreement was $11,900. When plaintiff inadvertently happened upon this agreement (defendant did not tell him of it), defendant told him that it was defendant's personal business and none of plaintiff's. The agreement stated that the payment was "to offset the cost of furnishing covered space, electricity, and other shop facilities supplied * * *" Plaintiff testified that $75 per month would have been a reasonable value for the space and facilities provided, and that it would have given Company a reasonable profit. Womack worked on Company's premises for 16 or 17 months which would have amounted to a total reasonable charge of $1,200–$1,275 instead of the $11,900 defendant received. The cost of Womack's services to the partnership would have been considerably diminished without this apparent kick-back to defendant. The court was justified in so finding and holding that the agreement amounted to an expropriation by defendant of partnership money.

(f) Payment to defendant's wife.

The court found that defendant wrongfully paid to his wife $5,000 of partnership money. Defendant admitted paying this sum to her and she admitted receiving it. However, both contended that it was in consideration of her signing a continuing guaranty arrangement so that the partnership could borrow money from the bank. Defendant at first denied knowledge of the agreement with the wife. Plaintiff testified that he had objected to any payment being made to her. The bank's representative testified that the only reason her signature was required was because of her community interest in her husband's property. Plaintiff O.K.'d one of the invoices involved in this transaction, but testified that he did it inadvertently. It cannot be said that the trial court did not have substantial evidence upon which to base the finding that the payment of partnership funds to defendant's wife was unlawful.

(g) Rentals.

The court found that defendant improperly charged rentals of $2,400 against the partnership. Defendant admitted making this charge but claimed that there had been an agreement, since so much of the partnership "stuff" was in Company's plant, that extra rent was necessary. Plaintiff denied that there was any such agreement. Further, defendant's bookkeeper had no recollection of any such agreement and stated that if there had been it would have been reflected in the books. Obviously the trial court's resolving of this conflict was supported.

(h) Interest charge.

[4] The court found that defendant improperly charged $420 for interest on partnership capital contributions. A partner is not entitled in the absence of a special agreement among the partners to interest on his capital contribution. (38 Cal.Jur.2d p. 134, § 161.) Defendant claimed an oral agreement with plaintiff. Plaintiff denied there was such agreement. The trial court resolved the conflict.

(i) Plaintiff did not overdraw and is entitled to half of moneys expropriated by defendant and to interest thereon.

[5] The court so found. The withdrawal of $8,000 by plaintiff does not come close to his share of the amounts found to be expropriated by defendant and to which the court held that he was entitled. Normally interest is not allowable on an unliquidated claim until the claim has been reduced to judgment. Cox v. McLaughlin, 76 Cal. 60, 67, 72, 18 P. 100. However, Civil Code, § 3287 provides: "Every person who is entitled to recover damages certain, *or capable of being made certain by calculation*, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day * * *" (Emphasis added.) A partner may collect interest where partnership funds have been wrongfully withheld or where a partner in charge of firm books wrongfully makes an overdraft. 38 Cal.Jur.2d 136–137, § 162; Forsyth v. Butler, 152 Cal. 396, 93 P. 90; Watson v. Kellogg, 129 Cal.App. 592, 599, 19 P.2d 253.

In Bowman v. Carroll, 120 Cal.App. 309, 312–313, 7 P.2d 734, the court reiterated the general rule that interest is generally not allowable on unascertained balances remaining in one partner's hands after dissolution. But the court applied the qualification to the rule that where equitable circumstances warrant, interest will be allowed from the time of settlement of the partnership accounts. The court upheld the allowance of interest from the time of the filing of the complaint by the plaintiff. The court, however, in Freese v. Smith, 114 Cal.App.2d 283, 250 P.2d 261, held that the allowance of interest by the trial court was error where none of the factors of the Bowman case was present, viz., where the defendant sold partnership assets and kept proceeds, where she denied the existence of the partnership, where she prolonged litigation, and where she altered book entries which had admitted the plaintiff's partnership interest. More recently in Speka v. Speka, 124 Cal.App.2d 181, at page 187, 268 P.2d 129, 132, the court after citing the above authorities, states: "In the instant case the amount owing by appellant was undetermined at the termination of the partnership. But in view of the conduct of appellant, it cannot be said that the trial court abused its discretion in penalizing him with interest from the date of the dissolution of the partnership."

[6] Defendant seeks to distinguish these cases by showing that in the present case the defendant was not guilty of any extremely inequitable conduct. If the wrongful diverting, expropriation, and receiving, to himself, of partnership moneys, is not extremely inequitable conduct, it is difficult to picture what would be. The defendant also claims that the affairs of the partnership were in such a terrible state that they required a judicial decision based on a lengthy accountant's report to ascertain with any certainty the respective rights of the parties. The defendant has no one to blame but himself for the slipshod manner in which the partnership accounts were kept.

The trial court did not set any arbitrary dates from which interest was to start running. Where the dates of the transactions were calculated and ascertained, interest was allowed from such dates. Where the specific dates were not ascertained, interest was allowed from the last day of the year in which the transaction was found to have occurred. The trial court properly allowed interest within the terms of Civil Code, § 3287.

3. Receiver's Costs, Fees and Expenses.

[7] The rule is that the assessment thereof is within the sound discretion of the trial court (Owen v. Cohen, 19 Cal.2d 147, 155, 119 P.2d 713; Stanton v. Pratt, 18 Cal.2d 599, 602–603, 116 P.2d 609; Baldwin v. Baldwin, 82 Cal.App.2d 851, 856, 187 P.2d 429), and the assessment imposed on the party whose conduct made the appointment of a receiver necessary is proper (68 C.J.S. Partnership § 448, p. 1003). In this respect it cannot be said that the trial court would have abused its discretion in assessing defendant with the entire expense of the receiver.

[8] However, it appears in this action that the trial court did not assess the defendant with the entire costs. By its judgment of October 18, 1956, amending nunc pro tunc the judgment of September 14, 1956, the trial court found that the total amount paid to the receiver was $4,759.16 as of January 2, 1955. In addition the receiver was entitled to an additional fee of $887.65 for its services as respects the final accounting. The total amount of receiver's fees either paid or owing was $5,646.81. Half this total, or $2,823.40, was taxed to the defendant. Thus the defendant in fact was only taxed for half of the receiver's fees. There was no error in making such amendment. The amending judgment stated that in the original judgment there were certain clerical mistakes consisting of clerical errors and omissions. The trial court has the power to amend or correct its judgments because of clerical errors. Code Civ.Proc. § 473; Nacht v. Nacht, 167 Cal.App.2d 254, 334 P.2d 275. The correction made by the trial court was in effect the correction of the amount of fees taxed to defendant, and the correction inured to defendant's benefit, since he was taxed with only half rather than the entire amount of the receiver's fees, even though the amount previously calculated as the entire fees was less than half the entire amount under the amended judgment. There was no error in the court's action in correcting the judgment nor in taxing defendant with one-half of the receiver's fees and expenses.

The record shows that the trial court, the receiver and the accountants working for the receiver were confronted with a very confused state of affairs as respects the partnership and defendant's other business, due primarily to the manner in which the books were kept under defendant's direction. The trial court solved this confusion as best it could, and its action is as well supported as was possible under the circumstances.

[9, 10] There was no abuse of discretion in the denial of defendant's motion for new trial. The alleged newly discovered evidence would have been cumulative only. "Under such circumstances much must be left to the discretion of the judge who tried the case. He is the best judge as to whether or not the proffered testimony, had it been received, would have changed the decision, and as to whether or not had a new trial been granted, its receipt would probably result in a different termination of the litigation." Singh v. Banes, 129 Cal.App.2d 395, 402–403, 277 P.2d 89, 94.

Defendant's petition that this court receive new evidence is denied. See In re Estate of Schluttig, 36 Cal.2d 416, 224 P.2d 695; Bauer v. Bauer, 38 Cal.App.2d 309, 317, 100 P.2d 1070, 101 P.2d 1117.

The judgment is affirmed.

FRED B. WOOD, J., and TOBRINER, J., concur.

O W E S T KEY NUMBER SYSTEM

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171 Cal.App.2d 417

John LYKE and Naomi Lyke, Plaintiffs, Cross-Defendants and Appellants,

v.

C. E. PURSLEY and Louie Zeravica, Defendants, Cross-Complainants and Respondents.

Civ. 5680.

District Court of Appeal, Fourth District, California.

June 17, 1959.

Action by lessees, who had viewed premises when they negotiated for lease of motel which was under construction and who occupied the incomplete motel for several weeks before executing lease, against lessors for fraud and misrepresentation and for rescission for failure of consideration. The Superior Court of Kern County, Warren Stockton, J., rendered judgment for lessors for balance of rent due for use of motel property, and lessees appealed. The District Court of Appeal, Stone, J. pro tem., held that where both lessors and lessees were aware of need of license to occupy and operate motel, neither could enforce terms of lease for period during which lessees occupied premises without license.

Reversed.

1. Fraud 🔑58(4)

In action by lessees, who had viewed premises when they negotiated for lease of motel which was under construction and who occupied the incomplete motel for several weeks before executing lease, against lessors for fraud and misrepresentation for failure to have motel completed at time lessees took possession, evidence sustained finding that lessees were not victims of fraud or misrepresentation.

2. Licenses 🔑39.43

Not all contracts which involve illegal or unlicensed undertaking are unenforceable, but court must consider nature of undertaking in light of licensing statute.

3. Licenses 🔑39.43

If purpose of regulation is primarily for public protection, public policy requires that contracts within purview of statute between unlicensed persons be held unenforceable.

4. Licenses 🔑39.43

It is not necessary that licensing statute contain provision making contracts between unlicensed persons unenforceable in order to render a contract, which is between unlicensed persons within purview of the statute, unenforceable.

5. Innkeepers 🔑4

Permit or license to occupy or lease motel is required for protection of public. West's Ann.Health & Safety Code, § 18600 et seq.

6. Innkeepers 🔑4

Where both lessors and lessees were aware of need for license or permit to occupy and operate motel, neither could enforce terms of lease for period during which lessees occupied premises without license. West's Ann.Health & Safety Code, § 18600 et seq.

7. Innkeepers 🔑4

Where lessors could not collect rental due from lessees under lease because neither had obtained permit for occupancy of motel, fact that lessees had occupied motel for 4 months without paying rent did not vitiate notice of rescission of lease by lessees. West's Ann.Health & Safety Code, § 18600 et seq.

8. Innkeepers 🔑4

Under statute which requires license for occupation of motels, lease of partially constructed motel which had not been licensed for occupancy was not, as such, illegal agreement, and when lessees commenced occupation of unlicensed motel, lease became illegal simply to extent that it was used to facilitate unlicensed occupancy. West's Ann.Health & Safety Code, § 18600 et seq.

9. Innkeepers 🔑4

Where lessees had valid lease to partially completed motel, and they occupied motel before occupancy license had been obtained therefor, illegality of occupation did not preclude them from any right they had to recover rental paid under lease. West's Ann.Health & Safety Code, § 18600 et seq.

10. Landlord and Tenant 🔑34(5)

Fact that lessees, while occuping partially completed motel for four and one half months, helped lessors in completion thereof and correction of defects found therein by housing inspector did not preclude lessees from forever rejecting or rescinding lease for failure of consideration on ground that motel had not been completed and that occupancy permit had not been obtained, and rescission after the four and one half month period was not barred on ground of laches. West's Ann. Health & Safety Code, § 18600 et seq; West's Ann.Civ.Code, § 1689, subd. 2.

◆

Maas & Nairn, Bakersfield, for appellants.

Schwabacher & Cosgrove, Lancaster, for respondents.

STONE, Justice pro tem.

This is an appeal from a judgment in favor of defendants-respondents and against plaintiffs-appellants for balance of rent due for use of motel property. On August 9, 1955, respondents obtained a permit to construct a motel on property located near Rosamond in Kern county. While construction was in progress during January, 1956, appellants discussed leasing the premises from respondents. Approximately a month later all parties agreed upon the conditions of a proposed lease for a five year term. As the improvements had not been completed, the beginning date of the five year term was not inserted in the lease. This was the situation on March 5, 1956, when appellants moved onto the property and paid respondents $3,000 advance rental. The lease provided no forfeiture clause, but did state that the $3,000 covered the rent for the last two months. The record indicates that respondents were in need of money to complete construction of the improvements and requested this advance payment of $3,000 before the lease had been completely executed. Beginning on March 5th, appellants lived on the property and helped with the construction work. Late in March or early April the parties inserted March 20, 1956, in the lease as the beginning date of the five year term. This date was used because that was when the first room was rented. Upon backdating the beginning of the term, the lease was completely executed.

Although appellants rented some rooms beginning March 20th, the motel was only partially completed, and on May 20, 1956, an inspector for the Division of Housing found the premises incomplete and improperly constructed in ten specific respects. Written notice of the defects and an order to correct them was served on respondents and appellants on June 6. The notice contained a statement that no permit to occupy the premises had been issued. By July 16, 1956, the defects had not been corrected and appellants refused to pay any more rent. Whereupon, respondents served them with a three-day notice to pay rent or quit the premises. Appellants countered on July 18 with a notice of rescission of the lease agreement upon the ground of failure of consideration. Respondents finally completed the premises and secured a license to occupy the same for motel purposes on August 14, 1956.

[1] Appellants' first assignment of error is that the trial court erred in denying them damages by reason of respondents' alleged fraud and misrepresentation. The gist of appellants' contention is that respondents agreed to have the motel completed at the time appellants took possession of the property. However, the evidence discloses that appellants were well aware of the condition of the property and the motel buildings when they went into possession. They viewed the premises when they negotiated for the lease in January, 1956, and also when the terms of the lease were verbally agreed upon in February, 1956. Most significant is the fact that they occupied the property for several weeks before executing the lease. Hence, there is ample evidence of a substantial nature to support the trial court's finding that appellants were not the victims of fraud or misrepresentation. An appellate court will not attempt to reweigh the evidence under such a state of the record. Berniker v. Berniker, 30 Cal.2d 439, 182 P.2d 557; In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689.

[2–4] Appellants contend they had the right to rescind the lease because it was an illegal agreement. Their argument is that the state law, section 18600 et seq. of the Health and Safety Code, prohibits the use or lease of a motel without the approval of and licensing by the Division of Housing of the State of California. The undisputed evidence is that respondents secured a permit to construct a motel and that the premises were not completed or approved nor licensed for occupancy until August 14, 1956. Thus, the operation of the motel pursuant to the lease from March 20, 1956, to July 18, 1956, was contrary to law, as neither lessors nor lessees had obtained a permit or license. Not all contracts which involve an illegal or unlicensed undertaking are unenforceable. Norwood v. Judd, 93 Cal.App.2d 276, 209 P.2d 24. The court must consider the nature of the undertaking in the light of the licensing statute. If the purpose of the regulation is primarily for public protection, public policy requires that contracts within the purview of the statute between unlicensed persons must be held to be unenforceable. Loving & Evans v. Blick, 33 Cal.2d 603, 607, 204 P.2d 23; Lewis & Queen v. N. M. Ball Sons, 48 Cal.2d 141, 150, 308 P.2d 713. It is not necessary that the licensing statute contain a provision that contracts between unlicensed persons are unenforceable. The court said in Orlinoff v. Campbell, 91 Cal.App.2d 382, at page 385, 205 P.2d 67, at page 69:

> "The Highway Carriers' Act is clearly one for regulation of the industry and not for revenue alone. There is no provision in the act that contracts made by unlicensed carriers are void or unenforceable. The question whether the courts should impose that additional penalty seems not to have been decided in any reported case. As we shall see, the broad basis for the doctrine that contracts of certain unlicensed persons are unenforceable is that the courts should not lend their aid to the enforcement of contracts where perfomance would tend to deprive the public of the benefits of the regulatory measures."

[5, 6] A permit or license to occupy or lease a motel quite obviously is required for the protection of the public. Section 18600 et seq. of the Health and Safety Code places the duty of enforcing the provisions relating to motels under the jurisdiction of the Division of Housing. The permit for construction requires the filing of the proposed plans and specifications for approval, and they must meet certain health and sanitary requirements. The final permit to occupy or lease the premises issues only when those conditions have been fulfilled. In this case the application for permit to construct was approved August 9, 1955, and contained a written warning that the document was simply a permit to start construction, and that a separate permit or license was required before the premises could be occupied. The respondents gave possession to appellants on March 5, the lease was completed March 20, but the permit or license was not issued until August 14, 1956. On May 20, 1956, an inspector for the Division of Housing found the buildings incomplete and specified ten defects. It is significant that of the ten violations, eight pertained to health, sanitation and fire hazards. The well being of the public was being jeopardized by the failure of the parties to secure the necessary license to occupy and rent the motel. The record reflects that both lessors and lessees were aware of the need for a license or permit to occupy and operate a motel. Therefore, neither the appellants nor respondents can enforce the terms of the lease from March 20, 1956, to July 19, 1956, the period during which the lease was used as an instrument for the operation of the motel without a license. The court's finding that appellants were indebted to respondents for rent during the period that the premises were operated without a license is contrary to law and will not support the judgment.

[7] The appellants' third specification of error is that the court erred in finding appellants' rescission of July 18 was ineffective because they failed to return everything of value they had received from respondents. According to the record, the only thing of value appellants received from respondents was the unpaid balance

of rent for the period of March 20, 1956, to July 19, 1956. Since we have concluded that this amount cannot be collected by respondents because of the illegal nature of the occupancy, any failure to restore the rent would not vitiate the notice of rescission if otherwise valid.

[8, 9] The question is whether or not the illegal occupation pursuant to the lease precludes the appellants from recovering the $3,000 payment. The lease is dated January 21, 1956, the $3,000 payment was made March 5, 1956. Though dated January 21, 1956, the lease was not completely executed until the beginning date of the term was fixed as of March 20, 1956. The occupation of the premises pursuant to the lease did not commence until March 20, 1956. Since the lease, as such, was not an illegal agreement, and became so simply to the extent that it was used to facilitate the unlicensed use of the premises between March 20, 1956, and July 19, 1956, there is no legal restraint against appellants recovering the $3,000 advance payment made March 5, 1956. There is nothing in the record to indicate that the parties contemplated an illegal use of the premises at the time payment was made. In fact, the lease itself makes no mention of an uncompleted building and assumes a motel in being. Thus, if appellants have valid legal grounds for recovering the $3,000 down payment, aside from the question of illegality, they should prevail.

[10] Appellants properly pleaded a failure of consideration as well as fraud and misrepresentation. Although appellants worked on the buildings and grounds and otherwise aided in the work aimed at the completion of the improvements, they also frequently called upon respondents to complete the work. Some of the rooms were rented while others were under construction, and this state of turmoil continued from March 5, 1956, until July 18, 1956, at which time appellants gave notice of rescission. They cited, as reasons therefor, respondents' failure to complete the improvements and to secure a permit to operate the premises as a motel. They also specified respondents' failure to comply with the construction and repair orders of the State Department of Housing and of the Health and Safety Code of the State of California. Civil Code, § 1689, subd. 2, authorizes a rescission upon the ground of failure of consideration. The record supports the appellants' reasons for rescission, in that the permit to lawfully operate the premises was not issued until August 14, 1956, nearly a month after the notice of rescission was served. As stated hereinbefore, the Division of Housing, Department of Industrial Relations, served written notice upon respondents and notified appellants of the defects in the building, together with a demand to correct them. The period of time appellants worked with respondents and gave them an opportunity to complete the premises, namely, from March 5, 1956, to July 18, 1956, constituted a reasonable period under the circumstances. The fact that appellants worked with the respondents to complete the building and correct the defects does not preclude them from forever rejecting or rescinding the agreement. Furthermore, there is nothing in the record to indicate that the respondents were in any way harmed or damaged by reason of anything appellants did, nor by appellants' five-month delay in giving notice of rescission. In fact, the work appellants performed on the premises, as well as the rent they paid during the five-month period of delay, inured to respondents' benefit. The facts of the case fall within the rule laid down in Esau v. Briggs, 89 Cal.App.2d 427, at page 438, 201 P.2d 25, at page 32, wherein the court said:

> "Just how long plaintiff delayed in commencing the action after becoming aware of his right to rescind is not clear, but it was not longer than five months. The doctrine of laches does not rest entirely upon lapse of time, and it does not require any specified period of delay. Neet v. Holmes, supra, 25 Cal.2d [447] 460, 154 P.2d 854. Whether a defrauded party has rescinded 'promptly' depends upon all the circumstances of the par-

ticular case. Noll v. Baida, 202 Cal. 98, 109, 259 P. 433. It does not appear, in the present case, that the defendant suffered any injury on account of plaintiff's delay." See also Warfield v. Richey, 167 Cal.App.2d 93, 334 P.2d 101.

The judgment is reversed.

MUSSELL and SHEPARD, JJ., concur.

Vincent J. HORTON, Plaintiff and Appellant,

v.

Norvin R. KYBURZ, Defendant and Respondent. *

Civ. 9555.

District Court of Appeal, Third District, California.

June 25, 1959.

Rehearing Denied July 7, 1959.

Hearing Granted Aug. 21, 1959.

Son of deceased husband brought action against grandnephew of deceased second wife to have grandnephew declared a constructive trustee as to an undivided half interest in realty, which had been held by husband and second wife as joint tenants, on ground that they had orally agreed that survivor would devise realty one half to husband's son and one half to second wife's relatives. The grandnephew as a defense contended that he was a bona fide purchaser of the realty in that second wife conveyed a joint tenancy interest to him in consideration for his maintaining and improving the realty. The Superior Court, Sacramento County, Gordon A. Fleury, J., entered judgment adverse to the son, and he appealed. The District Court of Appeal, Warne, J. pro tem., held that evidence sustained finding that grandnephew was a bona fide purchaser of the realty for a valuable consideration, so that his joint tenancy from wife cut off any right that son might have had to enforce a trust against the realty.

Judgment affirmed.

1. Appeal and Error 🔑1075

Where plaintiff appealed from entire judgment in favor of defendant on both causes of action, but plaintiff stated in his briefs that he was only prosecuting the appeal from the trial court's decision for defendant on the first cause of action, judgment, insofar as it affected property mentioned in second cause of action, was required to be affirmed by District Court of Appeal.

2. Vendor and Purchaser 🔑242

In action by son of deceased husband against grandnephew of deceased second wife to have grandnephew declared a constructive trustee as to undivided half interest in realty, which had been held by husband and second wife as joint tenants, on ground that they had orally agreed that survivor would devise realty one half to husband's son and one half to second wife's relatives, wherein grandnephew contended that he was a bona fide purchaser of realty in that second wife conveyed joint tenancy interest to him in consideration for maintaining and improving realty, grandnephew had burden of proving that he was a purchaser in good faith and had given a valuable pecuniary consideration, or its equivalent. West's Ann.Civ.Code, §§ 1107, 1214.

3. Vendor and Purchaser 🔑236

A "valuable consideration" is such as money or the like, and the adequacy or inadequacy of the amount, or its disproportion to actual value of the property, does not affect question of kind of consideration.

See publication Words and Phrases, for other judicial constructions and definitions of "Valuable Consideration".

4. Vendor and Purchaser 🔑236

Adequacy of consideration is an element of good faith of transaction and has no bearing on whether consideration is a valuable or good one.

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* Opinion vacated 346 P.2d 399.

5. Deeds ⚷17(1)

A "valuable consideration" for a conveyance of land may be other than actual payment of money and may consist of acts to be done after the conveyance.

6. Trusts ⚷372(3)

In action by son of deceased husband against grandnephew of deceased second wife to have grandnephew declared a constructive trustee as to undivided half interest in realty, which had been held by husband and second wife as joint tenants, on ground that they had orally agreed that survivor would devise realty one half to husband's son and one half to second wife's relatives, wherein grandnephew contended that he was a bona fide purchaser of realty in that second wife conveyed joint tenancy interest to him in consideration for maintaining and improving realty, evidence sustained finding that grandnephew was a bona fide purchaser for value, so that his joint tenancy from second wife cut off any right that husband's son might have to enforce a trust against the realty. West's Ann.Civ. Code, §§ 1107, 1214.

7. Evidence ⚷276

Where case of plaintiff to have constructive trust established rested on alleged oral agreement, part of which was that survivor of husband and wife would leave plaintiff a one-half interest in realty, and fulfillment of such agreement would depend on wife devising one-half interest to plaintiff, if she did not convey it to him during her lifetime, statements made by the wife prior to her death, both to defendant and to her attorney that she had agreed to convey joint tenancy interest to defendant were properly admitted as part of the transaction. West's Ann.Code Civ.Proc. § 1850.

◆

Rowland & Paras, Sacramento, for appellant.

Brandenburger, White & Dillon, Sacramento, for respondent.

WARNE, Justice pro tem.

In this action appellant sought to have respondent declared a constructive trustee as to an undivided one-half interest in certain real property. The first cause of action relates to certain acreage in El Dorado County, hereinafter referred to as the ranch. The second cause of action related to certain improved property in Sacramento County as to which the same relief was sought.

[1] While appellant appeals from the entire judgment, he states in his briefs that he is only prosecuting this appeal from the trial court's decision for respondent on the first cause of action. Hence it follows the judgment insofar as it affects the property mentioned in the second cause of action must be affirmed.

Appellant is the natural son of Robert E. Horton by a former marriage. On December 12, 1916, Robert remarried. His new wife was Elizabeth A. Horton, to whom he remained married until his death on January 17, 1931. The respondent Norvin R. Kyburz is a grandnephew of Elizabeth. The property here involved was acquired during the second marriage.

After Robert's death, Elizabeth continued to own the property until February 15, 1954, at which time she executed a joint tenancy deed granting title to said real property to herself and respondent. Subsequent to the death of Elizabeth the joint tenancy was terminated and title to the ranch property vested solely in respondent. The property acquired by respondent by virtue of the joint tenancy deed of 1954 and its termination after Elizabeth's death is the same property as that originally acquired by Elizabeth and Robert in 1930, with the exception of 63 acres which Elizabeth sold to the United States Government in the year 1948 for the sum of $50 per acre. Appellant's asserted right to have the respondent declared constructive trustee of an undivided one-half interest in the remaining 160 acre ranch property is based upon the law as stated in Ryan v. Welte, 87 Cal.App.2d 897, 198 P.2d 357, and Notten v. Mensing, 3 Cal.2d 469, 45 P.2d 198. Appellant alleged and presented evidence to show that prior to Robert's death Robert and Elizabeth had agreed that everything which they owned they would hold as joint tenants; that upon the death of either, the survivor would own all of such assets; and that upon the death of the survivor, he or she would devise all of the property one-half to appellant and the remaining one-half "to the relatives of Elizabeth A. Horton, in accordance with her own wishes."

Appellant then alleged that in reliance upon the said agreement Robert "forbore to make any testamentary or other disposition thereof, or any part thereof, to any members of his own family."

Respondent denied that any agreement had been made between Robert and Elizabeth and further interposed the defense that he was a bon fide purchaser, in that Elizabeth conveyed the property to him for a good and valuable consideration, to wit: the making and performance by him of an agreement between them "that if this defendant would maintain and improve said real property during the lifetime of said Elizabeth A. Horton that she would convey to him a joint tenancy interest in said real property hereinabove described." He further alleged that for more than 7 years prior to the death of said Elizabeth A. Horton on October 11, 1956, he improved and maintained said property, which services consisted of the construction of small buildings thereon, roofing of a barn on the premises, planting of permanent pasture, development of water for springs, repair and construction of roads, repair of buildings and fences, and the removal of brush.

The trial court found that said oral agreement had been made by the spouses; that in reliance upon said oral agreement they had placed and maintained all of the property acquired by them, or either of them, during their marriage in joint tenancy with each other, including the real property herein referred to, and said Robert E. Horton did forbear to make any testamentary or other disposition thereof, or any part thereof, to any members of his own family in the event that Elizabeth should survive him; that Robert had made a will dated February 18, 1930, wherein he did purport to devise to his son, appellant herein, the ranch property. The trial court further found that respondent's special defense was true and that respondent was a bona fide purchaser of said real property, and "to enforce against said defendant [respondent] the oral agreement made and entered into between said Robert E. Horton and Elizabeth A. Horton * *, would be harsh, oppressive and unjust." Accordingly, judgment was entered in favor of respondent and this appeal followed.

[2] Appellant attacks the finding that respondent was a bona fide purchaser of the ranch property and also assigns as error the admission into evidence of Elizabeth A. Horton's statement made to her attorney that she had promised to give respondent a joint tenancy in the property. Also that it was error to admit into evidence a last will and testament of Elizabeth in which she left all her property to her grandnephew. Thus the gist of the problem is whether or not respondent under the provisions of sections 1107 and 1214 of the Civil Code was a purchaser in good faith and for a valuable consideration so that his joint tenancy from Elizabeth cut off any right appellant may have had to enforce a trust against the ranch property. It should be noted that in order to prevail respondent must (1) have been a purchaser in good faith, that is, have acted bona fide, and (2) have given conjunctionally a valuable pecuniary consideration, or its equivalent, as the words "good faith" and "valuable" are interpreted under these statutes; and in absence of either one or both of these prerequisites, he cannot prevail and the burden of proof is cast upon him. Scott v. Umbarger, 41 Cal. 410, 419; Eversdon v. Mayhew, 65 Cal. 163, 3 P. 641.

[3–5] In Cain v. Richmond, 126 Cal.App. 254, at page 260, 14 P.2d 546, at page 549, the court said: "A valuable consideration is such as money or the like, and the adequacy or inadequacy of the amount, or its disproportion to the actual value of the property, does not affect the question of the kind of consideration. Lindley v. Blumberg, 7 Cal. App. 140, 93 P. 894. The adequacy of the consideration is an element of the good faith of the transaction, and has no bearing upon whether the consideration is a valuable or good one. Frey v. Clifford, 44 Cal. 335, 342; Clark v. Troy, 20 Cal. 219, 220, 224." A valuable consideration for a conveyance of land may be other than the actual payment of money and may consist of acts to be done after the conveyance. Stanley v. Schwalby, 162 U.S. 255, 16 S.Ct. 754, 40 L.Ed. 960.

[6] Applying the above rules to the instant case it appears to us that the trial court's findings find ample support in the record. A recitation of the facts most favorable to respondent as disclosed by the record are as follows: Respondent was born on May 30, 1928. He was raised by his aunt and lived with her for as long as he can remember. While living with his aunt she paid all of his expenses, including furnishing him with food, clothing, a place to live, transportation, etc. Their relationship was like that of mother and son. During the early years of his boyhood respondent assisted his aunt in the care of her properties by mowing lawns, caring for the yard, doing odd jobs, attending the minor repairs of the ranch, and the upkeep of her rented units in Folsom. Respondent graduated from high school in the summer of 1947, at the age of 19, and thereafter held a job full time for a year as an apprentice electrician. He had various other jobs until he went into military service. He also worked for his aunt in his spare time. He entered military service on September 18, 1949, and remained in the service until September 14, 1953. Upon his return from the service he got a job from one W. M. Rumsey for a period of about 8 weeks, again full time. He then obtained a job with the Campbell Soup Company in Sacramento, again full time, where he worked 5 weeks. Then he obtained a job in San Francisco where he worked for 6 or 7 months, again full time. Then he moved back to Sacramento to work for the San Juan High School for about 6 months. Then he obtained work with the United States Government, where he worked full time from 1955 to the time of his great-aunt's death.

In 1949 Elizabeth told respondent that if he would continue helping her with her places and the ranch she would leave them to him. The substance of Elizabeth's undertaking was repeated occasionally thereafter. Prior to that time respondent assisted Elizabeth in maintaining the ranch by cutting brush, fixing fences, burning brush and clearing land. He also did work on certain rental properties in Folsom, Sacramento County, owned by his great-aunt. The work consisted of laying linoleum, papering, painting, etc. Respondent testified that after the oral agreement of 1949, he continued to do the same work, except on a larger scale. In 1954 respondent paid some of the expenses of clearing the ranch property and Elizabeth assured him that she would protect him and give him a joint tenancy interest.

Respondent described the work that he and his aunt did on the ranch as follows: "Well, we fixed the fences. We put in the northeast fence which was about a little over a quarter of a mile, and I built the northwest fence. It is about a quarter of a mile, about ready to fall down, and a couple of cross fences. We had three wells drilled. We paid fifty per cent apiece. I mean it was fifty fifty on the wells. Put an aluminum roof on the barn and jacked it up and poured a foundation on the north end of it and pillars through the middle and through the south end. We run water to the corral and across the road; put in pressure pumps and separator house. We knocked the front of it off and rebuilt that, reroofed it; put a foundation in the front of it and put a cement floor in it. We built a large three-car garage out of aluminum; and the clearing of the land and the reservoir around the hill; and the seeding of the south side; and there is about an acre of permanent pasture besides the brush clearing and burning and stuff that we had done before that." The clearing of the brush and fixing of the fences occurred prior to 1949. The wells were placed on the property in 1954 and 1955; and while the record is silent as to just when the rest of the work was performed or the improvements were made, the inference is that it was done after 1949, since prior to that year the property was leased out for cattle grazing.

Applying the hereinabove stated rules of law to the facts as above related, we feel that the trial court's findings are amply supported.

To support his claim that he was a bona fide purchaser from his great-aunt, respondent introduced all statements made by Elizabeth to her attorney at the time he drew the joint tenancy deed of February 15, 1954, to the effect that she wanted the deed drawn because she wanted to comply with her agreement with her great-nephew. Appellant objected to this testimony upon the ground that it is hearsay and self-serving and the objection was overruled. The very same type of oral statements by Elizabeth to respondent himself were offered in evidence, objected to upon the same ground, and admitted after overruling the objection. Also, after objection, the court admitted into evidence a last will and testament of Elizabeth, dated November 16, 1954, in which she left all her property to her grand-nephew, together with the reasons for the execution of her will as stated by her attorney.

[7] These statements of Elizabeth, both to respondent and to her attorney, are claimed by appellant to have been erroneously admitted by the trial court. We do not agree. The statements made at the time of the execution of the will and the deed of conveyance were admissible as part of the transaction. Code of Civ.Proc. sec. 1850.

Appellant's case rested on the alleged oral agreement, a part of which was that the survivor of Elizabeth and Robert Horton would leave appellant a one-half interest in the property. Thus, fulfillment of the agreement would depend upon Elizabeth Horton's devising said one-half interest to appellant if she did not convey it to him during her lifetime. "This testamentary act being a part of the transaction alleged by appellant, evidence concerning such act or the omission thereof was admissible as part of the whole transaction * * *" Frazure v. Fitzpatrick, 21 Cal.2d 851, 858, 136 P.2d 566, 570. The statements of Elizabeth to her attorney who drafted the deed and will were admissible as part of that transaction and were relevant to the reason for the conveyance and what Elizabeth intended to accomplish thereby. Orella v. Johnson, 38 Cal.2d 693, 696, 242 P.2d 5; Sethman v. Bulkley, 9 Cal.2d 21, 24, 68 P.2d 961; Simons v. Bedell, 122 Cal. 341, 349–350, 55 P. 3; Airola v. Gorham, 56 Cal.App.2d 42, 50–52, 133 P.2d 78; Code of Civ.Proc. sec. 1850. Therefore, there was no error in the admission of that evidence.

No other points require discussion.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

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171 Cal.App.2d 356

**PEOPLE of the State of California,
Plaintiff and Respondent,
v.
William P. NELSON, Defendant
and Appellant.
Cr. 3505.**

District Court of Appeal, First District,
Division 1, California.
June 16, 1959.

Defendant was convicted of possession of marihuana and of unlawfully planting and cultivating the narcotic plant. The Superior Court, City and County of San Francisco, Walter Carpeneti, J., rendered judgment, and defendant appealed. The District Court of Appeal, Hanson, J. pro tem., held that where affidavit of narcotic agent disclosed that not only was he advised by informant that marihuana plants were growing at rear of defendant's premises, but that agent had personally corroborated that fact by viewing the premises and affidavit disclosed that an informer had subsequently advised narcotic division that marihuana was being concealed and smoked within defendant's residence, court had probable cause for issuing search warrant.

Affirmed.

1. Searches and Seizures ⟹3(4)

Where information was related to narcotics division on two separate dates, fact that affidavit of narcotic agents in connection with issuance of search warrant referred to two informers whereas evidence showed that there was only one informer did not render search and seizure illegal. West's Ann.Pen.Code, §§ 1539, 1540.

2. Searches and Seizures ⟹3(4)

Where affidavit made in connection with issuance of search and seizure warrant showed that date upon which information was first received from undisclosed informant was April 4, but affiant, a narcotic agent, alleged that he had observed marihuana plants growing in defendant's back yard and finally alleged that informants had given information that offenses were then presently being committed and lapse of time between time when agent saw plants growing and issuance of warrant was 14 days, search and seizure were not illegal on basis that statements in affidavits were not based on current information but on stale information too remote in time to justify issuance of warrant. West's Ann. Pen.Code, §§ 1539, 1540.

3. Searches and Seizures ⟹3(10)

The issuance of a search warrant is a judicial act based on facts found by magistrate and may not be questioned except to determine its sufficiency as a matter of law.

4. Searches and Seizures ⟹3(10)

Decision to issue search warrant may be questioned only under provisions and in manner pointed out by statutes referring to traverse of grounds for issuance and restoration of property and where that was not done defendant was precluded from controverting facts stated in affidavit upon which search warrant was based. West's Ann.Pen.Code, §§ 1539, 1540.

5. Searches and Seizures ⟹3(4)

Where affidavit of narcotic agent disclosed that not only was he advised by informant that marihuana plants were growing at rear of defendant's premises, but that agent had personally corroborated that fact by viewing the premises, and affidavit disclosed that an informer had subsequently advised narcotic division that marihuana was being concealed and smoked within defendant's residence, court had probable cause for issuing search warrant. West's Ann.Pen.Code, §§ 1539, 1540.

6. Arrest ⟹63(4)

Where officers in narcotic division had been informed that marihuana plants were growing in rear of defendant's premises and that marihuana was being concealed and smoked within the premises, and narcotic officer personally corroborated fact that marihuana was growing on premises by viewing same, officers when they arrested defendant had necessary reasonable cause to believe that defendant was guilty of committing the felony of planting and cultivating narcotic plants. West's Ann.Pen.Code, § 836.

7. Poisons ⟹9

Possession of narcotics in violation of law need not be exclusive but may be shown by circumstantial evidence.

8. Poisons ⟹9

Evidence sustained conviction for possession of marihuana.

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Gregory S. Stout, San Francisco, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., Thomas C. Lynch, Dist. Atty., Philip J. Hanley, Asst. Dist. Atty., San Francisco, for respondent.

HANSON, Justice pro tem.

The two main questions presented by this appeal are whether (1) the evidence which gave rise to the conviction of the defendant for having possession of marihuana and with unlawfully planting and cultivating the narcotic plant, was obtained as the result of an illegal search and seizure, and (2) whether the evidence is legally sufficient to sustain appellant's convictions. The case was tried by the court, a jury having been waived.

The basic facts upon which the judgment rests will now be stated. On or about April 4, 1957, and again in the first week of May 1957, the State Division of Narcotic Enforcement received information from an unknown informer that marihuana was being grown and used on the premises where the defendant and his family, along with his father and mother, were residing. On the basis of these reports Agent Lennon, on or about the 10th of May, observed from a vacant lot next door to defendant's home that plants were growing in the rear yard of the premises which, at his distance from them, appeared to be marihuana. Subsequently, on May 24, 1957, the agent Lennon again observed that the plants were still growing on the Nelson premises, but at twice the height of his first observation of them. On May 18, 1957, the division received information from an informer (evidently the same informer mentioned above) that marihuana was being kept and smoked in the Nelson home.

In the early part of May 1957 the division had information that Nelson's license had been cancelled and accordingly it arranged with the police that when Nelson drove his car from his home on the evening of May 24, 1957, as he was expected to do, that he would be arrested by the police if he failed to produce a valid driver's license, and that immediately thereafter he would be arrested by the officers of the Narcotic Division for violating the narcotics law. Meanwhile on May 24, 1957, Agent Lennon swore to an affidavit which was presented to a municipal court judge who on the basis of the affidavit issued on that date a search warrant which authorized search of the Nelson premises. The officers being thus fortified were able to carry their plan into execution. Nelson was arrested first by the police officer and next by the division officers. He was then taken to his home. The officers entered the Nelson home, but the facts as to the manner of entry and the statements of the officers and of the father of the defendant as to what was said and what occurred is disputed. The search by the officers revealed 19 marihuana cigarettes in a jewel box on or in a dresser in the bedroom occupied by defendant and his wife and the growing marihuana plants in the back yard. All the parties living at the Nelson house denied any knowledge as to the presence of the cigarettes or plants. On the day following the arrest of the defendant, marihuana debris was found in the floor board and in the ash tray of the automobile which was under defendant's sole control and occupied only by him at the time of his arrest.

[1] The first contention of appellant is that the evidence was obtained as the result of an illegal search and seizure. The alleged illegality is predicated on the fact that the affidavit of Lennon referred to two informers whereas the evidence showed there was but one informer; but, that information was relayed to the division on two separate dates is not disputed. Another claim of illegality is that the statements in the affidavit were based not on current information, but on "stale" information too remote in time to justify the issuance of a search and seizure warrant, and therefore the search and seizure was illegal.

In the instant case the date given upon which *information* was first received from undisclosed informants was *April 4, 1957.* It is to be noted that it is not alleged when the *informants themselves saw violations being committed.* (Cf. Waggener v. McCanless, 1946, 183 Tenn. 258, 191 S.W.2d 551, 162 A.L.R. 1402). However, the affiant further alleged that information was received subsequent to that date, and that he had observed marihuana plants growing in the defendant's back yard. See People's Ex. 6. It is obvious that the latter two events occurred after the date given (April 4, 1957). Further, the affiant alleged that the informants gave the information in the present tense:

> "That on April 4, 1957, and on subsequent dates affiant has been advised by two informers that marijuana is being grown in the backyard and secreted in the room of William Nelson, located at 141 Joost Street, in the City and County of San Francisco; that marihuana *is being smoked and kept* at said address; * * *." (People's Ex. 6; emphasis added.)

It has been held where the affidavit states no exact date but is based upon the observation of the affiant, and the offense being committed was stated in the present tense, that the warrant is sufficient. Hanson v. State, 1933, 55 Okl.Cr. 138, 26 P.2d 436. It could thus be reasoned that the information given by the informants was to the effect that the facts were as stated on the date the information was received, i. e., April 4, 1957, and dates subsequent to that time.

[2–4] The agent Lennon, as appears from the reporter's transcript, saw the marihuana plants growing on defendant's premises on May 10, 1957, and received further information from the informer on or about May 18, 1957. The lapse of time was at most 14 days, if we take May 10 as the date to be considered, or six days if we take May 18 as the critical date. While the authorities outside this state are not in accord as to how current the facts relied upon should be, an interval of not more than 20 days has never been held so unreasonable as to vitiate the search warrant; beyond 30 days has always been held as an unreasonably long delay. 162 A.L.R. 1414. Why the courts should have concluded that 30 days is too long is not clear. Possibly it stems from the fact that in Massachusetts, for instance, a statute passed some time prior to 1866 limited the time to 30 days. See Commonwealth v. Certain Intoxicating Liquors, 95 Mass. 52. But, that apart, we must not forget that the issuance of a search warrant is a judicial act based on facts found by the magistrate which may not be questioned except to determine its sufficiency as a matter of law. Arata v. Superior Court, 153 Cal.App.2d 767, 315 P.2d 473. Moreover, the decision may be questioned only under the provisions and in the manner pointed out by sections 1539 and 1540 of the Penal Code. That was not done here. Hence under the circumstances of this case the defendant is precluded from controverting the facts stated in the affidavit upon which the search warrant was based. See State v. Best, 1930, 150 A. 44, 48, 8 N.J.Misc. 271; United States v. McKay, D.C., 2 F.2d 257, 259–260. Compare 5 A.L.R.2d 396; United States v. Allen, D.C., 147 F.Supp. 955. The case of Sgro v. United States, 287 U.S. 206, 53 S.Ct. 138, 77 L.Ed. 260, heavily relied on by appellant is not in point. In that case the court concluded: "The opinion of the [District] court was actually based on the conclusion that the officer issuing the second warrant made no findings of probable cause at that time, but merely changed the date of the old warrant." 85 A.L.R. 114.

[5] Aside from the provisions of sections 1539 and 1540, we must hold that the court had probable cause for issuing the warrant. The affidavit of Lennon disclosed that not only was he advised by an informer that marihuana plants were growing at the rear of the Nelson premises, but that he had personally corroborated that fact by viewing the premises. Secondly, the affidavit disclosed that an informer had subsequently advised the division that marihuana was being concealed and smoked within the Nelson residence. The single fact that marihuana was being grown on the premises would warrant the magistrate in issuing a search warrant with respect to the entire premises as the judge would be entitled to infer that the growing marihuana when harvested would find its way into the house to be there kept and sold or smoked, or indeed for further planting.

[6] The officers of the division when they arrested the defendant, advised as they were of the statements of the informer and of the fact that marihuana was growing on the Nelson premises, had the necessary reasonable cause to believe

that the defendant was guilty of committing the felony. Pen.Code, § 836. Moreover, the search and seizure which followed was not based on the arrest, but upon the rights accorded to them by the search warrant, which, we have seen, was issued on probable cause.

The final contention of the appellant is that the evidence does not sustain the judgment on the ground that it fails to show that he had either knowledge or possession of the marihuana cigarettes or plants.

[7] In People v. Van Valkenburg, 111 Cal.App.2d 337, 350, 244 P.2d 750, 752, it was pointed out that possession need not be exclusive but may be shown by circumstantial evidence. The court therein stated:

> "* * * While it is necessary, on a possession charge, to show knowledge on the part of the defendant, People v. Gory, 28 Cal.2d 450, 170 P.2d 433, such possession need not be exclusive, and may be shown by circumstances as well as by direct evidence, and may be constructive as well as physical. People v. Torres, 98 Cal.App.2d 189, 219 P.2d 480; People v. Brown, 92 Cal.App.2d 360, 206 P.2d 1095; People v. Graves, 84 Cal.App.2d 531, 191 P.2d 32; People v. Wong Fun, 39 Cal.App.2d 211, 102 P.2d 774."

[8] The circumstantial evidence in this case establishes marihuana was found growing in the back yard of the home occupied by defendant. Marihuana cigarettes were found in a jewel box in his bedroom. Add to this, the fact of marihuana debris being found in the automobile which was under his sole control, and occupied only by him at the time of his arrest, and it becomes clear that the evidence was sufficient to raise an inference of knowledge and to justify his conviction.

Judgment affirmed.

BRAY, P. J., and FRED B. WOOD, J., concur.

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171 Cal.App.2d 409

Irene P. EATON and Samuel J. Eaton, Petitioners and Appellants,

v.

STATE WATER RIGHTS BOARD; Henry Holsinger, Chairman and Member of the State Water Rights Board; John B. Evans and W. P. Rowe, Members of the State Water Rights Board, Defendants and Respondents,

Thomas J. Buchanan; John R. Burke; Boy Scouts of America, San Fernando Valley Council, Inc.; and Smithson Springs Water Company, Real Parties in Interest.

Civ. 23447.

District Court of Appeal, Second District, Division 3, California.

June 17, 1959.

Hearing Denied Aug. 12, 1959.

Proceeding on a writ of mandate to compel the State Water Rights Board to issue to the petitioners a permit to appropriate waters from a creek. From a judgment of the Superior Court of Los Angeles County, Bayard Rhone, J., the petitioners appealed. The District Court of Appeal, Vallée, J., held that where petitioners for appropriation of water invoked the jurisdiction of the Board, and the Board had jurisdiction to grant or deny the application but did not have jurisdiction to try the rights of prior permittees and since the prior permits had not been revoked and with those permits in force there was no unappropriated water in the creek, the Board correctly denied the petitioners' application.

Affirmed.

1. Waters and Water Courses ⚷130

All water flowing in any natural channel not otherwise appropriated is subject to appropriation in accordance with the Water Code, and water which has never been appropriated constitutes unappropriated water. West's Ann.Water Code, §§ 102, 1201, 1202(a).

2. Statutes ⚷184

A statute is to be construed with a view to promoting rather than defeating its general purpose and policy behind it.

3. Action 🔑35

Where a statutory remedy or proceeding is specially provided, it cannot be enlarged by construction nor made available except on the statutory conditions.

4. Waters and Water Courses 🔑151

The provisions of the Water Code relating to the same subject matter must be examined to ascertain the effect of the statute providing the procedure for revocation of permits to appropriate water. West's Ann.Water Code, §§ 1410–1415.

5. Waters and Water Courses 🔑127

The main purpose of the Water Code was to provide an orderly method for appropriation of unappropriated water. West's Ann.Water Code, §§ 1410–1415.

6. Waters and Water Courses 🔑128

All parts of the Water Code relating to permits to appropriate water are to be construed together so far as possible without doing violence to the language or spirit. West's Ann.Water Code, §§ 1410–1415.

7. Waters and Water Courses 🔑151

The provisions of the Water Code relating to revocation of permits should be construed in light of the purpose sought to be achieved. West's Ann.Water Code, §§ 1410–1415.

8. Waters and Water Courses 🔑143

The Water Code shows the legislative intent that a permit once issued and continued in force shall remain valid until revocation in the manner prescribed in the statute, and while the issuance of a permit does not confer on the permittee a fully protected right, it does continue in effect a priority of right and gives the permittee the right to take and use the amount of water specified therein until the issuance or refusal of a license. West's Ann.Water Code, §§ 1410–1415, 1455, 1600–1677.

9. Waters and Water Courses 🔑143

On the issuance of a permit, the permittee has the right to take and use water to the extent allowed in the permit and as long as the permit is outstanding he has that right and the requirements in a permit may be extended by the Board. West's Ann.Water Code, §§ 1410–1415.

10. Waters and Water Courses 🔑128

Since the provisions in the Water Code with respect to revocation of permits are particular and specific provisions, they must prevail over general provisions. West's Ann.Water Code, §§ 1410–1415.

11. Waters and Water Courses 🔑133

Where petitioners for appropriation of water invoked the jurisdiction of the Board, the questions were whether there was unappropriated water available in matters relating to what they proposed to do with the water, and the Board had jurisdiction to grant or deny the application but did not have jurisdiction to try the rights of prior permittees, and since the prior permits had not been revoked and with those permits in force there was no unappropriated water in the creek, the Board correctly denied the petitioners' application. West's Ann.Water Code, §§ 1410–1415.

12. Waters and Water Courses 🔑151

Contention of petitioners to appropriate waters from creek that other permits were void because the permittees did not exercise due diligence and because the time extensions were invalid could only be determined in a proceeding for revocation of those permits under the Water Code. West's Ann.Water Code, § 1410 et seq.

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Clayson, Stark & Rothrock and George G. Grover, Corona, for appellants.

Stanley Mosk, Atty. Gen., John Robert Burton, Deputy Atty. Gen., and Gavin Craig, Chief Counsel, Water Rights Board, Sacramento, for respondent State Water Rights Board.

Ray C. Eberhard, Los Angeles, for Thomas J. Buchanan, real party in interest.

DeForrest Home, Albert Hampton, Los Angeles and C. T. Waldo, Tujunga, for San Fernando Valley Council, Inc., Boy Scouts of America, real party in interest.

Teague, Dixon & Adams and James E. Dixon, Ventura, amici curiae on behalf of neither party.

VALLÉE, Justice.

Appeal by petitioners Eaton from a judgment denying a writ of mandate to compel the State Water Rights Board to issue to petitioners a permit to appropriate water from Le Montaine Creek in Los Angeles County.

About July 20, 1955, petitioners filed with the Division of Water Resources their application (number 16477) for a permit to appropriate waters of Le Montaine Creek. Prior to the filing of this application the division had issued two permits (numbers 7588 and 9134) to appropriate unappropriated water in Le Montaine Creek. Protests to the granting of a permit to petitioners were filed by the holders of permits 7588 and 9134 on the ground that no unappropriated water remained in Le Montaine Creek for appropriation. Petitioners filed answers asserting that permits 7588 and 9134 were not valid and not in force and effect and that unappropriated water existed in Le Montaine Creek. After notice duly given, a hearing was held by the division on May 16, 1956.

On July 5, 1956, the State Water Rights Board succeeded to all the powers, duties, responsibilities and jurisdiction of the division relating to the appropriation of water. On September 19, 1956, the board adopted its decision Number D-862, finding that permits 7588 and 9134 were then in force and effect and that there was insufficient flow in Le Montaine Creek to provide any unappropriated water under petitioners' application. On December 7, 1956, the board issued its order rejecting petitioners' application. The basis of the decision was that there was no unappropriated water available in Le Montaine Creek. The determination was grounded on the conclusion that the two prior permits to appropriate water from Le Montaine Creek had been issued for projects either of which would more than utilize the entire flow of this creek, and that they were presently in force and effect, not having been revoked by the board in the manner provided by statute after hearing. The superior court denied a writ of mandate. This appeal followed.

The court found that permits 7588 and 9134 had not been revoked in the manner required by law in that no hearing for this purpose had been held or notice given or other proceedings taken in the manner and as required by Water Code, section 1410; that there is no water in Le Montaine Creek in excess of the amounts for which these permits were issued and that there is no unappropriated water for appropriation under petitioners' application.

Petitioners do not contend there is sufficient water in Le Montaine Creek for all the applicants. They contend the prior permittees failed to exercise due diligence as required by statute; that the earlier permits are void as a result of the lack of due diligence; and that extensions granted to them by the board were beyond the jurisdiction of the board. Petitioners' contentions cannot be sustained. It is conceded that no proceeding had been had to revoke either permit 7588 or 9134. We have concluded that since permits 7588 and 9134 had not been revoked, petitioners are without remedy in this proceeding.

The board correctly states the only question necessary for decision: "Can the validity of a permit to appropriate unappropriated water be attacked collaterally in a proceeding to determine whether an additional such permit should be issued, or should such a permit only be invalidated or revoked directly after hearing in the manner provided by statute?"

[1] All water within the state is the property of the people of the state, but the right to its use may be acquired by appropriation in the manner provided by law. Water Code, § 102. See Ferrier, California Water Rights Administration, 44 Cal.L. Rev. 833. All water flowing in any natural channel not otherwise appropriated is subject to appropriation in accordance with the provisions of the Water Code. Water Code, § 1201. Water which has never been

appropriated constitutes unappropriated water. Water Code, § 1202(a).

The method of acquiring rights to the use of unappropriated water is provided primarily in division 2, part 2, of the Water Code. Sections 1200–1801. Any person may apply to the board for a permit for any unappropriated water. Water Code, § 1252. The filing of a proper application gives the applicant "a priority of right as of the date of the application until such application is approved or rejected." Water Code, § 1450. "The board may grant, or refuse to grant a permit and may reject any application, after hearing." Water Code, § 1350. As a prerequisite to the issuance of a permit to appropriate water, there must be unappropriated water available to supply the applicant. Water Code, § 1375(d). The board is authorized to ascertain whether water attempted to be appropriated is appropriated. Water Code, § 1051(c). The board "shall reject" an application when in its judgment the proposed application would not best conserve the public interest. Water Code, § 1255.

On approval of an application the board issues a permit. Water Code, § 1380. The issuance of a permit gives the right to take and use water to the extent and for the purpose allowed in the permit. Water Code, § 1381. Section 1455 reads: "The issuance of a permit continues in effect the priority of right as of the date of the application and gives the right to take and use the amount of water specified in the permit until the issuance or the refusal of issuance of a license for the use of the water." "The period specified in the permit for beginning construction work, for completion of construction work, for application of the water to beneficial use, or any or all of these periods may, for good cause shown, be extended by the board." Water Code, § 1398. "The board may for good cause shown further extend the time for completion, or, if the determination as to completion is favorable to the applicant, shall issue a license which gives the right to the diversion of such an amount of water as has been found by inspection to have been applied to beneficial use." Water Code, § 1610.

Sections 1410 to 1415, inclusive, prescribe the procedure for the revocation of permits. Section 1410 reads:

> "If the work is not commenced, prosecuted, and completed, or the water applied to beneficial use as contemplated in the permit and in accordance with this division and the rules and regulations of the board, the board shall, after notice in writing and mailed in a sealed, postage prepaid and registered letter addressed to the permittee at the address given in his application, and after a hearing, revoke the permit and declare the water subject to further appropriation."

Section 1411 reads:

> "The findings and declarations of the board on the revocation of a permit shall be deemed to be prima facie correct until set aside by a court of competent jurisdiction."

Section 1412 gives the holder of a permit the right to petition the superior court for a writ of mandate to inquire into the validity of the order revoking the permit. Section 1413 reads:

> "Unless the petition for a writ of mandate is filed within the time specified all rights of the permittee under the permit cease and lapse."

Section 1414 reads:

> "The priority of right of any permittee filing a petition for a writ of mandate under this article continues under the permit until a final judgment is rendered as to the validity of the order revoking the permit."

Section 1415 provides that until and unless the order revoking the permit is finally ordered to be set aside by the court, the permittee shall not take or use any of the water, the right to take and use which is granted by the permit.[1]

[2, 3] A statute is to be construed with a view to promoting rather than defeating its general purpose and the policy behind it. 45 Cal.Jur.2d 631, § 122. Where a statutory remedy or proceeding is specially provided it cannot be enlarged by construction, nor made available except on the statutory conditions; that is, by strictly following the directions of the act. Lustig v. Superior Court, 79 Cal.App. 629, 631, 250 P. 702.

[4–6] The provisions of the Water Code relating to the same subject matter must be examined to ascertain the effect of section 1410. Burger v. Hirni, 50 Cal.App.2d 709, 712, 123 P.2d 891. The main purpose of the code was to provide an orderly method for appropriation of unappropriated water. Temescal Water Co. v. Dept. of Public Works, 44 Cal.2d 90, 95, 280 P.2d 1. All its parts relating to permits to appropriate water are to be construed together so far as possible without doing violence to the language or spirit. 45 Cal.Jur.2d 626, § 117. The provisions relating to revocation of permits should be construed in the light of the purpose sought to be achieved. People v. Moroney, 24 Cal.2d 638, 644, 150 P.2d 888.

[7] The provisions of the Water Code to which reference has been made clearly show a legislative intent that a permit, once issued and continued in force, shall remain valid until revocation in the manner prescribed in section 1410. By the filing of an application the applicant secures a right of procedural priority, a conditional right to the future acquisition of the right to the use of water. The issuance of a permit carries forward the right of procedural priority and adds the consent of the state to begin construction and to initiate the use of water, limited by the terms of the permit. See Ferrier, California Water Rights Administration, 44 Cal.L.Rev. 833, 839. While the issuance of a permit does not confer on the permittee a fully perfected right, it does continue in effect the priority of right and gives the permittee the right to take and use the amount of water specified in the permit until the issuance or the refusal of a license. Water Code, § 1455. The final procedural step in perfecting a water right is the issuance of a license as prescribed in sections 1600 through 1677 of the Water Code. The issuance of a license is merely confirmatory of a right acquired by use in accordance with the permit.

[8] On the issuance of a permit the permittee has the right to take and use the water to the extent allowed in the permit. As long as the permit is outstanding, he has that right. The requirements in a permit may be extended by the board. A permit does not expire merely from the passage of time. It remains in force until revoked in the manner prescribed by section 1410. So long as his permit remains in force, his right to take and use the water specified therein continues. A permit in force can only be revoked after notice to the permittee and a hearing. It is only on such revocation that the water specified in the permit is "subject to further appropriation." Water Code, § 1410.

[9] We must presume the provisions of the Code (1) that the issuance of a permit continues in effect the priority of right as of the date of the application and gives the right to take and use the amount of water specified in the permit until the issuance or the refusal of a license; (2) that the period specified in the permit may be extended by the board; and (3) that a permit may be revoked by the board after notice and hearing—were intended to perform some useful office. Since the provisions with respect to revocation of permits are particular and specific provisions they must be held to prevail. See Board of Supervisors of Los Angeles County v. Simpson, 36 Cal.2d 671,

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[1] These provisions have been the law in substantially the same form since the enactment of the Water Commission Act in 1913. Stat.1913, c. 586, p. 1012, §§ 18–20.

673, 227 P.2d 14; Rose v. State of California, 19 Cal.2d 713, 723–724, 123 P.2d 505; Whittemore v. Seydel, 74 Cal.App.2d 109, 120, 168 P.2d 212.

The hearing at bar was on petitioners' application to appropriate water: it was not in a proceeding to revoke permit 7588 or 9134 after notice that the hearing would be to determine whether those permits or either of them should be revoked. The notice of the hearing did not give the permittees notice that the hearing to be conducted would be for the purpose of determining whether their permits should be revoked. The question before the board was whether a third permit should be issued to petitioners.

[10] When petitioners invoked the jurisdiction of the board to appropriate water the questions were whether there was unappropriated water available and matters relating to what they proposed to do with the water. The board had jurisdiction to grant or deny that application. It did not have jurisdiction to try the rights of prior permittees. The only proceeding in which the board has jurisdiction to determine whether a permit should be revoked is one under section 1410. If petitioners' contentions should be sustained, a permit could be revoked indirectly in a collateral proceeding when there is a statute expressly providing the mode by which a permit may be revoked.

[11] Since the prior permits had not been revoked, and since with those permits in force there was no unappropriated water in Le Montaine Creek, the board correctly denied petitioners' application.

[12] Petitioners' contentions that permits 7588 and 9134 are void because the permittees did not exercise due diligence and because the time extensions were invalid can only be determined in a proceeding for revocation of those permits under section 1410 et seq. of the Water Code.

We are not to be understood as holding that the board may not refuse to extend the period specified in the permit if good cause for an extension is not shown.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

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171 Cal.App.2d 320

PEOPLE of the State of California, Plaintiff and Respondent,
v.
Thomas Cloyd NICHOLS, Defendant and Appellant.
Cr. 3554.

District Court of Appeal, First District, Division 2, California.
June 15, 1959.
Hearing Denied Aug. 12, 1959.

Defendant was convicted in Superior Court, City and County of San Francisco, Raymond J. Arata, J., of robbery in first degree, and he appealed. The District Court of Appeal, Kaufman, P. J., held that where three eyewitnesses identified defendant as robber of store, and there was other evidence of his guilt, and jurors specifically returned to rehear evidence of the eyewitnesses, and identification of alleged accomplice was repeatedly introduced into record by defendant's counsel, remark by prosecutor while defendant was on stand, that alleged accomplice had pleaded guilty to the robbery when there was nothing in record to indicate that anyone had pleaded guilty, was not incurable error, but error was cured by instruction to jury to disregard remark.

Affirmed

1. Criminal Law 🔑1186(4)

Under constitutional provision for reversal of judgment because of improper admission of evidence resulting in miscarriage of justice, reversal is required when reviewing court, after examination of entire cause, including evidence, is of opinion that it is reasonably probable that result more favorable to appealing party would have been reached in absence of the error. West's Ann.Const. art. 6, § 4½.

2. Criminal Law ⚿1186(4)

Where three eyewitnesses identified defendant as robber of store, and there was other evidence of his guilt, and jurors specifically returned to rehear evidence of the eyewitnesses, and identification of alleged accomplice was repeatedly introduced into record by defendant's counsel, remark by prosecutor while defendant was on stand, that alleged accomplice had pleaded guilty to the robbery when there was nothing in record to indicate that anyone had pleaded guilty, was not incurable error, but error was cured by instruction to jury to disregard remark. West's Ann.Const. art. 6, § 4½.

3. Criminal Law ⚿404(4)

In robbery trial wherein prosecution did not rely on specific type of weapon, admission in evidence of weapon found under passenger seat in defendant's automobile at time of his arrest while he and alleged accomplice, who was driver, were sitting in automobile on evening following robbery was not error.

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William D. Piercy, San Francisco, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., San Francisco, for respondent.

KAUFMAN, Presiding Justice.

Defendant appeals from a judgment of conviction entered on a jury verdict finding him guilty of robbery in the first degree. He also appeals from the order denying his motion for a new trial. He contends that the judgment must be reversed because the prosecution announced to the jury that his associate Winslow had pleaded guilty and introduced into evidence guns not connected with him or the crime.

The circumstances of the robbery are as follows: About 11:45 p. m. on Saturday, January 25, 1958, two men robbed the Cataffo Market at 2301 Van Ness Avenue at the corner of Vallejo Street in San Francisco. The robbers took Mr. Cataffo's wallet and about $90 from the cash register. Mr. Cataffo identified the defendant as the armed robber who had ordered him into the back room and had taken his wallet. Mr. Gubbins, a news vendor, who was standing outside the Cataffo Market, was forced into the store at gunpoint by the two robbers. Mr. Gubbins identified the defendant as one of the men. A Mr. Schade was on his way to the Cataffo Market. He noticed a greenish blue '52 or '53 car with its motor running and the lights out parked on Vallejo Street. He entered the store while the robbery was in progress. One of the robbers who was standing by the cash register with a gun in his hand ordered him to the rear. Mr. Schade identified the defendant as the man behind the cash register wearing a red and black cap.

The following evening, about 11:50 p.m. while on patrol, police officer Tompkins and Inspector Jones saw three persons in a greenish blue DeSoto on the 2900 block of Mission Street. As they passed the car they noticed that it had a rear license plate but no front license plate and that the man at the wheel was a man they had known in the past. Two of the passengers got out of the car. The policemen turned around and asked all three to identify themselves and to explain their reasons for being in that location. The driver of the car was Mr. Winslow; the defendant and a Mr. Sweeden were the two passengers. In the course of the questioning, Winslow attempted to flee but was apprehended.

Officer Tompkins found two loaded guns under the front seat on the passenger side of the car. Winslow stated that the guns were his and that he was trying to sell them. The defendant stated that the car belonged to his wife and that he was Winslow's stepfather and that Winslow was wearing his coat. All three were arrested. Several days later, Winslow's car, a blue 1948 Plymouth, was found parked in the back of 323 Noe Street next door to the defendant's home at 325 Noe Street. Two coats and a black checkered cap were found in this automobile.

By information, T. E. Winslow and the defendant were charged with armed robbery. Both entered pleas of not guilty. Before the trial Winslow pleaded guilty and was sentenced.

Defendant's first contention on appeal relates to the following which occurred on the cross-examination of the defendant:

> "Q. Do you recall who you were with at the time you were arrested? A. I sure do.
>
> "Q. You sure do. And who were you with? A. Mr. Winslow and Mr. Sweeden.
>
> "Q. They were Winslow, the same man who was identified in this case as being in the Cataffo Grocery and who had pleaded guilty to the charge of robbery, is that correct?
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> "Mr. Karesh: If Your Honor please, I feel that is a highly prejudicial statement.
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> "Mr. Reichert: I don't see how it is.
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> "The Court: There is nothing before in the record that indicates that any defendant has pleaded guilty. I do not believe so, Mr. Reichert. Mr. Winslow was identified, that is true, by the testimony.
>
> "The Court will sustain the objection to the question and admonish the jury to disregard the statement of the District Attorney that anybody has been found guilty of this robbery, particularly Mr. Winslow. You are to disregard that statement, not to take it into consideration in deciding the issues of this case."

The fact that Winslow was the other participant in the robbery was first brought out by defendant's counsel on the cross-examination of Mr. Gubbins. Then, the witness Schade, in reply to the District Attorney's question, stated that the other robber was Winslow. Defendant's counsel repeated the reference to Winslow several times on cross-examination of Schade. During the course of this cross-examination, defendant's counsel asked that the newspaper pictures of defendant, Winslow and Sweeden be admitted into evidence, and stipulated that the newspaper article accompanying the pictures be put into evidence. After the introduction of the picture, defendant's counsel further questioned the witness about Winslow.

[1] Defendant relies on People v. Bearss, 10 Cal. 68; People v. Collum, 122 Cal. 186, 54 P. 589; and People v. Ford, 89 Cal.App.2d 467, 200 P.2d 867. The two former cases were decided before the enactment of Section 4½ of Article VI of the State Constitution. The nature of the error that requires a reversal under this provision is that there is a miscarriage of justice "only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." People v. Watson, 46 Cal.2d 818, at page 836, 299 P.2d 243, at page 254.

In People v. Ford, supra, a conviction of grand theft was reversed because of the prosecutor's stating in his argument to the jury that the defendant's acquaintance had been convicted of possessing the stolen property, even though the statement was not assigned as misconduct and the court was not requested to admonish the jury to disregard it. In that case, however, the evidence of defendant's guilt was slight aside from his confession which was given under circumstances indicating that it was involuntary.

[2] In the instant case, three eye-witnesses identified the defendant as one of the participants in the robbery. There was also other evidence of defendant's guilt. The jury here specifically returned for the

purpose of rehearing the evidence of the three eye-witnesses, and then deliberated for several hours before returning their verdict. Furthermore, as we pointed out above, the identification of Winslow was first and repeatedly introduced into the record by defendant's counsel. While we agree with the defendant that the courts must exercise a restraining influence on the conduct of overzealous prosecutors, we do not think that in the instant case the remark complained of was an incurable error. Defendant argues that the district attorney's remark about Mr. Winslow's plea of guilty created incurable prejudicial error. As we recently said in People v. Daniel, 169 Cal.App.2d 10, 336 P.2d 556, there is no definite rule by which asserted misconduct may be measured for the purpose of determining whether it prevented the defendant from having a fair and impartial trial. There we also held that prompt admonishment by the trial court to the jury to disregard the statement cured the error. We think that here likewise the error was cured by the timely admonition to the jury.

[3] Defendant's second contention on appeal relates to the introduction into evidence of the weapons found in the car at the time of the arrest. The two guns found were nickel plated 38 revolvers. There was very little description of the guns used in the crime and no witness testified as to the similarity between the weapons used and People's Exhibits 9 and 10. The police report on the basis of the descriptions given by various witnesses developed a composite description of the weapons used as a gray steel 32 revolver and a blue steel automatic.

Defendant argues that these guns could not have been properly admitted into evidence even if they had been owned or possessed by the defendant, since they were not similar to the ones used in the robbery, citing People v. Richardson, 74 Cal.App.2d 528, 169 P.2d 44 and People v. Riser, 47 Cal.2d 566, 305 P.2d 1. In the instant case, the uncontroverted evidence establishes that the guns belonged to Winslow, but were found in the defendant's car. Defendant admitted knowing Winslow and stated he might have had dinner with Winslow about 10 p. m. on the night of the robbery.

The rule as announced in People v. Riser, 47 Cal.2d 566 at page 577, 305 P.2d 1, at page 8 is as follows:

> "When the specific type of weapon used to commit a homicide is not known, it may be permissible to admit into evidence weapons found in the defendant's possession some time after the crime that could have been the weapons employed. There need be no conclusive demonstration that the weapon in defendant's possession was the murder weapon. People v. Ferdinand, 194 Cal. 555, 563, 229 P. 341; People v. Nakis, 184 Cal. 105, 113–114, 193 P. 92. When the prosecution relies, however, on a specific type of weapon, it is error to admit evidence that other weapons were found in his possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons. People v. Riggins, 159 Cal. 113, 121, 112 P. 862; People v. O'Brien, 130 Cal. 1, 5, 62 P. 297; People v. Yee Fook Din, 106 Cal. 163, 165–167, 39 P. 530; People v. Wong Ah Leong, 99 Cal. 440, 34 P. 105."

Here the prosecution did not rely on a specific type of weapon and therefore the former rule would appear to be the proper one. We think this case is similar to People v. Beltowski, 71 Cal.App.2d 18, at page 23, 162 P.2d 59, at page 61, where the court said:

> "Here, however, two or three pistols were found in Beltowski's room (together with other arms and ammunition) at the time of the arrest. [citation] It was proper for the prosecution to lay before the jury all the circumstances surrounding the arrest. [citations] Nor need there be positive identification of a weapon. [citation]

> The possession by a defendant of means such as were used to commit the crime renders the same admissible even though not identified in any way by the eye-witness to the offense. People v. Radovich, supra [122 Cal.App. 176, 9 P.2d 542], and cases cited; People v. Hale, 81 Cal.App. 734, 735, 254 P. 639; People v. Stoerkel, supra [87 Cal.App. 336, 262 P. 825]; People v. Mar Gin Suie, supra [11 Cal.App.2d 42, 103 P. 951]; People v. Hightower, 40 Cal. App.2d 102, 107, 104 P.2d 378. In People v. Abbey, 124 Cal.App. 412, 417, 12 P.2d 655, the victim did not even see the gun, which was concealed in the defendant's coat pocket. It was nevertheless held admissible."

No prejudicial error appearing in the record before us, the judgment and order denying motion for new trial are hereby affirmed.

DOOLING and DRAPER, JJ., concur.

Hearing denied; PETERS, J., dissenting.

PETRI CLEANERS, INC., a California corporation, Plaintiff and Respondent,

v.

AUTOMOTIVE EMPLOYEES, LAUNDRY DRIVERS AND HELPERS LOCAL NO. 88 et al., Defendants,

Automotive Employees, Laundry Drivers and Helpers Local No. 88, Appellant.*

Civ. 23370.

District Court of Appeal, Second District, Division 2, California.

June 19, 1959.

Hearing Granted Aug. 12, 1959.

Employer brought action against union under the Jurisdiction Strikes Act to restrain picketing, and union sought injunctive relief against employer. The Superior Court of Los Angeles County, Harry M. Hunt, J. pro tem., entered an order adverse to the union, and the union appealed. The District Court of Appeal, Fox, P. J., held that evidence sustained finding of Superior Court that independent association of employer's employees was a labor organization not financed in whole or in part, interfered with, dominated, or controlled by employer or any employer association within meaning of the act.

Order affirmed.

1. Appeal and Error 🔑989

Where finding of fact is attacked, on ground that there is not any substantial evidence to sustain it, power of reviewing court begins and ends with determination of question whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact.

2. Appeal and Error 🔑930(1)

Where finding of fact is attacked on appeal, on ground that there is not any substantial evidence to sustain it, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences must be indulged in to uphold the verdict if possible.

3. Appeal and Error 🔑931(1), 989

When a finding of fact is attacked on appeal, on ground that there is not any substantial evidence to sustain it, all evidence most favorable to respondent must be accepted as true, and that unfavorable to respondent must be discarded as not having sufficient verity to be accepted by the trier of fact, and if evidence, so viewed, is sufficient as a matter of law, judgment must be affirmed.

4. Labor Relations 🔑946

In action by employer against union to enjoin union from picketing employer's plant or otherwise interfering with employer's business, evidence sustained trial court's finding that independent association of employer's employees was a labor organization not financed in whole or in part, interfered with, dominated, or controlled by employer or employer association within meaning of the Jurisdictional Strikes Act. West's Ann.Labor Code, §§ 1115–1120, 1117.

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* Opinion vacated 2 Cal.Rptr. 470, 349 P.2d 76.

5. Labor Relations ⚷933

In action by employer against union to enjoin union from picketing employer's plant or otherwise interfering with employer's business, trial court, in determining whether independent association of employees of employer was a labor organization not financed in whole or in part, interfered with, dominated, or controlled by employer or any employer association within meaning of the Jurisdictional Strikes Act was at liberty to consider employer's verified complaint and affidavits filed by employer in support thereof. West's Ann.Labor Code, §§ 1115–1120, 1117.

6. Labor Relations ⚷352

Fact that independent association of employees of employer was formed after picketing by union and after strike had been in effect for several months required careful scrutiny of employer's conduct to determine whether independent association was a labor organization not financed in whole or in part, interfered with, dominated, or controlled by employer or any employer association within meaning of the Jurisdictional Strikes Act. West's Ann.Labor Code, §§ 1115–1120, 1117.

7. Labor Relations ⚷352

Fact that no constitution or by-laws of independent association of employees of employer existed when employer recognized association and fact that members of association had not at that time indicated their desire in writing to join association were without substantial significance in determining whether association was a labor organization not financed in whole or in part, interfered with, dominated, or controlled by employer or any employer association within meaning of the Jurisdictional Strikes Act. West's Ann.Labor Code, §§ 1115–1120, 1117.

8. Labor Relations ⚷352

Fact that meetings of independent association of employees of employer were held on employer's property, so as to save association money, did not establish interference, dominion, or control by employer of association, and was not in itself sufficient to predicate a finding of financial support within meaning of the Jurisdictional Strikes Act. West's Ann.Labor Code, §§ 1115–1120, 1117.

9. Labor Relations ⚷177

Under California law, there is no requirement, in absence of a contract so providing, that an employer bargain collectively with his employees.

10. Labor Relations ⚷242

An employer may maintain a nonunion shop if he wishes.

11. Labor Relations ⚷371

If all or part of employer's workers go on strike, employer is at liberty to secure replacements.

12. Labor Relations ⚷913

Where employer refused to bargain with union representing a majority of its employees and replaced striking employees, and new employees formed independent association which qualified as a labor organization under Jurisdictional Strikes Act, employer was entitled to injunctive relief under the act against picketing by union. West's Ann.Labor Code, §§ 1115–1120, 1117, 1118.

13. Labor Relations ⚷962

Where it has been determined that there exists a jurisdictional strike within meaning of the Jurisdictional Strikes Act, granting of a preliminary injunction in favor of employer rests in sound discretion of trial court. West's Ann.Labor Code, §§ 1115–1120.

14. Labor Relations ⚷948

Even if it be assumed that pre-strike conduct of employer discouraged membership of employees in union in violation of statute, denial of the injunctive relief to union could not constitute an abuse of discretion under circumstances. West's Ann. Labor Code, §§ 921, 923, 1122.

Stevenson & Hackler, Herbert M. Ansell, Los Angeles, for appellant.

Rutan, Lindsay, Dahl, Smedegaard, Howell & Tucker, W. W. McCray, Santa Ana, for respondent.

FOX, Presiding Justice.

The litigation which gives rise to this appeal grows out of a labor controversy and involves an application of the Jurisdictional Strikes Act (Labor Code, §§ 1115–1120). The court issued a preliminary injunction prohibiting defendant Automotive Employees, Laundry Drivers and Helpers Local No. 88[1] from picketing plaintiff's plant or otherwise interfering with its business and denied defendant any injunctive relief under the provisions of sections 921–923 and 1122 of the Labor Code. Defendant has appealed.

Plaintiff has for many years operated a cleaning establishment in Long Beach and employed approximately 31 persons. Defendant is a labor organization. For some years prior to June, 1957, plaintiff operated a non-union business. Ralph Montgomery, a union organizer, contacted certain of plaintiff's drivers in June and July of 1957 in an effort to induce them to designate the defendant as their collective bargaining representative. Montgomery testified that he secured such authorization from nine of plaintiff's ten drivers. Thereafter, early in August, defendant requested that plaintiff recognize it as collective bargaining representative of the drivers and that negotiations be commenced looking toward a collective bargaining agreement. The plaintiff declined to recognize defendant or to deal with it. Plaintiff thereupon informed its drivers that management expected that the union would picket the plant beginning the following day (August 8th). They were all requested to come to work despite the presence of pickets, and were advised that if they refused it would be necessary to replace them because plaintiff had a responsibility to deliver its customers' clothing. On August 8th a strike was called and picketing of plaintiff's plant was initiated. All but one of plaintiff's drivers left their jobs; later, however, three returned to work. Other drivers were employed. A few days after the strike an action was filed to limit the number of pickets. Pursuant to stipulation, a limitation of two pickets in front and two in the rear was ordered. From August 8, 1957, to February 10, 1958, the date of the issuance of the preliminary injunction here under review, defendant continued to picket plaintiff's plant.

Sometime during September, 1957, one Roland Matthews, who had been employed by plaintiff for over two years prior to the commencement of the strike, obtained information regarding independent employee associations[2] during the course of conversation with a driver from a Santa Ana laundry. Shortly thereafter, Matthews inquired of Petri what management's attitude would be toward an independent association of company employees for collective bargaining purposes. He was advised by Petri that he would "go along" but informed Matthews that he (Petri) would have nothing to do with its organization. Later Matthews contacted Mr. Bowen of the Bowen Cleaners and learned that a Mr. Meader had assisted in the formation of an independent employees' association at that plant. Matthews spoke to Meader about the situation and told him that his services might be sought in the future. Due to personal matters requiring his attention, Matthews did not devote much time until December to making any further inquiries regarding the formation of an employees' association. Subsequently, he did obtain additional information pertaining to the manner and desirability of forming such an organization from several truck drivers who crossed the picket line at Petri's and who themselves belonged to independent associations. Also, while reading a newspaper, he learned of another laundry which had such an association and contacted its president and obtained additional information concerning its organization and operation. Management was again approached for assurance that there would be no discrimination against those who might join an independent employees' association if one were formed. In the meantime, Matthews had contacted various employees at Petri's regarding the idea of an independent organization and received a favorable response.

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[1] Cleaners and Dyers, Local No. 36, was also named as a defendant but is in no way involved in this appeal.

[2] Matthews had had some experience with reference to the operation of an employee association, having been president of such an organization in Texas for five or six years.

Following Christmas, 1957, Matthews again spoke to Meader and told him he thought the association was going to be formed and made arrangements to meet with him. Two such meetings took place at Matthews' apartment. It was agreed that an organizational meeting should be held on January 8, 1958. After his request to use plaintiff's premises for the meeting was denied, Matthews made arrangements with a real estate broker to hold this meeting in a vacant building around the corner from plaintiff's plant and rented chairs for the occasion. According to Matthews' testimony, the meeting was held in said building on January 8 after working hours. The purpose of this meeting was to organize and name the association. Matthews opened the meeting by stating the purpose of Meader's presence, explained the workings of such an organization, how to organize it, and then turned the meeting over to Meader, who explained the procedure to be followed in organizing an association of this type. Archie Fraser, a driver, was elected chairman of the Association. The drivers were divided on the question whether there should be two separate organizations, one for the drivers and one for the inside help, or one over-all association with separate negotiating committees. The latter scheme was adopted. At this meeting Meader provided Fraser with a form of a letter, the purport of which was to demand recognition of the Association. A request for recognition was thereupon prepared which Fraser signed. On January 9, Fraser and Petri signed a formal recognition agreement.[3]

Thereafter, on January 14, 1958, Fraser was informed by management that it wished to commence negotiations on a labor contract. There was a general meeting of plaintiff's employees on January 15, after working hours. Meader attended this meeting. Matthews was elected Parliamentarian; a treasurer was also elected, and a constitution and by-laws committee appointed. This meeting, as well as all others except that held on January 8, was conducted on company property.

Subsequent to the general meeting, the drivers met separately that evening and discussed and formulated demands with respect to their employment situation which they wanted considered by management. These demands, as finally agreed upon by the drivers, dealt with sick leave, vacations, minimum guaranteed salary, commissions, selection of routes, and other related matters.

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[3] The pertinent provisions of the recognition agreement are as follows:

"Now, Therefore, It Is Understood And Agreed that the said Employer, for and in consideration of the promise of the Association that said association will not strike or otherwise interfere with the operation of Employer for a period of one hundred twenty (120) days following the signing of this agreement, and for and in consideration of the further promise that the said Association will not affiliate with any other labor organization during said period of one hundred twenty (120) days, said Employer does hereby promise to recognize The Independent Association of Petri Employees as the exclusive collective bargaining agency for all route salesmen, and does agree to sit down and consult with said Association and attempt to arrive at a working agreement controlling wages, hours and working conditions and other fringe benefits for the said employees who are members of the Association. The said Employer further agrees not to recognize any other labor organization as a bargaining agency for the employees of said Employer during the aforesaid period of one hundred twenty (120) days."

On January 16, 1958, commencing at 6:00 p. m., the drivers met with management and negotiated a formal contract. While this contract was actually signed by the drivers on the 22d of January, it was to become effective as of January 20, 1958. Fraser testified that it was the drivers' idea to speed up negotiations and also their idea to pre-date their signatures in accordance with the effective date of the contract. It was Petri's suggestion that the contract go into effect on February 3.

In conjunction with plaintiff's complaint, affidavits were filed by Petri, W. W. McCray (plaintiff's attorney), "Petri Employees," and by Fraser. Defendant filed an answer and also a cross-complaint seeking an injunction and damages. Plaintiff's request for a restraining order was denied on January 14; however, on February 10, the court granted plaintiff's motion for a preliminary injunction and denied defendant's motion for like relief. It is from this order that defendant appeals.

Section 1115, Labor Code, declares a jurisdictional strike to be against the public policy of this state. Section 1116 provides for injunctive relief against such a strike. Section 1118 defines a jurisdictional strike as follows:

Section 1118. "As used in this chapter, 'jurisdictional strike' means a concerted refusal to perform work for an employer or any other concerted interference with an employer's operation or business, arising out of a controversy between two or more labor organizations as to which of them has or should have the exclusive right to bargain collectively with an employer on behalf of his employees or any of them, or arising out of a controversy between two or more labor organizations as to which of them has or should have the exclusive right to have its members perform work for an employer."

A "labor organization" is defined in section 1117 as follows:

Section 1117. "As used herein, 'labor organization' means any organization or any agency or employee representation committee or any local unit thereof in which employees participate, and exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, hours of employment or conditions of work, which labor organization is not found to be or to have been financed in whole or in part, interfered with, dominated or controlled by the employer or any employer association within one year of the commencement of any proceeding brought under this chapter. The plaintiff shall have the affirmative of the issue with respect to establishing the existence of a 'labor organization' as defined herein.

"As used herein, 'person' means any person, association, organization, partnership, corporation, unincorporated association, or labor organization."

Defendant's first argument is that plaintiff has failed to prove that The Independent Association of Petri Employees was not financed in whole or in part, interfered with, dominated or controlled by the employer. The trial court expressly found that there was no financial support, interference, domination or control by the plaintiff. Defendant seeks to impeach the order appealed from by arguing that it is not supported by the evidence.

[1–3] It is well settled that "[w]hen a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact. (Citations.)" Primm v. Primm, 46 Cal.2d 690, 693, 299 P.2d 231, 233. Furthermore, "all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible." Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183, 184. As stated in Re Estate of Teel, 25 Cal.2d 520, at page 527, 154 P.2d 384, at page 388, "[a]ll of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed."

[4] Testing the evidence by the above rules, we believe there is ample support for the trial court's finding. Fraser testified that there was no pressure exerted by plaintiff to form the Association and that he learned of the idea from Matthews. The latter testified that on his own initiative and on his own time he made inquiries concerning the formation of an independent association and employed Meader to assist in the organization of Petri's employees. Beyond this, Matthews paid Meader $250 for his services, which sum was never reimbursed. Matthews received no pay raise, no increase in his Christmas bonus, nor did he borrow any money from the company. The evidence clearly shows that management had no representative at any of the employee meetings prior to the bargaining meeting of January 16, 1958. Although company property was utilized to hold meetings subsequent to January 8, the plaintiff refused permission to use its premises for the crucial meeting on the latter date. Furthermore, while Petri said he would go along with the idea of an employee association, there is not the slightest reference in the evidence that he requested, received, or was promised anything in the way of dominion or control in return for his promise not to discriminate against those who joined such an organization. Lack of control was further demonstrated by the fact that despite Petri's desire to have February 3 as the effective date of the contract, the drivers nevertheless selected and secured January 20 as such date. It was Meader, a stranger to management, hired by an employee, who furnished materials for the letter requesting recognition, for the constitution and by-laws and for a union contract. The evidence also pictured the drivers as undecided on the type of internal organization they desired, but on a vote an over-all employee association with separate negotiating committees was decided upon.

On January 14, plaintiff had circulated an affidavit among its employees for their signatures to be used in support of its pending action for injunctive relief. Out of the twenty signatures, only two were those of drivers. The fact that the drivers were unwilling to commit themselves in writing prior to the time they actually negotiated a contract is indicative of their independence and the absence of any interference, dominion or control.

The evidence also establishes that the drivers discussed and formulated among themselves specific items pertaining to the terms of their employment which they presented to plaintiff and that these demands, among other things, were covered by the contract which followed the meeting of January 16, 1958. A reading of this contract shows that these matters were of substantial magnitude and not merely meaningless concessions by management. This fact strongly suggests that Petri was engaging in something more than artificial negotiations with his own puppet; that the parties were truly dealing at arm's length. It is not without significance that the contract was signed by all the driver-members of the Association.

[5] Plaintiff's verified complaint and the affidavits filed in support thereof also assert the voluntary character of the association and the absence of financial support, interference, domination or control. The trial court, of course, was at liberty to consider these documents. Voeltz v. Bakery, etc., Union, 40 Cal.2d 382, 386, 254 P.2d 553. The complaint, affidavits and evidence recited above are ample to support the trial court's finding that The Independent Association of Petri Employees qualified as a "labor organization" as defined in section 1117, *supra*.

Since the trial court's finding of bona fides is supported by substantial evidence, it is unnecessary to discuss the conflicts in the evidence or the asserted facts disclosed by the evidence which defendant contends would support a finding contrary to that reached by the trial court. Primm v. Primm, supra. However, as the full scope of the non-control and financial support aspect of section 1117 has not heretofore been thoroughly considered by our courts, it seems appropriate to comment upon the evidence which defendant contends supports its position.

Defendant first argues that as Petri was notably hostile toward trade unions but friendly toward the idea of an employee association after the commencement of the strike, it should be concluded that he unduly interfered or indicated his preference to his employees and thereby, though subtly, restricted their freedom of choice. This may be true in some cases, but the record before us fully justifies a contrary inference. Dan Burns, called as a witness by defendant, testified that he was presently a driver employed by plaintiff (although he had resigned, effective shortly thereafter) and that he did not apply for membership in the defendant union nor did he join the Association, but he had attended their meetings and voiced his opinion. He also testified that there was never any pressure or threats of any nature as to whether he did or did not join the association. Grady Ouzts, called by the defendant as a witness, testified that when McCray was attempting to obtain the employees' signatures on the "Affidavit of Petri Employees" on January 14, McCray stated he wanted free and willing signatures only. The fact that only two drivers signed also indicates that their freedom of choice was not curtailed.

[6, 7] Next, defendant attaches significance to the fact that the Association was formed after a strike had been in effect for several months and argues that plaintiff's conduct should be subject to careful scrutiny. With this we are in full accord. However, the fact that no evidence was offered that an employees' association was discussed prior to the strike is without much importance in view of the evidence that was introduced. Also, the fact that no constitution or by-laws existed when plaintiff recognized the Association and that its members had, at that time, not indicated their desire to join in *writing* is also without substantial significance. See Chavez v. Sargent, 52 Cal.2d —, 339 P.2d 801. A constitution and by-laws committee was subsequently appointed. It would not be unusual or suspicious to postpone the naming of that committee in order to provide time for the more essential matters which were disposed of at the January 8 meeting, i. e., learning about the formation of an association, voting on it, deciding upon its internal structure, and electing its president. Although not all of plaintiff's employees attended the January 8 meeting, a majority of those attending actually voted to have an association as presently constituted and Matthews testified that he had the vote of other employees who were not in attendance that evening. This fact is borne out by the twenty signatures on the "Affidavit of Petri Employees" signed on January 14. Carefully scrutinized, the above and other evidence to which our attention is directed merely presented to the trial court a question of fact which, as previously noted, was decided adversely to defendant.

[8] Defendant's next argument concerns the fact that the company assertedly allowed the use of its time and property for Association purposes. Whether or not company time was used and, if so, the extent of that use, is in conflict. Assuming, arguendo, that company time was used, this would be merely another factor for the trial court's consideration. In Culinary Alliance, etc., Union 402 v. Beasley, 135 Cal.App.2d 186, at page 193, 286 P.2d 844, at page 848, the court discussed this question as follows: "It is argued that Beasley interfered with and supported the association by permitting his employees to attend an organizational meeting during working hours, and performing their work for them while they were attending such meeting * * *. Assuming that this is one fact to be considered it is not, in itself, controlling." This, of course, would

also be true regarding the use of company property for Association meetings. The first and probably the most important meeting (viz. the organizational meeting on January 8th) was not conducted on company premises. All subsequent meetings were on plaintiff's property. While this probably saved the Association money, it does not establish interference, dominion or control, nor is that in itself sufficient to predicate a finding of financial support as contemplated by section 1117.

Lastly, the defendant states that the plaintiff signed the recognition agreement before a majority of the employees had indicated a willingness to belong to the Association. As previously discussed, there is testimony that the Association had majority approval before Petri was asked to recognize it.

If the trial court had found the weight of the evidence to favor defendant's position, had drawn the inferences from it that defendant has drawn, and resolved the conflicts in the evidence in defendant's favor, it may well be that a judgment for defendant would be sustained, had one been so rendered. However, the trial court found for the plaintiff and, as previously stated, such decision is supported by substantial evidence. It should be noted, there is no suggestion that the instant dispute affected interstate commerce, hence the Labor Management Relations Act and the cases thereunder decided are not controlling.

[9–12] Defendant also seeks reversal of the order on the ground that "a company which has precipitated a strike by its refusal to recognize and bargain with a union representing a majority of its employees is not entitled to injunctive relief against such a strike based upon a recognitional demand of an association claiming to represent the replacements of the striking employees." At the outset, it should be noted that under California law there is no requirement, absent a contract so providing, that an employer bargain collectively with his employees.[4] 29 Cal.Jur.2d 815. He may maintain a nonunion shop if he wishes. If all or part of his workers go on strike, he is at liberty to secure replacements. Thereafter, if his employees, including the replacements, form their own association which qualifies under section 1117, no reason appears why an injunction against picketing may not be obtained if the trial court finds the existence of a jurisdictional strike as defined in section 1118. In Voeltz v. Bakery, etc., Union, 40 Cal.2d 382, at pages 386–387, 254 P.2d 553, at page 556, supra, the court stated: "We do not believe that the fact that a dispute existed between defendants and plaintiff before the association was formed and came into the picture, takes the case out of the act requiring that the interference with the employer's business arise out of a controversy between unions, for after the association was formed and plaintiff's employees became members thereof, it endeavored to have defendants withdraw from the arena and to induce plaintiff to bargain with it exclusively, yet defendants continued their activities, interfering with plaintiff's business. *It may be inferred that what began as a dispute between employer and the union became a dispute between unions as to which should be exclusive bargaining agent.*" (Emphasis added.)

Although the Voeltz case did not involve replacement employees, we believe the quoted language is apposite since (1) there was nothing *per se* legally improper in plaintiff's refusal to recognize defendant, (2) in view of plaintiff's right to hire replacements, and (3) in light of the court's finding that the Association was not financed, interfered with, dominated or controlled by plaintiff. The crucial fact is that there was a jurisdictional strike in violation of the public policy of this state (Labor Code, § 1115) and that it was not precipitated by any unlawful conduct on plaintiff's part.

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[4] Under the National Labor Relations Act, section 8(a) (5), 29 U.S.C.A. § 158(a) (5), it is deemed an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees. The California Legislature has considered proposed legislation similar to that found in section 8(a) (5), supra (see Cal.Assembly Bills Nos. 538 (1937) and 579 (1939)), but such was never enacted into law. While section 923, of the Labor Code may be broad enough to denounce certain employer activities which would frustrate the policy therein expressed (see Elsis v. Evans, 157 Cal.App.2d 399, 408–410, 321 P.2d 514), such provision is not sufficiently comprehensive to incorporate a rule equivalent to that set forth in N.L.R.A., section 8(a) (5).

[13] Whether plaintiff is entitled to a permanent injunction is not now before this court. Once it has been determined that a jurisdictional strike exists, the granting of a preliminary injunction rests in the sound discretion of the trial court. "The authorities are numerous and uniform to the effect that the granting * * * of a preliminary injunction on a verified complaint, together with oral testimony or affidavits, even though the evidence with respect to the absolute right therefor may be conflicting, rests in the sound discretion of the trial court, and that order may not be interfered with on appeal, except for an abuse of discretion." People v. Black's Food Store, 16 Cal.2d 59, 61, 105 P.2d 361, 362. As stated in Isthmian S. S. Co. v. National Marine, etc., Ass'n, 40 Cal.2d 433, at page 435, 254 P.2d 578, at page 579: "Whether a preliminary injunction shall be granted rests largely in the discretion of the trial court and will not be reversed on appeal unless there is a manifest abuse of discretion." In Sommer v. Metal Trades Council, 40 Cal.2d 392, at page 402, 254 P.2d 559, at page 566, the court discussed the trial court's exercise of discretion as follows: "On the application for the preliminary order the court also could, and undoubtedly did, weigh the probable injury which would ensue to the plaintiff by denying the temporary relief as against the absence of probable injury which would accrue to the defendants by granting it. The record does not indicate that the court abused its discretionary power in making these determinations adversely to the defendants and in granting the injunctive order pending a trial on the merits." Likewise, in the instant case, it cannot be said that there was an abuse of discretion.

We find no merit in defendant's contention that plaintiff is barred from obtaining equitable relief because of its unclean hands. This argument is nothing more than a restatement of defendant's other contentions which have heretofore been discussed and resolved adversely to it.

[14] Attention will now be directed to defendant's cross-complaint and its prayer for injunctive relief under sections 921, 923, and 1122 of the Labor Code. Assuming, arguendo, that plaintiff's alleged pre-strike conduct was such as to violate section 921 and the public policy announced in section 923, did the trial court's denial of the preliminary injunction constitute an abuse of discretion? This must be answered in the negative.

With respect to plaintiff's asserted misconduct, Larson testified that he was discharged because of union activity. But he also stated that he was offered reinstatement. Furthermore, when asked by defendant's counsel whether management had requested that he sign a letter withdrawing his membership from the union, Larson testified: "Mr. Filbert [a representative of Management] had a piece of paper there [at the time reinstatement was offered]. He said, 'I don't imagine you will sign this, but,' he says, 'we would like to have you sign but it is up to you.' * * *" On cross-examination, Larson testified as follows regarding his discharge and subsequent refusal to accept reinstatement:

> "Mr. McCray: That time you had the supervisor's job you were considered management or managerial capacity, had the right to recommend firing and hiring didn't you?
>
> "Mr. Larson: I don't know. I never had anything to do with the hiring. They always hired the men and they were given to me to break in.

"Mr. McCray: You could influence the firing or hiring because of your managerial or supervisory capacity, could you not? A. Yes, I could.

"Q. And wasn't that spoken of at the time you were called into Mr. Petri's office in relation to your termination of your work? The fact that you were management and were apparently attempting to go into the union? A. Well, it—as Mr. Petri said that he didn't think that I should belong to a union, it was explained to me that I was a working supervisor running routes and therefore I wasn't supposed to be in a union, or I had the choice.

"Q. But that was a part of the controversy between you and Mr. Petri at the time that he had this conversation was the fact that you were considered and carried on the payroll as management or supervisory capacity? A. I believe that was brought up, yes, when I was in Mr. Petri's office that evening.

"Q. And after they reinstated you, it was by your own choice that you didn't want to work in a nonunion plant and refused to come back to work? A. I just did not accept their reinstatement.

"Mr. McCray: I believe the reason was you felt he would not go union?

"Mr. Larson: That was part of it and another part of it was I didn't think Mr. Petri would be happy with me. He couldn't be having fired me and I didn't think I would be happy working for Mr. Petri."

Wolford, who also had been given notice, was offered reinstatement which he refused to accept. Grady Ouzts was also discharged. He testified that when he was given notice no mention was made of his union affiliation or the fact that he did not belong to the Association.

A meeting of the drivers was called the day preceding the strike. With respect to this meeting, Jeffrey Winfrey testified as follows:

"Mr. Ansell: Can you tell us in your own words what you remember Mr. McCray saying that night or any other agent of the company? A. Well, he was introduced by Mr. Filbert, I think, and as near as my recollection, and he told us that about our rights for belonging to a union or not belonging and I think he read —as near as I can remember—as this has been talked over so much in the last four months, it is pretty hard to remember everything so much pro and con, but I think he read from a pamphlet there something about the Labor Code of California, expressing our rights to belong or not to belong to a union and there was quite a bit of other—I am like Mr. Wolford, I already had my mind made up and I didn't pay too much attention, but at the end they said that they expected pickets the next morning and they hoped that we would show up for work. And I think they said something about if we wanted to cross the picket line we would have protection."

Without restating all the evidence, suffice it to say that there is evidence in the record tending to show that plaintiff's conduct and attitude with respect to his employees belonging to the defendant was not exemplary. However, it is equally clear that by offering prompt reinstatement before a strike was called and fully advising the drivers of their rights under California law to belong to a union if they so desired, plaintiff appears to have ameliorated its attitude with respect to the above matters. At the time of trial plaintiff was not, so far as the evidence discloses, discouraging membership in any union or in any way interfering with his employees' right to freedom of choice, or discriminating against any employee because of union affiliation or sympathy. As the court found the Association to be bona fide, it would not be proper to order plaintiff to negotiate with defendant as the exclusive bargaining agent of his employees, for this simply was not the fact. Nor would it have been appropriate, as defendant also requested, to order the disestablishment of the Association without a full hearing on the merits. A court should be slow to order undone by a preliminary injunction that which may be declared wholly proper upon a final examining of the merits. Under all the circumstances of this case, it cannot be said that the trial court's denial of the temporary relief sought by defendant constituted an abuse of discretion.

The order is affirmed.

ASHBURN and HERNDON, JJ., concur.

Hearing granted; BRAY, P. J., and TOBRINER, J., sitting pro tem.

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171 Cal.App.2d 488

Meyer M. PASKIL, Plaintiff and Respondent,

v.

LEIGH RICH CORPORATION, a corporation, also known as La Cienega Lanes; Bernard Rich, Emanuel Levy, and Moris Horowitz, Defendants.

Leigh Rich Corporation, a corporation, Appellant.

Civ. 23391.

District Court of Appeal, Second District, Division 2, California.

June 25, 1959.

Personal injury action arising when plaintiff fell while bowling. The Trial Court, Otto J. Emme, J., entered order granting plaintiff's motion for new trial on ground that error in law had been committed in giving of unavoidable accident instruction, and defendants appealed. The District Court of Appeal, Herndon, J., held that, where plaintiff charged defendants with negligent maintenance of bowling establishment on ground that fall had been caused by patch of plastic wood filler in approach to bowling lane, and defendants introduced evidence that fall had been caused solely by inept and improper manner in which plaintiff made his approach to alley preparatory to delivering the bowling ball, giving of unavoidable accident instructions was error, and granting of new trial did not constitute an abuse of trial court's discretion.

Order affirmed.

1. Appeal and Error 🔑854(6), 977(1)

Determination of motion for new trial rests so completely within trial court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears, and order will be affirmed if it may be sustained on any ground, even though reviewing court might have ruled differently in first instance.

2. Appeal and Error 🔑1066

Giving of unavoidable accident instruction is prejudicial if evidence discloses no condition and no action or conduct apart from parties' conduct which could reasonably have been found sufficient to acquit them of negligence.

3. New Trial 🔑39

Theaters and Shows 🔑6(39)

Where, in personal injury action arising when plaintiff fell while bowling, plaintiff charged defendants with negligent maintenance of bowling establishment on ground that fall had been caused by patch of plastic wood filler in approach to bowling lane, and defendants introduced evidence that fall had been caused solely by inept and improper manner in which plaintiff made his approach to alley preparatory to delivering bowling ball, giving of unavoidable accident instructions was error, and granting of new trial did not constitute an abuse of trial court's discretion.

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Hunter & Liljestrom, Gerald V. Barron, Los Angeles, for appellant.

William C. Powers, Los Angeles, for respondent.

HERNDON, Justice.

Defendants appeal from an order granting plaintiff's motion for a new trial. The sole ground upon which the new trial was granted was that error in law was committed in giving the "unavoidable accident" instruction (BAJI No. 134) condemned (except in special situations) in Butigan v. Yellow Cab Co., 49 Cal.2d 652, 320 P.2d 500. Defendants urge that under the peculiar facts of the instant case (1) the giving of the instruction did not constitute error, and (2) if there was error, it was not prejudicial.

Plaintiff seeks recovery of damages for personal injuries allegedly suffered as the result of a fall sustained while engaged in the sport of bowling. He charges defendants with negligence in the maintenance of the bowling establishment and attributes his fall to a defect in the floor of the alley or lane which he was using at the time. At the trial he introduced evidence tending to prove that his fall was caused by a patch of plastic wood filler in the approach to the lane 3 to 5 inches in length, about ½ inch in width and 1/16th to ⅛th inch higher than the surrounding wood.

Defendants denied the material allegations of the complaint and alleged the defense of contributory negligence. They introduced evidence tending to prove that the alleged defect was not in existence at the time in question, and that plaintiff's fall was caused solely by the inept and improper manner in which he made his approach to the alley preparatory to delivering the ball.

The jury returned a verdict for defendants. The court thereafter granted plaintiff's motion for a new trial solely upon the ground above indicated. Thus, the determinative issue is whether the trial judge reasonably could have regarded the giving of the "unavoidable accident" instruction as prejudicially erroneous.

[1] The rule of law governing our review of the order here challenged was recently stated in Shaw v. Pacific Greyhound Lines, 50 Cal.2d 153, 159, 323 P.2d 391, 394, as follows: "The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears, and the order will be affirmed if it may be sustained on any ground, although the reviewing court might have ruled differently in the first instance. Brandelius v. City and County of San Francisco, 47 Cal.2d 729, 733–734 306 P.2d 432. In the Brandelius case it was stated that the granting of a new trial could be reversed 'only if * * * the questioned instruction was absolutely accurate and under no reasonable interpretation could possibly have misled or confused the jury.' 47 Cal.2d at page 745, 306 P.2d at page 442." And as stated in Balthrop v. Atchison, T. & S. F. Ry. Co., 142 Cal.App.2d 823, at page 826, 299 P.2d 341, at page 343: "It has been said 'If the challenged instruction was erroneous in any degree, or even if it was only "fairly debatable" that such instruction may have been misleading, the broad discretion of the trial court may not be disturbed, * * *.' " Sloboden v. Time Oil Co., 131 Cal.App.2d 557, 558, 281 P.2d 85; Los Angeles City High School District v. Kita, 169 Cal.App.2d 655, 338 P.2d 60.

[2] Turning now to the specific question whether it was error under the facts of this case to give the "unavoidable accident" instruction, the following language from Halleck v. Brown, 164 Cal.App.2d 586, 330 P.2d 852, 854, appears to be controlling. "It is well settled that the giving of the unavoidable accident instruction is prejudicial where the evidence discloses no condition and no action or conduct apart from the conduct of the parties that could reasonably have been found sufficient to acquit them of negligence. Martz v. Ruiz, 158 Cal.App.2d 590, 322 P.2d 981; Britton v. Gunderson, 160 Cal.App.2d 66, 324 P.2d 938; Brenner v. Beardsley, 159 Cal.App.2d 304, 323 P.2d 841; Emerton v. Acres, 160 Cal.App.2d 742, 325 P.2d 685; Grant v. Mueller, 160 Cal.App.2d 804, 325 P.2d 680."

[3] To the same effect are Perrotti v. Sampson, 163 Cal.App.2d 280, 329 P.2d

310, and McGuire v. Navarro, 165 Cal.App.2d 661, 332 P.2d 361. The last cited case involved a collision of automobiles. A judgment in favor of the defendant was reversed by reason of the error in giving the "unavoidable accident" instruction notwithstanding defendant's testimony that the accident resulted solely from the fact that the driver of another automobile had forced him off the road. In other words, it was defendant's theory that the intervening negligence of a third party was the sole proximate cause of the collision—a theory which provided a better basis than we find in the case at bar for argument that the instruction was appropriate.

The precedents cited above point clearly to the conclusion that the giving of the "unavoidable accident" instruction was error and that the granting of the new trial did not constitute an abuse of discretion.

The order is affirmed.

FOX, P. J., and ASHBURN, J., concur.

TWIN LOCK, INCORPORATED, a California Corporation, Petitioner,
v.
SUPERIOR COURT OF the State of CALIFORNIA IN AND FOR the COUNTY OF LOS ANGELES, Respondent,

Albert Agron, Robert A. Clifford and Joseph R. Frank, Real Parties in Interest. *
Civ. 23846.

District Court of Appeal, Second District, Division 1, California.
June 10, 1959.

Hearing Ordered July 13, 1959.

Prohibition proceeding. The District Court of Appeal, Nourse, J. pro tempore, held that Civil Procedure Code section is not a limitation on court's power to compel party to make discovery but on court's power to compel, through proceedings in contempt or by arrest, attendance of witness any place outside of county in which he resides and more than 150 miles from his place of residence; and held that court has power to impose sanctions on account of failure of party witness (that is, a party or officer, director or managing agent of a party) to appear pursuant to notice to take his deposition, even where notice fixes for taking of party witness' deposition a place outside of county in which he resides and more than 150 miles from his place of residence.

Alternative writ discharged and peremptory writ denied.

See, also, 340 P.2d 748.

1. Discovery 🔑77

Notice of taking of deposition of party, or officer, director or managing agent of a party, is not directed to witness but to party and does not place any compulsion upon witness to attend but does place compulsion upon party to produce witness; and failure to respond to notice does not make witness subject to contempt powers of court or to arrest. West's Ann.Code Civ.Proc. §§ 1989, 2016–2035, 2019(a) (1).

2. Statutes 🔑216

If statement of intent, by committee which drafted Civil Procedure Code sections, had been contained in report to Board of Governors or to Legislature at time statutes were proposed, it would have been a great aid in interpreting sections; but statement having been made after enactment of sections, it was not of any aid. West's Ann.Code Civ.Proc. §§ 1989, 2016–2035, 2019(a) (1).

3. Statutes 🔑212

Court would have to assume that, in enacting discovery statutes which were in substance exact counterparts of federal rules, Legislature had intended that they should have same meaning, force and effect as had been given federal rules by federal courts. West's Ann.Code Civ.Proc. §§ 1989, 2016–2035, 2034(d).

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* Opinion vacated 344 P.2d 788.

4. Discovery ⚿77

Civil Procedure Code section is not a limitation on court's power to compel party to make discovery but on court's power to compel, through proceedings in contempt or by arrest, attendance of witness any place outside of county in which he resides and more than 150 miles from his place of residence; and court has power to impose sanctions on account of failure of "party witness" (that is, a party or officer, director or managing agent of a party) to appear pursuant to notice to take his deposition, even where notice fixes for taking of party witness' deposition a place outside of county in which he resides and more than 150 miles from his place of residence. West's Ann.Code Civ.Proc. §§ 1989, 2016–2035, 2019(a) (1).

See publication Words and Phrases, for other judicial constructions and definitions of "Party Witness".

5. Prohibition ⚿30

Where statutes, which District Court of Appeal had been called upon to construe, in proceeding to prohibit Superior Court from enforcing by sanctions an order made for appearance of certain nonresident party witnesses, were new enactments in state, and petitioner had in good faith sought protection of District Court of Appeal, it would not be right that petitioner be penalized because, although its contentions had merit, District Court of Appeal could not agree with them; but District Court of Appeal had no power to direct Superior Court as to what action it could take as to matters within its jurisdiction and, accordingly, could not, upon denying peremptory writ, direct court to fix new dates for taking of depositions and to withhold any order imposing sanctions until witnesses failed to appear at new dates fixed by court. West's Ann.Code Civ.Proc. §§ 1993, 2034.

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W. Claude Fields, Jr., Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Assistant County Counsel, and Edward A. Nugent, Deputy Counsel, Los Angeles, for respondent.

O'Melveny & Myers, Philip F. Westbrook, Jr., and Norbert A. Schlei, and Maxwell E. Greenberg, Los Angeles, for real parties in interest.

NOURSE, Justice pro tem.

Petitioner seeks a writ of prohibition to enjoin the respondent court from enforcing by sanctions an order made for the appearance of certain non-resident party witnesses.

Petitioner commenced the subject action to recover both compensatory and punitive damages against the defendants therein named for violation of a fiduciary relationship alleged to exist between petitioner and certain of the defendants under a contract and unfair competition. Petitioner also sought to enjoin the defendants from attempting to represent the petitioner before the United States Patent Office, from claiming to be the owner of a certain invention and from manufacturing or selling certain articles manufactured and containing the invention and trade secrets which petitioner claimed to own.

The complaint alleges that petitioner had entered into an agreement to purchase from the defendants Frank, Agron and Clifford (real parties in interest herein) a certain invention and an application for letters patent thereon for the price of $1,250,000 plus certain additional sums; the said purchase price to be payable in installments at certain prescribed times as set forth in the agreement; that petitioner had performed all of the terms and conditions of said contract upon its part to be performed; that the real parties had asserted that the contract had been breached and claimed to be the owner of said letters patent and had entered into the manufacture of the devices which contained the invention in question.

Defendants Agron et al. answered, denying performance of the argument by petitioner; alleging that petitioner had defaulted in the making of payments on the purchase price and that by reason thereof said agreement had been terminated. They filed a cross-complaint alleging a breach of contract by the petitioner; that a controversy existed as to whether petitioner was in default under the contract; as to whether the contract had been terminated; as to whether Twinlock, Inc., a Delaware corporation and the owner of all the stock of petitioner and petitioner were liable for certain sums as damages. They prayed not only for declaratory judgment but for an accounting and damages and for an injunction against the cross-defendants manufacturing or selling any devices involving the use of the invention above mentioned and enjoining petitioner from removing from California any of its assets.

A preliminary injunction was issued by the court by the terms of which petitioner was enjoined from making a transfer of any of its funds to certain of its officers, one Krause and one Bannister who are respectively the secretary and a director of petitioner and are among those whose depositions are sought by the real parties in interest.[1]

After the subject action was at issue, the real parties in interest gave notice pursuant to section 2019 of the Code of Civil Procedure that they would take the depositions of certain named persons including Charles F. Krause, Jr., C. Parke Masterson, Jr., Joseph Lavorata, Norman DePlanque and Lemuel Bannister, Jr., at Los Angeles at the time and place set forth in the notice. Each of the persons named in the notice is an officer or a director of petitioner and each of them resides in the state of New York and none of them was in the state of California at the time of the giving of such notice.

Petitioner moved the respondent court to vacate the notice of the taking of the depositions of the above named persons upon the ground that the taking of the depositions at the place designated in the notice would cause annoyance, undue expense, embarrassment and oppression. The respondent court denied their motion to vacate and ordered that the depositions of said officers and directors be taken at Los Angeles at times therein named. Petitioner then sought a writ of prohibition from this court and on April 10th this court denied the petition upon the grounds that the petition was premature inasmuch as petitioner had not exhausted its remedies under section 2019(b) of the Code of Civil Procedure before the respondent court by applying thereto for a change in the place of the taking of said depositions and had failed to show that the respondent court had threatened to impose sanctions.

Petitioner did not produce the above named witnesses at the time and place fixed by the lower court's order but did petition that court for a change in the place of the taking of said depositions from Los Angeles to New York city. The real parties in interest simultaneously moved the court pursuant to section 2034 of the Code of Civil Procedure for an order imposing the sanctions provided for by paragraph (b) (2) (iii). The respondent court denied petitioner's motion for a change of the place of the taking of the depositions; ordered that the depositions of the witnesses be given at Los Angeles on dates fixed in the order and continued the real parties' in interest motion for sanctions to a date beyond that which it had fixed for the giving of the depositions.

Petitioner then filed the present petition for a writ of prohibition and this court issued an alternative writ restraining the respondent court from further proceedings pending further order of this court.

[1-4] Petitioner makes but one contention to support its petition for a peremptory writ of prohibition. Briefly stated this contention is that a court of this state is without power to impose sanctions pursuant to section 2034(d) of the Code of Civil Pro-

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[1] Real parties in interest, respondent here, stipulated in the trial court and in oral argument before this court that payments by petitioner to Krause and Bannister of their necessary expenses in coming to and staying in Los Angeles for the purpose of giving their depositions should not be deemed a violation of the provisions of the injunction.

cedure on account of the failure of a party witness (that is, a party or an officer, director or managing agent of the party) to appear pursuant to the notice to take his deposition given under section 2019(a) (1) of the Code of Civil Procedure[2] in any case where the notice fixes the place of the taking of the party witness's deposition at a place outside of the county in which he resides and more than 150 miles from his place of residence. Petitioner bases this contention upon the provisions of section 1989 of the Code of Civil Procedure that a witness "is not obliged to attend as a witness" unless the distance to the place of the giving of his deposition is less than 150 miles from his place of residence. This contention cannot be sustained.

The taking of a deposition of a party and in case of a corporation, the deposition of its officers, directors or managing agents is a part of the discovery procedure provided for by chapter 1904 of the Statutes of 1957 (amending or enacting §§ 2016 through 2035 of the Code of Civ.Proc.). The giving of the notice of the taking of a deposition of a party or an officer, director or managing agent of a party does not place any compulsion upon the witness to attend but does place a compulsion upon the party to produce that witness. The notice is not directed to the witness but to the party and a failure to respond to the notice does not make the witness subject to the contempt powers of the court or to arrest. Section 2034 of the Code of Civil Procedure makes clear the difference in the effect of the failure of a witness to respond to a subpoena and the failure of a party to appear pursuant to a notice of the taking of his deposition. Under the provisions of that section, if the deposition to be taken is that of a person other than a party and he is not under subpoena, no sanctions can be invoked because of the failure of the witness to appear nor is the witness subject to the contempt powers of the court or to arrest pursuant to section 1993 of the Code of Civil Procedure. If such a witness be under subpoena and he fails to appear he may be punished for contempt or be placed under arrest provided the subpoena commanded his appearance at a place not more than 150 miles from his place of residence but sanctions against a party may not be imposed. If, however, the person whose deposition is to be taken be a party witness who has not been placed under subpoena, his failure to appear does not subject him to the contempt powers of the court or to arrest but the court may impose sanctions against the party pursuant to paragraph (d) of section 2034 of the Code of Civil Procedure. In imposing sanctions the court is not exercising its power to compel the attendance of the witness for the purpose of giving evidence but is exercising its power to compel discovery by a party.[3]

Section 1989 of the Code of Civil Procedure is not a limitation on the court's power to compel a party to make discovery but on its power to compel, through proceedings in contempt or by arrest, the attendance of a witness at any place outside of the county in which he resides and more than 150 miles from his place of residence.

Petitioner argues that if the court has power to impose sanctions against the party because he does not produce a party witness it is accomplishing indirectly that which it could not accomplish directly by compelling the witness's attendance by subpoena and that therefore it must have been the intention of the Legislature to make section 1989 of the Code of Civil Procedure, which it amended at the same time as it enacted the present sections 2016 to 2035, both inclusive, applicable to discovery proceedings initiated to procure the deposition of a party witness. In support of this argument they direct our attention to a report of the Committee on Administration of Justice of the State Bar of California (see State Bar Journal, July-August, 1958, pp. 389–393), which committee drafted and through the State Bar submitted to the State Legislature the sections of the Code of Civil Procedure last above mentioned, stating that it had been the intent of the committee in drafting the proposed statutes that section 1989 of the Code of Civil Procedure should be applicable to the provisions of section 2019(a) (1). Such a statement by the committee, if it had been contained in the report to the board of governors or to the Legislature at the time the statutes were proposed, would be a great aid in interpreting the statutes in question. Having been made after their enactment it is not of any aid particularly in view of the fact that when the enactment of the present sections 2016–2035 was proposed to the Legislature they were proposed as an adoption by this state of federal rules of procedure relative to discovery and with the express purpose of broadening discovery proceedings in California to the end that they would be comparable with those proceedings in the federal courts. (Report of the Committee on Administration of Justice, 31 Cal.State Bar Journal (1956) pp. 204–231.) We must assume that in enacting these discovery statutes which are in substance exact counterparts of the federal rules, the Legislature intended that they should have the same meaning, force and effect as have been given the federal rules by the federal courts. Union Oil Associates v. Johnson, 2 Cal.2d 727, at page 735, 43 P.2d 291, at page 295, 98 A.L.R. 1499 and cases there cited; Scripps Memorial Hospital v. California Employment Comm., 24 Cal.2d 669, 151 P.2d 109, 155 A.L.R. 360; Holmes v. McColgan, 17 Cal.2d 426, at page 430, 110 P.2d 428, at page 430. In the federal courts it has been uniformly held that the limitations as to the place of the taking of the deposition of a witness subpoenaed to appear and gave his deposition as set forth in Rule 45 of the Federal Rules of Civil Procedure (28 U.S.C.A.) are not applicable to proceedings for the purpose of discovery through the depositions of party witnesses. Collins v. Wayland, 9 Cir., 1944, 139 F.2d 677; Anthony v. RKO Radio Pictures, Inc., D.C.1948, 8 F.R.D. 422; Bernstein v. N. V. Nederlandsche-Amerikaansche, etc. (Chemical Bank & Trust Co.), D.C., 15 F.R.D. 37; 4 Moore's Federal Practice, p. 2018 and cases there cited.

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[2] In substance section 2019 (a) (1) provides that in case of a party witness, service of a subpoena upon the deponent is not required if proper notice of the taking of the deposition be made.

[3] For the distinction between the power of the court to punish for contempt for a violation of a subpoena and its power to impose sanctions, see Hammond Packing Co. v. State of Arkansas, 212 U.S. 322, 29 S.Ct. 370, 53 L.Ed. 530; Peitzman v. City of Illmo, 8 Cir., 141 F.2d 956.

Petitioner argues that great hardships might be imposed where the courts of this state have acquired jurisdiction over a defendant non-resident individual or foreign corporation. That the statute might be abused and hardships imposed is quite true, but the court is given the power to change the place of the taking of the deposition of a party witness and must use sound discretion in refusing such an application and in the case of a party defendant who had not voluntarily brought himself within the jurisdiction of the courts of this state it is unlikely that a court in the exercise of sound discretion would order him to come to this state for the purpose of discovery. We are not, however, faced with any question of discretion as at oral argument here, counsel for petitioner abandoned any claim of any abuse of discretion.

Further, the witnesses here are officers of a corporation incorporated under the laws of this state and it has its principal place of business within the county in which it brought the subject action and it, if not its officers, is a resident of the county where the depositions are to be taken.

Petitioner does not assert that there is any constitutional limitation on the power of the Legislature to authorize the courts to impose sanctions against a party who had failed to make discovery in accordance with the statute. It is apparent, therefore, that the respondent court having jurisdiction over the parties and the subject matter of the action has the power to make the order imposing sanctions which it threatens to make. In imposing sanctions it would therefore not act in excess of its jurisdiction and this court is therefore without power to prohibit its imposition of the sanctions.

[5] By the alternative writ heretofore issued, we stayed the order of the respondent court which changed the dates for the taking of the depositions of the party witnesses of plaintiff corporation. Petitioner now asks that if we deny the peremptory writ, which we must do, that we direct the respondent court to fix new dates for the taking of those depositions and to withhold any order imposing sanctions until the witnesses have failed to appear at the dates fixed by the court. This we would do had we the power for the statutes which we have been called upon to construe are new enactments in this state and counsel have had no decisions of appellate courts of this state to guide them and have in good faith sought the protection of this court and should not be penalized because, although their contentions had merit, we could not agree with them. We do not, however, have the power to direct the trial court as to what action it may take as to matters within its jurisdiction. If it should err in exercising its jurisdiction that error would necessarily have to be presented to the appellate court upon an appeal. It must not be understood from what we have just stated that we entertain any thought that the respondent court will take the drastic step of imposing the sanctions asked by the real parties in interest, without first providing a reasonable further opportunity for petitioner to comply with the notice of the taking of the depositions in question.

The alternative writ is discharged and the peremptory writ is denied.

WHITE, P. J., and LILLIE, J., concur.

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171 Cal.App.2d 236

TWIN LOCK, INCORPORATED, a California corporation, and Twinlock, Inc., a Delaware corporation, Petitioners,

v.

SUPERIOR COURT OF The State of CALIFORNIA IN AND FOR the COUNTY OF LOS ANGELES, Respondent.

Albert Agron, Robert A. Clifford and Joseph R. Frank, Real Parties in Interest.

No. 23903.

District Court of Appeal, Second Division, Division 1, California.

June 10, 1959.

Prohibition proceeding to enjoin enforcement of order requiring petitioners to produce and permit inspection of certain documents or, in the alternative, for a writ of mandate to compel court to vacate order. The District Court of Appeal, Nourse, J., pro tempore, held that the same rules which govern production of documents under subpoena duces tecum govern inspection of papers and documents in hands of party to action, and that right to production of documents in hands of party is not as broad as right to examine party.

Order accordingly.

1. Discovery ⚷80

The same rules which govern production of documents under subpoena duces tecum govern inspection of papers and documents in hands of party to action, and right to production of documents in hands of party is not as broad as right to examine party. West's Ann.Const. art. 1, § 19; West's Ann.Code Civ.Proc. §§ 2016, 2031.

2. Discovery ⚷89

In action to enjoin defendants from claiming to be owners of invention, wherein defendants alleged that plaintiffs had breached agreement for purchase of invention and sought an accounting and damages, defendants would be entitled, in event they were able to establish rescission, to an accounting from plaintiffs on account of any devices manufactured and sold after termination of its right so to do, and, accordingly, entries in plaintiffs' books of account and other records pertaining to profits and losses could be relevant, and court properly required plaintiffs to produce and permit inspection of documents evidencing such matters. West's Ann.Code Civ.Proc. § 2031.

3. Discovery ⚷99

In action to enjoin defendants from claiming to be owners of invention, wherein defendants alleged that plaintiffs had breached agreement for purchase of invention and sought an accounting and damages, the court abused its discretion, acted in excess of its powers, and invaded constitutional rights of plaintiff when it entered, without material being identified or shown to contain competent and admissible evidence material to issues to be tried, blanket order which did not identify particular records to be produced by plaintiff. West's Ann.Civ.Code, § 3275.

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Gibson, Dunn & Crutcher and John L. Endicott, and W. Claude Fields, Jr., Los Angeles, for petitioners.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Asst. County Counsel, and Edward A. Nugent, Deputy County Counsel, Los Angeles, for respondent.

O'Melveny & Myers, Philip F. Westbrook, Jr., Norbert A. Schlei and Maxwell E. Greenberg, Los Angeles, for real parties in interest.

NOURSE, Justice pro tem.

Petitioners seek a writ of prohibition to enjoin the respondent court from enforcing an order requiring them to produce and permit inspection by the real parties in interest of certain documents or, in the alternative, a writ of mandate to compel the respondent court to vacate that order.

Twin Lock, Incorporated, is the plaintiff and a cross-defendant in the subject action.

The basic issues as formed by the complaint and the cross-complaint and the answers thereto are set forth in the opinion concurrently filed herein in Twin Lock, Incorporated v. Superior Court, Cal.App., 340 P.2d 743. Such further facts as may be pertinent to the questions here raised will be stated by us in deciding the questions presented.

Pursuant to section 2031 of the Code of Civil Procedure the real parties in interest moved the respondent court for an order requiring the petitioners here to produce and permit inspection and copying of certain documents. They based their motion upon all the papers, files and pleadings in the action and upon the declarations of one of their attorneys and the declaration of the real party in interest, Agron. The respondent court granted the motion as to certain of the documents demanded and denied it as to others. Petitioners attack the order as to certain of the documents demanded on the ground, among others, that good cause was not shown for their production and that, consequently, the order violates their constitutional rights against unreasonable searches and seizures under article I, section 19 of the Constitution of this state.

[1] Although real parties in interest assert that their right to the production of documents is, under section 2031, as broad as their right to examine a party under the provisions of section 2016, we are convinced that this contention cannot be sustained and that the same rules which govern the production of documents under subpoena duces tecum and governed their production under section 1000, Code of Civil Procedure, prior to the enactment in 1957 of section 2031, govern the production of documents under that section; this, by reason of the fact that the rules announced by the Supreme Court are based upon a constitutional guaranty against unreasonable searches and seizures and the Legislature could not, by changing the terms of the statute, in anywise infringe upon those constitutional rights.

The rule as to the right to inspection of papers and documents in the possession of a party to an action is laid down in McClatchy Newspapers v. Superior Court, 26 Cal.2d 386, 159 P.2d 944. See also Adams v. Superior Court, 49 Cal.2d 427, 433, 317 P.2d 983. The Supreme Court, at page 396 of 26 Cal.2d, at page 950 of 159 P.2d of the McClatchy opinion, stated the rule as follows: "The right to have an inspection of papers and documents in the hands of a party to the action or a third person *is governed by different rules from those applying to depositions.* A party or witness has a constitutional right to be free from unreasonable searches and seizures, and it is therefore incumbent upon the one seeking an inspection to show clearly that he has a right thereto and that the constitutional guaranties will not be infringed. Hence, *the affidavit in support of the demand for inspection must identify the desired books, papers and documents and it must clearly show that they contain competent and admissible evidence which is material to the issues to be tried.* The affiant cannot rely merely upon the legal conclusion, stated in general terms, that the desired documentary evidence is relevant and material." (Italics ours.)

[2] Among the documents which the court ordered petitioner Twin Lock, Incorporated, to produce were certain ledgers and other books of account, invoices, cancelled checks and financial statements.[1] Petitioners do not complain of said order insofar as it applies to the production of the designated records for the period prior to October 1, 1958, but assert that any entries made in any such records as to matters after October 1, 1958, are immaterial. The basis for this contention is that on October 2, 1958, the real parties in interest gave notice of rescission of the basic agreement between the parties under which petitioner Twin Lock, Incorporated, had agreed to purchase and real parties in interest had agreed to sell certain inventions and an application for letters patent upon the grounds that Twin Lock, Incorporated, had defaulted in the payments of the purchase price required to be made by it under the terms of the agreement. They, therefore, claim that any entries in their books of account or any other records pertaining to their profits or losses after the date mentioned could not be relevant. There is no merit in this contention.

The pleadings show that after October 1, 1958, petitioner Twin Lock, Incorporated, has continued to use the invention covered by the contract and to manufacture and sell certain electrical devices. Therefore, if the real parties in interest are, under the cross-complaint, able to establish the rescission they would be entitled to an accounting from the plaintiff in the action on account of any devices manufactured and sold by it after the termination of its right so to do. We may further point out that if at the trial of the action it should be established that the plaintiff was in default the court might, in the exercise of its equitable powers, relieve it therefrom upon condition that within a time stated it should pay to defendants the amount in which it was then in default plus interest and, as certain of the payments which plaintiff was required to make to real parties in interest on account of the purchase price were based upon a percentage of its net profits the books of account and other financial records as to the transactions occurring after October 1st would be relevant and material. Civ.Code § 3275.

The court, by its order, further required each of the petitioners to produce their stock record books. The materiality of these records is established by the contract between the parties. By the contract petitioner Twin Lock, Incorporated, agreed to pay the real parties in interest on account of the basic purchase price of $1,250,000, 50 per cent of the net profits received from all sales of capital stock or warrants for the purchase of capital stock of both Twin Lock, Incorporated and Twinlock, Inc., in excess of the sum of $300,000. It is too apparent for argument that the stock record books would show the number of shares sold by each corporation and would be relevant evidence in establishing the amount, if any, which was due to real parties in interest upon the date of their attempted rescission on account of sales of stock which had accrued during the pendency of the litigation.

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[1] "1. * * * (a) General Ledger of Twin Lock, Incorporated from its inception to date; (b) All subsidiary ledgers including specifically cash receipts records, cash disbursements records, check records, voucher and invoice records, sales records, payroll records, and journal entry records, from the inception of Twin Lock, Incorporated to date. (c) All sales invoices, cancelled checks and paid bills from the inception of Twin Lock, Incorporated to date. * * * (f) All financial statements or reports or copies of financial statements or reports prepared for Twin Lock, Incorporated by independent accountants or accounting firms."

[3] The court further ordered Twin Lock, Incorporated, to produce "All correspondence and letters or memoranda, or copies of letters or memoranda to or from bookkeepers, or accountants or accounting firms, concerning the manner in which books or accounting records of Twin Lock, Incorporated should be maintained or kept or interpreted, or concerning the preparation by said bookkeepers, accountants or accounting firms or other documents or reports based upon or in any way reflecting the contents of said books or accounting records."

This was a blanket order which does not identify the particular records to be produced and while there was some showing made to the respondent court that some of the material covered by the order did exist, none of it was identified and there was no showing made that any of the material contained competent and admissible evidence material to any issue to be tried.

The court, by this portion of the order, abused its discretion, acted in excess of its powers and invaded the constitutional rights of petitioner, Twin Lock, Incorporated.

The court further ordered Twin Lock, Incorporated, to produce "memoranda or correspondence filed with or sent to the Bureau of Internal Revenue or the Internal Revenue Service or any representative thereof, by * * * Twin Lock, Incorporated or any of its officers, agents or employees * * *"

It also required Twin Lock, Incorporated, to produce copies of its federal income tax returns for the fiscal years 1957 and 1958.

Petitioners do not attack the order insofar as it requires the production of the income tax returns and has produced them. The balance of the order it attacks upon grounds hereinbefore stated and its attack must be sustained.

The declarations filed in support of the motion for the order do not contain any evidence that such memoranda or correspondence as plaintiff was required to produce exists, much less any showing that the memoranda or correspondence contain any matter competent or admissible in evidence.

A peremptory writ of prohibition is denied insofar as subparagraphs (a), (b), (c), (d) and (f) of paragraph 1 and paragraph 2 of said order are concerned.

Let a peremptory writ of prohibition issue enjoining respondent court from enforcing its said order of May 13, 1959, insofar as it requires the production by petitioner Twin Lock, Incorporated, of all correspondence and letters or memoranda, or copies of letters or memoranda to or from bookkeepers or accountants or accounting firms, concerning the manner in which books or accounting records of Twin Lock, Incorporated should be maintained or kept or interpreted, or concerning the preparation by said bookkeepers, accountants or accounting firms or other documents or reports based upon or in any way reflecting the contents of said books or accounting records;[2] and insofar as it requires the production by petitioner, Twin Lock, Incorporated, of memoranda or correspondence filed with or sent to the Bureau of Internal Revenue or the Internal Revenue Service or any representative thereof by Twin Lock, Incorporated or any of its officers, agents or employees on its behalf.[3]

WHITE, P. J., and LILLIE, J., concur.

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[2] Paragraph 1(e) of the order.

[3] As set forth in paragraph 1(g) of the order.

171 Cal.App.2d 424

Arthur P. SMITH, Plaintiff and Appellant,

v.

Panon HEILMAN, Defendant and Respondent.

Civ. 9558.

District Court of Appeal, Third District, California.

June 18, 1959.

Hearing Denied Aug. 12, 1959.

Action by divorced husband against his former wife for declaration that he was not father of wife's child, which was born after alleged gestation period of 198 days. The Superior Court, San Joaquin County, George F. Buck, J., entered judgment adverse to divorced husband, and divorced husband appealed. The District Court of Appeal, Warne, J. pro tem., held that divorced wife's testimony that she had not had sexual intercourse with any man, other than divorced husband, from date of their marriage until time of divorce was sufficient to support trial court's declaration of child's legitimacy, and that fact that former wife joined issue and offered evidence on question of child's legitimacy did not constitute waiver of defense that Washington divorce decree determining that child was issue of the marriage was res judicata of the issue of legitimacy.

Judgment affirmed.

1. Evidence ⚷383(4)

Birth certificate, which had been made by the attending physician, and which stated that the pregnancy was a nine-months' pregnancy was prima facie evidence that the pregnancy was of such duration. West's Ann.Health & Safety Code, § 10551.

2. Bastards ⚷3

In action by divorced husband against his former wife to obtain declaration that he was not father of former wife's child, evidence that child had been born after alleged gestation period of only 198 days and that birth certificate stated that the pregnancy was a nine-months' pregnancy made presumption that the child, born of lawful wedlock, was legitimate a disputable one, and legitimacy of child became question of fact. West's Ann.Civ.Code, § 193; West's Ann.Code Civ.Proc. §§ 1060, 1980.1–1980.7; West's Ann.Health & Safety Code, § 10551.

3. Appeal and Error ⚷1010(1)

Where, in action by divorced husband against his former wife for declaration that he was not father of wife's child, question of child's legitimacy was one of fact, judgment adverse to divorced husband would have to be affirmed on appeal if there was any substantial evidence to support it. West's Ann.Civ.Code, § 193; West's Ann. Code Civ.Proc. §§ 1060, 1980.1–1980.7; West's Ann.Health & Safety Code, § 10551.

4. Appeal and Error ⚷931(1)

In determining whether there was any substantial evidence to support judgment based on determination of fact question, all conflicts had to be resolved on appeal in favor of prevailing party, and evidence would have to be viewed in light most favorable to her.

5. Bastards ⚷6

Upon appeal from judgment adverse to divorced husband in action by divorced husband against his former wife for declaration that he was not father of wife's child, there was substantial evidence to sustain trial court's declaration of child's legitimacy and to establish that Washington divorce decree was free of intrinsic or extrinsic fraud and free of any deceit or fraud practiced in the action by either of the parties.

6. Bastards ⚷6

In action by divorced husband against his former wife for declaration that he was not father of wife's child allegedly born after a 198-day gestation period, divorced wife's testimony that she had not had sexual intercourse with any man other than divorced husband, from date of their marriage until time of divorce was sufficient to support trial court's declaration of child's legitimacy, even though there might be an abundance of record evidence to the contrary. West's Ann.Code Civ.Proc. § 1060; West's Ann.Civ.Code, § 193.

7. Divorce ⚷384

In action by divorced husband against his former wife for declaration that he was not father of wife's child, fact that former wife joined issue on question of child's legitimacy and offered evidence on the issue did not constitute a waiver of her defense that final decree in parties' Washington divorce action determining that child was issue of marriage was res judicata of the issue of legitimacy. West's Ann.Code Civ.Proc. § 1060.

8. Judgment ⚷951(1)

Party relying on plea of res judicata must produce evidence of a former adjudication and, in some cases, evidence dehors the record to establish scope of the prior adjudication.

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Leonard G. Husar, Angels Camp, Herbert Chamberlin, San Francisco, for appellant.

Smith & Zeller, Stockton, for respondent.

WARNE, Justice pro tem.

This is an appeal from a judgment declaring and decreeing that appellant is the natural father of Laurel Smith, the daughter of respondent Panon Heilman, his former wife, in an action brought by appellant seeking a declaration that he was not the father of said child.

The complaint alleges that the plaintiff and defendant were married October 22, 1943, and were divorced January 28, 1954; that during the period from April, 1945, to November 17, 1945, plaintiff was on naval duty in the South Pacific and during that time did not cohabit with defendant; that on June 7, 1946, when plaintiff was again on naval duty in the South Pacific, defendant gave birth to a mature female infant of full term gestation; that defendant represented to plaintiff that said child was born three months prematurely and was plaintiff's child; that plaintiff did not learn that such representation was false until July, 1956; and upon information and belief plaintiff alleges that he cannot be, and is not, the father of said child.

Defendant in her answer admits that she and the plaintiff were married on October 22, 1943; that they were divorced on January 28, 1954; and that she gave birth to the child in question on June 7, 1946. She denied all other allegations in the complaint. Defendant affirmatively alleged that "it was adjudicated * * * in the divorce proceedings between the parties * * * on the 28th day of January, 1954, in the Superior Court of the State of Washington for Kitsap County, that the female child referred to * * * was the lawful issue and child of the plaintiff and that any issue as to the paternity of said child was finally adjudicated and determined by the decree of the said Court by said judgment regularly and duly made and entered." The court found that said child was born to plaintiff and defendant as the issue of the marriage and that said child was born on June 7, 1946. It further found "That prior to the commencement of this action it was adjudicated in that certain action in the Superior Court of the State of Washington for Kitsap County, Panon Smith, plaintiff, vs. Arthur P. Smith, defendant, Action No. 31638, that the plaintiff in said Washington action and the defendant in this action was the mother, and the defendant in said Washington action and the plaintiff in this action was and is the father of said minor child, Laurel Smith; that said judgment was regularly and duly made and entered by the said Superior Court of the State of Washington for Kitsap County; that said judgment was, prior to the commencement of this action, final; that no motion for new trial was made therein nor any appeal taken therefrom; that said judgment was free of any fraud, either intrinsic or extrinsic, and free of any deceit of fraud practiced in said action by any of the parties thereto."

As a conclusion of law the court made a declaration in accordance with the terms of section 1060, Code of Civil Procedure, to the effect that plaintiff is the father of Laurel Smith, "and that said judgment so entered is a valid subsisting, lawful judgment and binding on the parties and finally adjudicates the paternity of said child, * * *"

The final judgment decreed and declared "That Laurel Smith, Daughter of Panon Heilman, defendant, is the daughter of the plaintiff, Arthur P. Smith, and Arthur P. Smith is the natural father of said Laurel Smith."

The pertinent facts as disclosed by the record are: Plaintiff was away from his wife and in active service of the Navy from the middle of April, 1945, until about November 17, 1945. He rejoined his wife on the 21st or 22d day of November, 1945, and they cohabited until he resumed active service in the Navy around February 4, 1946. Before he left she told him she was pregnant and that a doctor had told her the baby would be born around August 13, 1946. While he was away she gave birth to the child in question on June 7, 1946. Plaintiff testified that the first news of the birth came from his brother when they met on the island of Saipan in July of 1946. A month later he testified that he received a letter from defendant in which she said the baby was born prematurely in the sixth month of pregnancy. The defendant testified that she wrote to her husband advising him of the birth of a baby within a few days after its birth and that the Red Cross had been instructed to send her husband a telegram on the same day on which the baby was born. Defendant testified that the child was born prematurely. However, the official birth certificate shows that the child was born in the ninth month of pregnancy, and that a serological test for syphilis in the mother had been made in the fourth month of gestation. The records of the hospital where the defendant was confined show that the delivery was normal, that the baby weighed 8 pounds, 9 ounces, at birth, and was not in the incubator at any time. It was the testimony of defendant that she did not have sexual relations with any man other than the plaintiff in this action from the date of their marriage to the date of their divorce, the divorce having been entered in the year 1954, over seven years after the birth of the child. It was the testimony of plaintiff that he believed at all times he was the father. The evidence indicates a potential period of 198 days between the date of possible conception and the date of the birth of the child.

By stipulation of the parties blood tests of plaintiff, defendant, and the child (Laurel) were taken pursuant to the Code of Civil Procedure, sections 1980.1–1980.7, and it appears that the report of the hematologist was considered by the court but is not in the record. It appears in the briefs that the report states: "The only possible conclusion is that Mr. Arthur P. Smith cannot be excluded as the father of Laurel * * *"

Appellant contends that there is no substantial evidence to support the findings of the trial court. Section 193 of the Civil Code provides as follows: "All children born in wedlock are presumed to be legitimate."

And in Murr v. Murr, 87 Cal.App.2d 511, 197 P.2d 369, a case wherein the facts are very similar to the facts in the instant case, the court lays down the rules applicable to presumptions in such a case. The court said at page 513 of 87 Cal.App.2d at page 371, of 197 P.2d:

"Plaintiff and defendant were married on December 28, 1941. Plaintiff enlisted in the Navy on February 10, 1942, and thereafter the parties were absent from each other until the wife visited him in New Jersey for approximately two weeks in January, 1943. Thereafter they were absent from each other until he visited the wife in Los Angeles from the 15th or 17th of July, 1943, to the 22nd day of July, 1943. Thereafter they were absent from each other until November, 1944. The wife gave normal birth to a mature child, weighing 6¼ pounds, on January 21, 1944, which date was 190 days after July 15, 1943, or 188 days after July 17, 1943. The birth certificate, made by the attending physician, Dr. Rue, stated that the pregnancy was a nine-months' pregnancy. The wife testified that she had never had sexual intercourse with anyone other than her husband.

"Section 1962 of the Code of Civil Procedure provides in part that: 'The following presumptions, and no others, are deemed conclusive: * * * 5. The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate.' Section 1963 of the Code of Civil Procedure provides in part that: 'All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind: * * * 31. That a child born in lawful wedlock, there being no divorce from bed and board, is legitimate.' In [In] Re Estate of McNamara, 181 Cal. 82, 183 P. 552, 7 A.L.R. 313, the court was considering whether the presumption of legitimacy was conclusive or disputable, under circumstances where the period of gestation was 304 days and the birth of the child was not within the normal or usual operation of the laws of nature. The court therein held 181 Cal. at page 95, 183 P. at page 552 that the presumption was not conclusive, and that the presumption was conclusive only when the birth of the child came within the normal period of gestation. In [In re] Estate of Walker, 180 Cal. 478, at page 491, 181 P. 792, at page 797, the court held that the presumption of legitimacy should be considered conclusive if the husband and wife were cohabiting and it was possible under the laws of nature for the husband to be the father of the child. It was also said therein, 180 Cal. at page 491, 181 P. at page 797, that '[I]t is always permitted to show that it was not possible by the laws of nature for the husband to be the father, as by showing impotency on his part, want of intercourse during the possible period of conception * * *.' As above stated, in the present case the period of gestation was 188 or 190 days. In Dazey v. Dazey, 50 Cal.App.2d 15, at page 20, 122 P.2d 308 [at page 310], it was said in referring to a medical textbook, that '"It is customary to reckon the length of pregnancy as nine calendar months, or ten lunar months, two hundred and eighty days' duration, dating from the first day of the last menstruation."' It was also said therein, 50 Cal.App.2d at page 20, 122 P.2d at page 310, that: 'This author also plainly states that if we compute the period from fruitful coition to birth, it [period of gestation] varies from 220 days to 330 days.' The attending physician, called as a witness by defendant, testified that, in determining the date when a child will be born, the members of the medical profession count 280 days from the last menstrual period, but if they could actually know the date of fruitful coition they would count the time of delivery from that date; that there is no recognized rule in the medical profession that the periods of pregnancy range from 220 days to 330 days; that there is no hard and fast rule limiting the periods of pregnancy; that he would not consider it an average case if a child were born 190 days after fruitful coition, but he would not say that it was an abnormal case. Under the circumstances here, the presumption as to legitimacy should be regarded as disputable. * * *"

[1–6] A certified copy of the birth certificate is prima facie evidence of the facts stated in it (Health & Saf.Code, sec. 10551), and therefore the certificate herein is prima facie evidence that the pregnancy was of nine months' duration. A mature child having been born after an alleged gestation period of six and one-half months (198 days), which period according to authoritative medical opinion was about one month shorter than the shortest known period of gestation for such a birth and the birth certificate being prima facie evidence that it was a nine-months' pregnancy, the presumptions hereinabove noted became disputable presumptions and are not determinative of the issue in this case. Hence the legitimacy of the child involved became a question of fact, and if, under the familiar rule on appeal, there is any substantial evidence to support the judgment, it must be affirmed. All conflicts must be resolved in favor of the prevailing party and the evidence viewed in the light most favorable to her. O'Banion v. Borba, 32 Cal.2d 145, 147, 195 P.2d 10. With this rule in mind we feel that there is substantial evidence to sustain the court's declaration of legitimacy of the child, and that the judgment in the Washington divorce decree was free of any fraud, either intrinsic or extrinsic, and free of any deceit or fraud practiced in said action by any of the parties thereto. The testimony of the respondent that she did not have sexual intercourse with any man other than the appellant from the date of their marriage to the time of their divorce was sufficient within itself to support the declaration made by the trial court, even though there may be an abundance of record evidence to the contrary. Pores v. Purity Milk Co., 135 Cal.App.2d 305, 307, 287 P.2d 169.

[7, 8] Nor is there any merit in appellant's contention that respondent by joining issue on the question of the child's legitimacy, and offering evidence on the issue, thereby waived her defense that the final decree in the Washington divorce action decreeing that the child in question was the issue of the marriage was res judicata. Respondent did not voluntarily raise this issue. Appellant was attacking the provision in the divorce decree on the ground of alleged misrepresentations made by respondent concerning the date the child was conceived (fraud) and he cannot object if respondent is also allowed to open up the previous case in her defense of and in support of the divorce decree. The party intending to rely on a plea of res judicata must produce evidence of a former adjudication and in some cases evidence dehors the record may be required to establish the scope of the prior adjudication. Domestic and Foreign Petroleum Co., Ltd. v. Long, 4 Cal.2d 547, 562–563, 51 P.2d 73, and In re Estate of Landau, 158 Cal.App. 2d 176, 322 P.2d 222, cited by appellant, do not support his contention. The cases hold that where there is no pleading or proof nor reliance on a former judgment the defense of res judicata is waived.

The judgment is affirmed.

PEEK, Acting P. J., and SCHOTTKY, J., concur.

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171 Cal.App.2d Supp. 869

Stanley L. HUDSON, etc., et al., Plaintiffs,
v.
John H. HUTCHASON et al., Defendants,

John H. Hutchason and Joe S. Hutchason, Defendants and Appellants,

Sineo Joseph Daniele, Defendant and Respondent.

C. A. 9759.

Appellate Department, Superior Court,
Los Angeles County, California.
May 26, 1959.

Action to recover contribution. From an order of the Municipal Court of Burbank Judicial District, Leonard W. Hamner, J., vacating and setting aside a judgment of contribution between defendants, the defendants appealed. The Appellate Department of the Superior Court, David, J., held that a motion to vacate the judgment for mistake and excusable neglect was properly denied, and that the code provisions for contributions were applicable.

Order reversed and judgment of contribution declared in full force and effect.

1. Judgment ⚷162(4)

Where notice of motion to enter judgment against joint tort-feasor was duly served on all necessary parties including respondent, and there was no appearance for the respondent and no evidence why his attorney did not appear, evidence failed to show surprise, inadvertence or excusable neglect so as to justify vacation of judgment of contribution. West's Ann. Code Civ.Proc. §§ 875–880.

2. Contribution ⚷9(1)

Where statute made contribution procedure apply to causes of action accruing on or after January 1, 1958, and on May 13, 1958, judgment was rendered against defendants as joint tort-feasors based on a cause of action accruing April 1957 and a defendant paid the judgment in full and secured a judgment for contribution against codefendant as a joint tort-feasor on July 8, 1958, the statute was applicable, since the new cause of action arose not on the date of tort liability judgment but when one joint tort-feasor discharged the entire judgment. West's Ann.Code Civ.Proc. §§ 875(c), 876, 880; West's Ann.Civ.Code, § 1432.

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DeForrest Home and Albert Hampton, Los Angeles, for appellants.

Samuel Z. Winnikoff, Los Angeles, for respondent.

DAVID, Judge.

On May 13, 1958, judgment was rendered against defendants Hutchason and Daniele in a personal injury action, as joint tort feasors. The cause of action upon which this judgment was based accrued in April, 1957. By definition, a cause of action "accrues" when suit may be brought thereon. Hutchasons paid the judgment in full, and proceeding under Code of Civil Procedure §§ 875–880 inc. (Cal.Stats.1957, ch. 1700) secured a judgment for contribution against Daniele as joint tort feasor, entered on July 8, 1958, unopposed the hearing. Upon January 14, 1959, Daniele made a motion to vacate the judgment of contribution.

The motion was made on the ground of mistake and excusable neglect of defendant Daniele and his attorney; and the meritorious defense asserted, was that the code provisions for contribution were not applicable, since C.C.P. § 880 provides "This title shall become effective as to causes of action accruing on or after January 1, 1958."

[1] 1. The record shows that the "Notice of Motion to Enter Judgment against Joint Tort Feasor" was duly served by mail on all necessary parties including respondent. It further shows that there was "No appearance for defendant Daniele" at the hearing of the motion. There is no evidence as to why Daniele's attorney did not then appear and no evidence except hearsay why Daniele was not there. These facts should have been shown by competent evidence at the hearing of the motion to vacate the judgment of contribution. Lacking such evidence, there was no showing that the order was entered by surprise, inadvertence or excusable neglect. Colvin v. Sibley, 1953, 117 Cal.App.2d 144, 255 P.2d 16; Gray v. Sabin, 1890, 87 Cal. 211, 25 P. 422; Smith v. Tunstead, 1880, 56 Cal. 175; Romero v. Snyder, 1914, 167 Cal. 216, 138 P. 1002; Vallejo v. Green, 1860, 16 Cal. 160; Reilly v. Ruddock, 1871, 41 Cal. 312; Williamson v. Cummings Rock Drill Co., 1892, 95 Cal. 652, 30 P. 762; Farias v. Farias, 1917, 33 Cal.App. 237, 164 P. 818; Ross v. San Diego Glazed Cement Pipe Co., 1920, 50 Cal.App. 170, 194 P. 1059; Dusy v. Prudom, 1892, 95 Cal. 646, 30 P. 798; Brooks v. Johnson, 1898, 122 Cal. 569, 55 P. 423; Yancey v. National Benevolent Ass'n, 1898, 122 Cal. 676, 55 P. 604.

Since a showing of excusable neglect is jurisdictional in relief against a judgment, the order must be reversed on this ground. There is grave doubt that the court had jurisdiction to act on the date of the order. Jones v. Alexander, 1950, 101 Cal.App.2d 44, 224 P.2d 870; Brownell v. Superior Court, 1910, 157 Cal. 703, 710, 109 P. 91; Barry v. Barry, 1954, 124 Cal.App.2d 107, 111, 268 P.2d 147.

[2] 2. Under the formerly prevailing rule, (Pacific Indemnity Co. v. California Electric Works, 1938, 29 Cal.App.2d 260, 84 P.2d 313), a judgment against joint tort feasors was joint and several, and contribution, except in special cases, could not be

compelled. The question here, is whether the provisions of C.C.P. § 880, making the contribution procedure apply to "causes of action accruing on or after January 1, 1958" has reference to the cause of action under which such joint liability arose, or the new cause of action for contribution. This new cause arises, not at the date of the tort liability judgment, but when under C.C.P. § 875(c) one joint tort feasor discharges the entire judgment, or pays more than his pro rata as defined in C.C.P. § 876, as share and share alike. (Compare also Civil Code, § 1432). We believe this is the "cause of action" referred to in C.C.P. § 880, rather than the accrual of the original tort action.

Since Daniele as a joint tort feasor was liable for the entire judgment, there can be no impairment of any vested right by payment of one-half of it to Hutchason, the other joint tort feasor, who by his payment in full has reduced Daniele's liability to the plaintiff to nothing.

The order of January 29, 1959, granting the motion of Sineo Joseph Daniele to set aside the judgment of contribution entered against him on July 8, 1958, is reversed, and the said judgment of contribution is declared to be in full force and effect, as originally entered.

SWAIN, Acting P. J., and HULS, J., concur.

52 Cal.2d 407

Walter L. STEPHENSON et al.,
Respondents,
v.
CITY OF PALM SPRINGS et al., Appellants.
L. A. 24645.

Supreme Court of California,
In Bank.
June 26, 1959.

Suit to enjoin enforcement of "right-to-work" ordinance. The Superior Court of Riverside County, Hilton H. McCabe, J., granted the relief sought, and appeal was taken. The Supreme Court, Schauer, J., held that Palm Springs "right-to-work" ordinance was void for repugnance to state law encouraging and protecting closed and union shop agreements and for invading field occupied by state to exclusion of local ordinances; and held that neither announced intention of ordinance to prohibit only agreements neither prohibited nor authorized by state laws nor separability clause could save ordinance.

Affirmed.

Opinion reported at 320 P.2d 238, vacated.

Municipal Corporations 🔑592(1)

Palm Springs "right-to-work" ordinance was void for repugnance to state law encouraging and protecting closed and union shop agreements and for invading field occupied by state to exclusion of local ordinances; and neither announced intention of ordinance to prohibit only agreements neither prohibited nor authorized by state laws nor separability clause could save ordinance.

* * *

Jerome J. Bunker, City Atty., Palm Springs, Sheppard, Mullin, Richter, Balthis & Hampton, George R. Richter, Jr., and Edwin H. Franzen, Los Angeles, for appellants.

Severson, Davis & Larson, Nathan R. Berke, George Brunn, Brobeck, Phleger & Harrison and Marion B. Plant, San Francisco, as amici curiae on behalf of appellants.

Lewis Garrett and Lionel Richman, Los Angeles, for respondents.

Charles P. Scully and Victor Van Bourg, San Francisco, as amici curiae on behalf of respondents.

SCHAUER, Justice.

Defendants, the City of Palm Springs and its chief of police, appeal from a judgment which permanently enjoins them from enforcing a "right-to-work" ordinance enacted by the Palm Springs city council on November 14, 1956.[1] We have concluded

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[1] The ordinance provides in material part as follows:

"Right-To-Work

"2920. Public Policy. It is declared to be the public policy of the City of Palm Springs that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor organization. Sections 920 to 923, inclusive, of the Labor Code of the State of California have been construed by its courts to protect the rights of persons to work despite membership in a labor organization. On the other hand, those sections have been construed by the Supreme Court of California as not prohibiting or preventing a closed shop or union shop which has the effect of denying the right to work because of non-membership in a labor organization. It is the intention of this ordinance to prohibit closed shop and union shop agreements of any type *which are neither prohibited nor authorized by state laws* and to prevent any person being deprived of his employment because of his non-membership in a labor organization. [Italics added.]

"2921. Prohibited Agreements. No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, nor shall the city, or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of non-membership in a labor organization.

"2922. Void Agreements. Any act or any provision in any agreement which is that under the law as settled in Chavez v. Sargent (1959), 52 Cal.2d ——, 339 P.2d 801, the state law of California has occupied the field to the exclusion of local ordinances and, hence, that the judgment should be affirmed.

The pending matter was determined in the trial court solely upon the pleadings. Walter L. Stephenson, a member of Local Union 440, International Brotherhood of Electrical Workers, brought the action individually and in a representative capacity on behalf of the union and its members. The complaint alleges that on December 29, 1956, plaintiffs and H & S Electronic Service Corp., an employer, entered into a written collective bargaining agreement which provides, among other things, that the employer "shall employ only members in good standing in the Union" except in cases where the Labor Management Relations Act of 1947 (the Taft-Hartley Act, 29 U.S.C.A. § 141 et seq.) applies. If it applies, the employes are required to become union members within 31 days after the beginning of employment and to maintain membership as a condition of employment.

Plaintiffs further allege that the employer maintains "its sole place of business in the City of Palm Springs, hires employees in the City of Palm Springs and conducts its business in said City." There are no allegations suggesting that interstate commerce is involved or that the employer's business affects it.

After alleging that defendants threaten plaintiffs with criminal prosecutions for having entered into the described collective bargaining agreement, and that for stated reasons defendants' threatened enforcement of the ordinance will irreparably injure plaintiffs and deprive them "of their rights of self organization and free competition for employment," plaintiffs pray for an injunction against such enforcement.

Defendants demurred for failure of the complaint to state a cause of action, the court overruled the demurrer and granted a preliminary injunction, and defendants thereafter waived their right to answer and stipulated with plaintiffs that the matter be submitted for final judgment upon the pleadings theretofore filed. The court permanently enjoined defendants from enforcing the ordinance, and this appeal followed.

It is the announced intention of the Palm Springs ordinance (§ 2920) "to prohibit closed shop and union shop agreements of any type which are neither prohibited nor authorized by state laws." But this stated intention to avoid either forbidden duplication or forbidden conflict (Pipoly v. Benson (1942), 20 Cal.2d 366, 370–371, 125 P.2d 482, 147 A.L.R. 515) is immediately contravened by the fact that sections 2921, 2922, and 2923 of the subject ordinance purport to declare that all closed and union shop agreements are illegal, void, and criminal, whereas under state law (Lab.Code, §§ 920–923, 1115–1122, 1126, as explained in Chavez v. Sargent, supra, 52 Cal.2d ——, 339 P.2d 801) such agreements are encouraged and protected.

The separability clause of the ordinance (§ 2925) cannot save it. In regard to this local legislation (as in regard to the state

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in violation of this ordinance shall be illegal and void.

"2923. Violation A Misdemeanor. Any person, corporation or association of any kind who violates, or attempts to induce another to violate, any provision of this ordinance, or who enters into any agreement containing a provision declared illegal by this ordinance, or who attempts to enforce in this city any provision in an agreement made elsewhere which provision is declared illegal by this ordinance, shall be guilty of a misdemeanor and subject to the penalties provided by Section 0313 of the 'Palm Springs Ordinance Code.'

"2924. Injunctive Relief. No provision or provisions of this ordinance shall prevent the granting of injunctive relief to any person or persons injured or threatened with injury by any act declared illegal by this ordinance.

"2925. Severability. The provisions of this ordinance are declared to be severable, and the unconstitutionality or invalidity of any section or provision of this ordinance shall not affect the remainder thereof."

legislation considered in Smith v. Cahoon (1931), 283 U.S. 553, 563–564, 51 S.Ct. 582, 75 L.Ed. 1264), the following considerations are important (bracketed modifications adapt the Smith case language to our situation; the unconstitutionality with which we are here concerned is the city's exceeding its power, under Cal.Const., art. XI, § 11, to enact and enforce police measures which do not conflict with general laws):

> "If it be said that the [ordinance] contemplated the severability [sic] of its requirements in providing * * * that if any of its provisions were held to be unconstitutional, the validity of the remaining portions should remain unaffected, the answer is that no line of severance is indicated in the terms of the [ordinance]. The effect of this saving clause is merely that, if one provision is struck down as invalid, others may stand. But until such separation has been accomplished by judicial decision, the [ordinance] remains with its inclusive purport, and those concerned in its application have no means of knowing definitely what eventually will be eliminated and what will be left. * * *
>
> "If, ignoring the explicit comprehensiveness of their requirements, it could be said that the provisions of the [ordinance] should be severed * * *, the result would be to make the [ordinance], until such severance was determined by competent authority, void for uncertainty. * * * The [city council] could not thus impose upon laymen, at the peril of criminal prosecution, the duty of severing the * * * provisions and of thus resolving important constitutional questions with respect to the scope of a field of regulation as to which even courts are not yet in accord."

For the reasons hereinabove stated the judgment is affirmed.

GIBSON, C. J., and SHENK, SPENCE, and PETERS, JJ., concur.

Leonor GUERRA, Plaintiff and Appellant,
v.
CASA HAMILTON CORPORATION, a corporation, dba under fictitious firm names of Hotel El Cortez and El Cortez Motel, Handlery Hotels, Inc., a corporation, et al., Defendants and Respondents.*

Civ. 5879.

District Court of Appeal, Fourth District, California.

July 7, 1959.

Rehearing Denied Aug. 4, 1959.

Hearing Granted Aug. 31, 1959.

Passenger's action for personal injuries when arm became caught in gap between elevator floor and wall of elevator shaft. The Superior Court, San Diego County, Joe L. Shell, J., entered judgment for hotel owner and order denying passenger's motion for judgment notwithstanding verdict and passenger appealed. The District Court of Appeal, Shepard, J., held that under circumstances of case it was not error for trial court to give in addition to the res ipsa loquitur instruction, an instruction that the mere happening of an accident did not alone support inference that some party was negligent.

Affirmed.

1. Carriers ⚷320(23), 347(1)
New Trial ⚷69, 72

In elevator passenger's action for personal injuries sustained when her arm became caught in gap between elevator floor and wall of elevator shaft, where there was conflicting testimony as to the amount of alcohol passenger had previously consumed and exactly how the accident occurred, it was the exclusive province of jury to judge the weight and credibility of testimony offered and it was the trial court's prerogative to exercise the same function in passing on motion for new trial.

2. Negligence ⚷138(2)

If uncontradicted evidence as a matter of law requires giving of res ipsa loquitur instruction, that is, if evidence compels the sole conclusion that accident is of a kind which ordinarily does not occur in absence of someone's negligence, that accident was caused by an agency or instrumentality within exclusive control of defendant, and that accident was not due to any voluntary contribution on part of plaintiff, then giving both res ipsa loquitur instruction and instruction that mere happening of accident does not raise an inference of negligence is error.

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* Opinion vacated 1 Cal.Rptr. 330, 347 P.2d 674.

3. Negligence ⚷138(2)

Where jury depending upon how it weighs testimony might reasonably conclude that factually one or more of the three elements having application to res ipsa loquitur doctrine are missing, then it is proper to give instruction that mere happening of an accident does not raise an inference of negligence together with the res ipsa loquitur instruction, plus an explanation of the relation of the two and how they may be applied.

4. Carriers ⚷321(21)

In elevator passenger's action for personal injuries sustained when arm became caught in gap between elevator floor and wall of elevator shaft where testimony was conflicting as to amount of alcoholic beverages passenger had previously consumed and as to how the accident occurred, there was no error in giving not only an instruction on res ipsa loquitur but also an instruction to the effect that a mere happening of an accident does not support an inference of negligence, since jury, depending on how it weighed the testimony, might conclude that one or more of the elements applicable to res ipsa loquitur doctrine were missing.

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Robert C. Thaxton, San Diego, for appellant.

John W. McInnis, McInnis, Focht & Fitzgerald, San Diego, for respondents.

SHEPARD, Justice.

This is an appeal from a judgment for defendant in an action for personal injuries alleged to have been suffered by the plaintiff as a result of the negligent operation of a passenger elevator operated by defendant.

Plaintiff, a divorcee, returned from her day's work as a restaurant manager at Tijuana to her home in San Diego, and had dinner with four other adult friends and relatives about 8:30 p. m. on Saturday, March 25, 1956. These five persons left home together about 9:30 or 10:00 p. m. in celebration of the wedding anniversary of two members of the party. They went to the Admiral Kidd Officers' Club, arriving somewhere between 10:00 and 11:00 p. m. The members of the party testified they each had one drink at that club. One witness on cross-examination said they had "about one drink". They left the Admiral Kidd Officers' Club shortly after midnight and together went directly to the El Cortez Hotel in San Diego, arriving at about 1:00 a. m. where they intended going to the Sky Room for further refreshments. The elevator operator was then at the clerk's desk and the party of five entered the empty elevator. The elevator operator entered behind them five or ten seconds later, closed the door, and started the elevator. From there on the evidence of detail is conflicting and hazy in many respects. It appears that plaintiff fell to the floor at about the time or immediately after the elevator started. The testimony is in conflict as to whether or not the elevator started with a jerk. Plaintiff says it did, but is not sure of the cause of her fall. She says she entered and started to turn to her right, which would place her left arm farthest from the door. One witness says she was in the middle of the elevator. She says she had on sleeves with large double cuffs. She says something jerked at her left cuff or sleeve. She does not know which caused her to fall. Some of the witnesses say the elevator did not start with a jerk.

The elevator operator says that he walked into the elevator behind the members of the party; that all were fully inside the elevator when he entered; that no one was close to the door; that he did not have to push anyone out of the way to reach the door handle by which he assisted the door to close and lock; and that he had used this elevator five years and it ran on this occasion as it always had. He testified that he first knew of the accident when plaintiff screamed; that he saw her on the floor and immediately stopped the elevator; that the elevator moved about one foot from momentum before it came to a dead stop; that he then returned the elevator a distance of about five feet to the lobby floor, from which it had started. Other witnesses gave varying versions of how the elevator moved, some saying it went entirely past the next upper floor then entirely back to the basement before arriving finally at the lobby floor. In any event, when it finally stopped plaintiff's arm was pulled out of the space between the elevator floor and the wall, an ambulance was called, and she was taken to the hospital. Her left arm suffered a comminuted fracture with lacerations, and her left leg was broken.

The elevator safety engineer employed by the Division of Industrial Safety, State of California, whose duty it was to and who did inspect this particular elevator in the years before and after the accident, testified that the elevator had an area of 5½ feet wide, four feet two inches in depth, with a carpet covering the floor. There is a stationary door three feet wide in the wall of the elevator shaft to permit entrance into the elevator but the elevator does not of itself have a door. The closing handle and bar are horizontal when closed. The elevator cannot be moved under normal operations unless the door is closed tight. In the normal operations of the elevator the movement is automatic, it starts slowly and takes eight or nine feet to attain its maximum speed of 400 feet per minute, which is one-half the maximum allowable speed for elevators of this type. The elevator was inspected and found to comply with all of the safety regulations of the Division of Industrial Safety of the State of California. The mechanism worked smoothly and would not ordinarily throw anyone to the floor. The door takes three and one-half seconds to close. There are handrails inside the elevator. The distance between the front edge of the elevator floor and the door is about three inches, but the distance between the floor of the entrance to the elevator and the front edge of the floor on the elevator itself is one inch. After full trial, the jury returned a verdict for the defendant and plaintiff appeals.

[1] Plaintiff first complains that the trial court committed prejudicial error in the giving of an instruction that "the mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action was negligent." In considering this question it must be remembered that if we consider that plaintiff correctly and accurately described her position after entering the elevator, the jury may well have believed that it would have been physically impossible for the door or anything on the door to have caught her left sleeve. The witnesses were placed in a simulated "elevator" floor area in front of the jury. This was visual to the jury but the record does not show the positions thus taken. The same procedure took place in plaintiff's demonstrating to the jury how she entered the elevator and started to turn around. The record does not reveal what position was thus shown to the jury. The jury was not required to absolutely accept the testimony that she had had only one drink at the Admiral Kidd Officers' Club. The testimony of some witnesses places her at the Club at 10:00 p. m. until after midnight. Others say the arrival was about 11:00 p. m. One witness says that they each had "about one drink". The evidence as to where they were at a given time and their position in the elevator, whether the elevator jerked or was smooth in operation, and whether it traveled up past the next floor and then back to the basement, is full of conflict. This conflict may

alternatively have been the natural result of excitement, inattention, lack of observation, poor memory or, on the other hand, fuzzy thinking from too much alcohol. The plaintiff had worked all day previously and it was not unreasonable for the jury to have believed that the combination of fatigue and one or more drinks of an alcoholic beverage caused her to fall with her arm extended into the space of approximately three inches between the door and the elevator floor, and that that was the sole and only proximate cause of the accident. The movements of the other members of the party in the elevator easily could have jostled her, or she could have tripped in the act of turning. The jury saw and heard the witnesses. It was in their exclusive province to judge the weight and credibility of the testimony offered, and it was the trial court's prerogative to exercise the same function in passing on the motion for a new trial. In re Estate of Bristol, 23 Cal.2d 221, 223 [2], 143 P.2d 689; Devens v. Goldberg, 96 Cal.App.2d 539, 215 P.2d 935.

[2] The trial court not only gave the res ipsa loquitur instruction and the "mere happening of an accident" instruction, but also gave the explanatory instruction by which it was made clear to the jury that the application of these instructions depended on the facts found by them to be true. The rule appears to be that where the uncontradicted evidence as a matter of law requires the giving of the res ipsa loquitur instruction, that is, where the evidence compels the sole conclusion that (1) the accident is of a kind which ordinarily does not occur in the absence of someone's negligence; (2) was caused by an agency or instrumentality within the exclusive control of the defendant; and (3) was not due to any voluntary action or contribution on the part of the plaintiff, then the giving of both instructions is error. Jensen v. Minard, 44 Cal.2d 325, 329 [5a–b], 282 P.2d 7; Barrera v. De La Torre, 48 Cal.2d 166, 170 [6], 308 P.2d 724; Alarid v. Vanier, 50 Cal.2d 617, 625 [6], 327 P.2d 897.

[3, 4] However, where the jury, depending on how it weighs the testimony might reasonably conclude that factually one or more of the three elements above referred to having application to the res ipsa loquitur doctrine are missing, it is then proper to give the "mere happening of an accident" instruction and the res ipsa loquitur instruction, plus an explanation of the relationship of the two and how they may be applied. In the case at bar this was done, and in view of the possible different views the jury might have reached as to what the facts were, we find no error and we see no reason for believing that the jury was confused, considering the instructions as a whole. Shaw v. Pacific Greyhound Lines, 50 Cal.2d 153, 157 [2] [3], 323 P.2d 391; Middleton v. Post Transportation Co., 106 Cal.App.2d 703, 705 [1] [2], 235 P.2d 855; Seedborg v. Lakewood Gardens Civic Ass'n, 105 Cal.App.2d 449, 455 [6a–b] [7], 233 P.2d 943. "Where the evidence is conflicting or subject to different inferences, it is for the jury, under proper instructions, to determine whether each of the conditions necessary to bring into play the rule of res ipsa loquitur are present." Baker v. B. F. Goodrich Co., 115 Cal.App.2d 221, 229 [6], 252 P.2d 24, 29. "The accident must not have been due to any voluntary act or contributing fault on the part of the plaintiff. As pointed out before, whether that situation existed was one for the jury to determine." Rasmus v. Southern Pac. Co., 144 Cal.App.2d 264, 270 [7b], 301 P.2d 23, 27.

Plaintiff further complains of the giving of certain other instructions and of the failure to give others. She does not quote them nor give any argument nor authorities in support of her position. Her citation of transcript pages in the clerk's transcript are erroneous as to some, so that we cannot identify them. As to those we can identify which were given, they were either erroneous statements of law or were covered by other instructions. In any event, we have read all of the instructions given as well as the transcript of the testimony in its entirety, and the jury appears to have been fully and fairly instructed on all necessary elements of the case.

The order denying a motion for judgment notwithstanding the verdict and the judgment are affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.

* * *

171 Cal.App.2d 473

Beatrice GONZALEZ, etc., et al., Plaintiffs and Appellants,

v.

Henry E. RIIS and R. E. Riis, dba Riis Brothers Partnership, Union Title Insurance & Trust Company, as Trustee, and Amelia G. Serrano, Defendants and Respondents.

Civ. 5887.

District Court of Appeal, Fourth District, California.

June 23, 1959.

Rehearing Denied July 20, 1959.

Hearing Denied Aug. 19, 1959.

Action by members of family for declaration that they were beneficial owners of 10 acres of land which they had occupied for more than 25 years. The Superior Court, San Diego County, Joe L. Shell, J., rendered judgment against members of family, and they appealed. The District Court of Appeal, Shepard, J., held that evidence sustained findings that family occupied property by permission of owners, that they made certain improvements and additions for their own use and benefit, that they paid a part of taxes during their occupancy but that there was never any gift of property to family or any of its members and that no express constructive or resulting trust was ever created with respect to the property.

Affirmed.

1. Trusts 🔑25(1), 44(3)

No particular language or terminology is necessary to create a trust, but alleged oral gifts, transfers or creations of trusts must be established by full, clear and convincing evidence.

2. Gifts 🔑49(4)
Trusts 🔑89(1), 110

In action by members of family which had occupied property for more than 25 years, for declaration of trust, evidence sustained findings that family occupied property by permission of owners, that they made certain improvements and additions for their own use and benefit, that they paid a part of taxes during their occupancy but that there was never any gift of property to family or any of its members and that no express constructive or resulting trust was ever created with respect to the property.

William F. Reed, Jack L. Oatman, San Diego, for appellants.

Edgar B. Hervey, James Edgar Hervey, San Diego, Henry F. Walker, Los Angeles, for respondent Serrano.

SHEPARD, Justice.

In this action plaintiffs, through six separate alleged causes of action, seek to have it declared that they are the beneficial owners of a certain 10 acres of land described in the complaint as located in Carmel Valley, County of San Diego, State of California. By their first cause of action they set out a simple action to quiet title, alleging themselves to be owners in possession. By their second cause of action they allege a resulting trust on account of certain promises alleged to have been made by one William Wilson and Rosa Wilson, the record owners of the property, as a result of which plaintiffs took possession and made improvements in reliance thereon.

As a third cause of action, they claim an express trust by reason of the same facts set forth in the second cause of action. By the fourth cause of action they claim a constructive trust, by reason of the same facts set forth in the second cause of action. By their fifth cause of action they claim a resulting trust by reason of the same facts set forth in the second cause of action. In their sixth cause of action they claim a completed gift by reason of the same facts set forth in the second cause of action. Upon completion of the trial, judgment was rendered in favor of defendants, and plaintiffs appeal.

Plaintiff Beatrice Gonzalez, in 1930, was the wife of Edward Polloreno, and the other plaintiffs are all the children of that marriage. Edward Polloreno was the nephew of Rosa Wilson while Beatrice, his wife, was apparently related to William Wilson, the husband of Rosa Wilson. William Wilson and Rosa Wilson were, in 1929, and for many years thereafter, the record owners of 121 acres of land, of which the 10 acres here in dispute was a part. On this 10-acre parcel there was then located a building formerly used as the Carmel Valley Club House. At that time the Pollorenos had one or two children but in the later years five or six more children were born of this marriage.

In general substance, the testimony produced by the plaintiffs was to the effect that about the year 1929 or 1930 the Wilsons orally stated to the Pollorenos that they, the Wilsons, then and there made a gift to the Pollorenos and their children of the land on which the Carmel Valley Club House was located; that they told the Pollorenos to go on the land, improve it and care for it and that when the youngest of the Polloreno children became of age the Wilsons would deed it to the Pollorenos and their children. Plaintiffs' evidence contains several versions and it is not clear exactly under what circumstances or when a deed was to be executed. Plaintiffs' testimony further shows that the Pollorenos then moved onto the land in question; that their children (also plaintiffs herein) lived in the building, improved it, built some additions, put in partitions and paid taxes thereon; that Mr. Wilson died in 1942 and Rosa Wilson became the sole record owner; that in October, 1952, Rosa Wilson signed and deposited in escrow for delivery to plaintiffs a deed which, if it had been delivered, would have conveyed the property under dispute to these plaintiffs. However, as a condition of the delivery of this deed she instructed that the plaintiffs pay the escrow charges (which amounted to about $40). On April 27, 1953, the escrow charges not having been paid, she cancelled the escrow and recovered the deed. None of the plaintiffs ever signed the escrow, but did know of its existence and of the necessity of paying the escrow charges. Later, Mrs. Wilson deeded the property to her daughter Amelia G. Serrano, who thereafter sold the property to defendants Riis Brothers. Mrs. Serrano is also a defendant herein. She disclaims any interest in the property except to use it for the benefit of her mother. At one time, while Rosa Wilson was applying to the welfare department for a pension, both Mrs. Wilson and Mrs. Serrano apparently made written statements that plaintiffs herein were the beneficial owners of this property.

Mrs. Wilson in her testimony denied that the statement attributed by plaintiffs to her and to Mr. Wilson of 1929 or 1930 purporting to make a gift to the Pollorenos were ever made. On the contrary she testified that the Pollorenos were without a home and that to help them she and Mr. Wilson permitted them to live in the buildings on the property under dispute, and to fix up the building to suit the Pollorenos' living convenience. She stated that she did for many years have the intention of giving the property to the Pollorenos, but that they did not improve the property in the manner claimed by them; that on the contrary, after the death of Edward Polloreno they were destructive; that they did not pay the taxes as claimed by them, but in fact paid the tax for only one or possibly two years; that the materials used in the improvements which were in fact made were purchased with money secured from a bank loan in the amount of $1,000 which she, Mrs. Wilson, guaranteed, and that she ultimately had to pay $900 principal plus interest; that she did not make the statement to the welfare department as signed by her, but merely that she ultimately expected to give the property to the Pollorenos and that the statement, in any event, was made only to secure the pension and was framed in the way it was written by the welfare department, and not by her. Mrs. Wilson's testimony was in part corroborated by defendant Serrano and to a small degree by other witnesses. Other evidence indicated the reasonable rental value of the property for the period of time occupied by the Pollorenos was $100 per month.

The trial court found against plaintiffs' contention of ownership and gift; found it to be true that the plaintiffs occupied the property by permission of the owners; that they went upon the property in 1931 under permission from William Wilson that they might make a home for themselves on the property for an indefinite period of time; that the plaintiffs did take possession, made certain improvements and additions thereon for their own use and benefit; that Edward Polloreno, the husband, died on April 11, 1949; and that plaintiffs paid a part of the taxes during their occupancy thereof. The trial court further found that there never was any gift of the property to the plaintiffs or any of them, and that no express constructive or resulting trust was ever created with respect to said property.

[1] The courts of this state have repeatedly held in varying types of cases relating to alleged oral gifts, transfers or creations of trust that while "No particular language or terminology is necessary to create a trust" (Neel v. Barnard, 24 Cal. 2d 406, 412 [2], 150 P.2d 177, 181), plaintiff must establish the alleged oral agreement by full, clear and convincing evidence (Fowler v. Security-First Nat. Bank, 146 Cal.App.2d 37, 43 [1], 303 P.2d 565; Dagdigian v. Dagdigian, 139 Cal.App.2d 721, 722 [2], 294 P.2d 507; Grace v. Rodrigues, 111 Cal.App.2d 131, 137 [4], 243 P.2d 906.) It has been repeatedly held that:

> "Whether the evidence to prove the existence of the trust is clear, satisfactory and convincing 'is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal.'" Viner v. Untrecht, 26 Cal. 2d 261, 267 [2], 158 P.2d 3, 6.

It has further been held: "To create an express trust there must be an explicit declaration of trust followed by an actual conveyance or transfer of property to the trustee." Bainbridge v. Stoner, 16 Cal.2d 423, 428 [3], 106 P.2d 423, 427.

[2] In the case at bar the evidence was conflicting. It is true that the trial court might have taken a different view of the ultimate facts proved. However, it saw and heard the witnesses and weighed their testimony and its consistency and inconsistencies. "The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal." Stromerson v. Averill, 22 Cal.2d 808, 815 [6], 141 P.2d 732, 736. As was said by Justice Fox of the Second District in a similar case:

> "The basic difficulty with plaintiff's argument is that he would have this court reweigh the evidence and draw inferences contrary to those drawn by the trial court. Under firmly established legal principles we are not at liberty to do this." Sukiasian v. Shakarian, 115 Cal.App.2d 798, 801 [6], 252 P.2d 956, 958.

We are convinced that the evidence was sufficient to support the findings, and that the findings support the judgment.

The judgment is affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.

171 Cal.App.2d 528

Armida QUEZADA, Petitioner,

v.

SUPERIOR COURT of State of California IN AND FOR COUNTY OF LOS ANGELES; A. Edward Nichols, Judge pro tem Presiding, Respondents,

Raul J. Quezada, Real Party in Interest.

Civ. 23930.

District Court of Appeal, Second District, Division 1, California.

June 26, 1959.

Hearing Denied Aug. 19, 1959.

Proceeding on petitions for writ of certiorari and/or writ of mandate to review order of a judge pro tempore holding that respondent was not in contempt of court in assertedly violating provisions of pendente lite order in divorce action. The District Court of Appeal, Nourse, J. pro tem., held that for purposes of constitutional provision stating that a "cause" in the Superior Court or a Municipal Court may be tried by member of bar as judge pro tempore, a civil contempt proceeding ancillary to a divorce action was "cause" and could be tried before a member of the bar as a judge pro tempore.

Petitions denied.

1. Certiorari ⇨64(2)

On petition for certiorari, only jurisdictional question could be considered and other questions which were purely matters of alleged error were not subject to review.

2. Divorce ⇨269(3)

Proceeding on order served upon husband, as defendant in divorce action, requiring him to show cause why he should not be held in contempt for failing to make payments pursuant to pendente lite order was one of "civil contempt".

See publication Words and Phrases, for other judicial constructions and definitions of "Civil Contempt".

3. Contempt ⇨40, 60(3), 61(1)

Civil contempt proceedings are not strictly criminal actions but are special proceedings in which the contempt must be proven beyond a reasonable doubt rather than by a preponderance of the evidence, and in which the party charged is entitled to the same protection of his constitutional rights as he would be in a criminal proceeding.

4. Divorce ⇨269

Stipulations ⇨4

The People of the State of California are not parties to civil contempt proceedings arising out of a divorce action and the only persons who might make any stipulation are the parties to the action in which the order sought to be enforced through contempt powers was issued.

5. Constitutional Law ⇨18

Where term "cause", as used in state Constitution, had, prior to amendment to Constitution, acquired definite meaning, including every matter that could come before court for decision, the term was to be accorded the same broad meaning when used in subsequent amendment to the Constitution. West's Ann.Const. art. 6, § 5.

6. Judges ⇨15(1)

For purposes of constitutional provision stating that a "cause" in the Superior Court or a Municipal Court may be tried by member of bar as judge pro tempore, a civil contempt proceeding ancillary to a divorce action was "cause" and could be tried before a member of the bar as a judge pro tempore. West's Ann.Const. art. 6, § 5.

See publication Words and Phrases, for other judicial constructions and definitions of "Cause".

Warner, Sutton & Warner, Barbara Warner, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Asst. County Counsel, Edward A. Nugent, Deputy County Counsel, Los Angeles, for respondents.

NOURSE, Justice pro tem.

Petitioner is the plaintiff in an action for divorce prosecuted by her against her husband Raul J. Quezada, the real party in interest respondent herein. Raul having failed to make certain payments for child support pursuant to a pendente lite order made by the respondent court, petitioner caused to be issued and served upon him an order to show cause why he should not be held in contempt. Upon the return date of the order to show cause the parties stipulated that the issue might be tried by and before one of the commissioners of the court as a judge pro tempore. Pursuant to the stipulation the commissioner was appointed as such judge. After the trial of the issue the judge pro tempore found that Raul was not in contempt and discharged the order to show cause.

Petitioner now seeks a writ of certiorari to review this proceeding and annul the order.

[1] There is but one jurisdictional question presented by the petitioner; all others being purely matters of alleged error and not subject to review in this proceeding. The sole jurisdictional question presented is: May a civil contempt proceeding be tried by and before a judge pro tempore appointed by the stipulation of the parties in accordance with section 5 of article VI of the Constitution of this state?

[2–4] It is petitioner's contention that the contempt proceedings are criminal in nature and that therefore the respondent court is without power to appoint a judge pro tempore despite the stipulation of the parties to such appointment. The proceeding in the subject matter was one of a civil contempt, prosecuted for the benefit of the petitioner rather than as a means of compelling respect for the order of the court and to protect the dignity of the court. In re Wilson, 75 Cal. 580, at pages 582–583, 17 P. 698, at pages 699–700. Civil contempt proceedings "are not strictly criminal actions" but are special proceedings in which the contempt must be proven beyond a reasonable doubt rather than by a preponderance of the evidence, and in which the party charged is entitled to the same protection of his constitutional rights as he would be in a criminal proceeding. Hotaling v. Superior Court, 191 Cal. 501, at pages 504–505, 217 P. 73, at page 74, 29 A.L.R. 127; Bridges v. Superior Court, 14 Cal.2d 464, at page 477, 94 P.2d 983, at page 989. The People of the State of California are not parties to the proceedings and the only persons who might make any stipulation are the parties to the action in which the order sought to be enforced through the contempt powers of the court was issued. Bridges v. Superior Court, supra, 14 Cal.2d 474–477, 94 P.2d 988–989.

[5, 6] In 1928 the People amended section 5 of article VI of the Constitution of this state so as to include the provisions that upon stipulation of the *parties litigant* "a cause in the superior court or in a municipal court" may be tried by a member of the bar as a judge pro tempore if his selection as such a judge is approved by the order of the court in which the *cause* is pending. Prior to the adoption of this amendment to section 5 of article VI of the Constitution the word "cause" as used in the Constitution of this state had acquired the definite meaning of including every matter that could come before the court for decision. See In re Wells, 174 Cal. 467, at pages 471–472, 163 P. 657, at pages 658–659; In re Stevens, 197 Cal. 408, at pages 413–414, 241 P. 88, at page 90. The familiar rule of construction requires that there be given a similarly broad meaning to section 5 as had been given to it by the Supreme Court in the cases just cited in construing section 4 of article VI of the Constitution.

The subject contempt proceeding was ancillary to the divorce action and was a cause which the respondent court had jurisdiction to decide and was one in which the parties litigant (plaintiff and defendant in the divorce action) could stipulate might "be tried by a judge pro tempore."

The petition for writ of certiorari and the petition for writ of mandate are denied.

WHITE, P. J., and FOURT, J., concur.

171 Cal.App.2d 390

Marion VECKI and Vera Vecki, his wife, Plaintiffs and Appellants,

v.

Rigmore SORENSEN, as Executrix of the Will and Estate of Peter Sorensen, Deceased, Defendant and Respondent.

Civ. 18030.

District Court of Appeal, First District, Division 1, California.

June 17, 1959.

Action for injunction to restrain defendant from quarrying land adjacent to plaintiffs' land and for damages inflicted upon such land. The Superior Court, County of San Mateo, A. R. Cotton, J., rendered judgment of dismissal for failure to bring case to trial within five years after filing of complaint, and plaintiffs appealed. The District Court of Appeal, Tobriner, J., held that where jury was impaneled in case within five years after plaintiff filed action, case was "brought to trial" within statute to effect that any action shall be dismissed unless it is brought to trial within five years after plaintiff has filed action, and plaintiffs' action was not subject to dismissal.

Reversed.

1. Action ⚷63, 66

Courts exist primarily to afford a forum for settlement of litigable matters between disputing parties and to deny forum upon ground that one or the other party has sacrificed it because procedure has itself been too slow is not just and only most compelling reasons would support a surrender of that necessary and valued right of resolution for any such cause.

2. Dismissal and Nonsuit ⚷60(2)

Where jury was impaneled in case within five years after plaintiff filed action, case was "brought to trial" within statute to effect that any action shall be dismissed unless it is brought to trial within five years after plaintiff has filed action, and plaintiffs' action was not subject to dismissal. West's Ann.Code Civ.Proc. § 583.

See publication Words and Phrases, for other judicial constructions and definitions of "Brought to Trial".

3. Trial ⚷18

Jury trial begins when jury is impaneled and not when the witness has been sworn. West's Ann.Code Civ.Proc. § 583.

4. Dismissal and Nonsuit ⚷60(6)

Where action was brought for injunction to restrain quarrying land adjacent to plaintiffs' land and for damages inflicted upon such land, and defendants' cross-complaint contended that plaintiffs owned only two thirds of land upon which damage was allegedly suffered, plaintiffs' damages could not be assessed while amount of their land remained unknown and undefined, and time lost because of action on counterclaim would not be computed in measuring of time for dismissal of action for failure to bring it to trial. West's Ann. Code Civ.Proc. § 583.

5. Dismissal and Nonsuit ⚷60(3)

Time lost because of impossibility or impracticability of conducting a successful trial is not to be computed in measurement of time under statute providing for dismissal because of failure to bring action to trial. West's Ann.Code Civ.Proc. § 583.

◆

Julian D. Brewer, San Francisco, for appellants.

Ropers & Majeski, Redwood City, for respondent.

TOBRINER, Justice.

This is an appeal from a judgment of dismissal for failure to bring the case to trial within five years after the filing of appellants' complaint.

In substance appellants' action for an injunction to restrain respondent from quarrying and excavating land adjacent to appellants' land, including damages thus inflicted upon appellants' land, gave birth to a second issue involving appellants' title. The litigation of the descendant dispute according to respondent caused a delay sufficient to dispatch the parent suit under Code of Civil Procedure, section 583, because it was not "brought to trial within five years after the plaintiff filed his action."

Appellants filed the original suit for injunction and damages on December 5, 1950. Respondent answered and cross-complained that approximately one-third of the land claimed by appellants had been mistakenly conveyed to them; that respondent, instead owned this one-third, and that the deed should be reformed to reflect the intent of the parties. The case was called for trial on December 4, 1952, a date which was two years minus one day later than the date of the filing. The jury was impaneled and sworn. Thereupon the judge ruled that the answer and cross-complaint raised equitable issues and ordered a "recess" of the jury until December 10, 1952, so that such "issues other than damages" might first be decided.

The resolution of those matters entailed a period of two years less 18 days. Thus, proceeding to hear the equitable issues, the court on December 19, 1952, entered a decree reforming the deed as urged by respondent, thereby reducing the amount of appellants' land to approximately two-thirds of that alleged in the complaint. Appellants appealed on January 12, 1953; the court therefore ordered "that the jury previously ordered to return Wednesday, December 10, 1952, need not appear as ordered." The First District Court of Appeal, Division Two (127 Cal.App.2d 407, 273 P.2d 908), affirmed the decree on November 16, 1954.

Further steps were then taken in the original action. After the death of defendant Peter Sorensen, appellants, on June 9, 1954, filed a claim against the estate incorporating the same allegations as those of the complaint, and on October 16, 1956, the parties stipulated that the executrix of the estate could be substituted for decedent. The trial court, on January 24, 1957, then "revived and continued" the action, substituting Sorensen's executrix as defendant, and granted appellants leave to file their supplemental complaint against the executrix. Although the case was set for jury trial on March 27, 1957, the clerk of the court dropped it from the calendar upon the erroneous impression that the jury fees had not been paid.

On June 7, 1957, respondent moved to dismiss, and after hearing, the court granted the motion on June 20, 1957, entering judgment of dismissal on June 28, 1957.

[1] We approach the case in the light of recognition of the fact that courts exist primarily to afford a forum for the settlement of litigable matters between disputing parties. Over a long and bitter history this peaceful method of adjudication has replaced other and primitive, and indeed physical, means of resolution (Frank, Courts on Trial, Princeton University Press (1949), pp. 5–13.) To deny the forum upon the ground that one or the other party has sacrificed it because the procedure has itself been too slow does not appeal to a mature sense of justice. Only the most compelling reasons would support a surrender of this necessary and valued right of resolution for any such cause.

In the instant case there are no compelling reasons to deny the right. We shall point out that the procedure did not entail a period longer than five years because the case was brought to trial within that span of time, and we shall set out, likewise, that practical considerations, long recognized as a justification for delay, were present in this litigation.

[2] The first decisive reason for holding that the action was not subject to dismissal lies in the fact that when the jury was impaneled and sworn on December 4, 1952, this case was "brought to trial" within the meaning of section 583.

In a characteristically pungent and penetrating decision, rendered during the pendency of the present appeal, Justice Dooling, in Kaoru Kadota v. City and County of San Francisco, 1958, 166 Cal.App.2d 194, 195, 333 P.2d 75, 76, ruled that "[t]he holding of our court in Silcox v. Lang, supra [78 Cal. 118, 20 P. 297], that the impanelment of the jury is a part of the trial not only comports with the common understanding among lawyers and judges, but finds support in the rulings of the courts of other jurisdictions in a variety of circumstances." In that case "[b]y written stipulation the time of trial was extended until May 11, 1957. On May 9, 1957, the parties regularly appeared in court for trial and a jury was impaneled and sworn." Plaintiff then obtained a continuance until May 12, 1957. However, on May 13, 1957, the trial court dismissed the action for failure to bring the case to trial within five years. In reversing an order of dismissal under section 583 the court declared, "Our Supreme Court in Silcox v. Lang, 78 Cal. 118, 124, 20 P. 297, 301, said: '*The impaneling of a jury is a part of the trial,* within the meaning of the code, and any ruling of the court with respect thereto, if erroneous, is an error of law occurring at the trial * * *' (Emphasis ours.)" Hence, "we are satisfied that the action was brought to trial within the time fixed by the written stipulation of the parties * * *." (166 Cal.App.2d at page 196, 333 P.2d at page 76.)

Respondents seek to refute Kadota upon the threefold premise that it erroneously relied upon Silcox v. Lang, 1889, 78 Cal. 118, 20 P. 297; that an impanelment of a jury is identifiable with rulings on demurrers and preliminary injunctions, which do not constitute a trial within the section; and that the commencement of a jury and non-jury trial must be identical and the latter does not begin until the first witness is sworn.

In Silcox an appeal from a lower court's order sustaining an objection to a challenge to a juror, was treated by appellants as an "'irregularity in the proceedings of the court'" and presented "by affidavits." (78 Cal. at page 124, 20 P. at page 301.) But, said the court, the trial judge's wrongful grant of the motion was an "'error in law occurring at the trial'" *because* the "impaneling of the jury is a part of the trial" (78 Cal. at page 124, 20 P. at page 301), and thus could be presented only by a bill of exceptions. The case therefore supports Kadota.

Respondent urges that the swearing of the jury involved only issues of law and therefore should be treated like a demurrer (Berri v. Superior Court, 1955, 43 Cal.2d 856, 279 P.2d 8) or a preliminary injunction (Superior Oil Co. v. Superior Court (1936), 6 Cal.2d 113, 56 P.2d 950). But the whole point is that the test of a pleading by demurrer seeks a determination of the matter "*without* the effort and expense of trial" (2 Witkin, California Procedure, § 482, p. 1468; emphasis added). The pretrial settlement of such a question does not compose the commencement of a trial.

[3] Neither can the rules pertaining to the commencement of a jury trial be assimilated to those of a non jury case. The rule that, because jeopardy attaches when the jury is sworn, the trial of a criminal case commences with the impanelment of a jury has long been established. Jackson v. Superior Court, 1937, 10 Cal.2d 350, 359, 74 P.2d 243, 113 A.L.R. 1422. Kadota now recognizes the same rule pertains to a civil case. Neither authority nor principle sustains the contention that a jury trial does not commence until a witness has been sworn.

[4] The second decisive reason for holding that the action should not have been dismissed lies in the fact that practical impediments blocked the consummation of the trial before the expiration of the five-year period. Respondent's cross-complaint contends that appellants owned only two-thirds of the land upon which the damage was allegedly suffered. The measure of the damage was obviously related to the quantum of the land. How could plaintiffs' damages be assessed if the amount of their land remained unknown and undefined? While respondent contends that the trial could have proceeded during the period of the appeal upon the basis of the trial court's reformation of the deed, a reversal by the appellate court would have

nullified the whole proceeding. Hence the vagary of plaintiffs' title, projected into an impossibility of fixing damage, impaired, if it did not negate, the process of the trial.

[5] The courts have properly held that time lost because of the impossibility or impracticality of conducting a successful trial is not to be computed in the measurement of the time specified in section 583.

In City of Pasadena v. City of Alhambra, 1949, 33 Cal.2d 908, 207 P.2d 17, 23, plaintiff city filed an action "to determine the ground water rights within the area" and during the course of it, "the trial court referred the matter to the Division of Water Resources of the Department of Public Works for a determination of the facts * * *." (33 Cal.2d at page 916, 207 P.2d at page 23) The reference entailed a period of four years, five months and eight days. The court held: "The issues to be tried were dependent to a great extent upon the facts to be ascertained by the referee, and it would have been impracticable, if not futile, to proceed to trial prior to the completion of the report. It follows that the time consumed by the reference should be excluded in computing the five-year period, and that, therefore, the action was not subject to dismissal under the provisions of section 583." (33 Cal.2d at page 917, 207 P.2d at page 23.)

City of Pasadena specifically relies upon two cases in which one of the parties appealed issues germinated by the primary case: Christin v. Superior Court, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153, and Westphal v. Westphal, 61 Cal.App.2d 544, 143 P.2d 405. Christin involved an intervening appeal from an order for change of venue, and in ruling that the period taken for the determination of the appeal should be excluded from the five-year limitation of the statute, the court cogently remarks: "If the actual time on appeal had consumed the whole of the five-year period, could plaintiff have been held barred from going to trial? This would be an amazing miscarriage of justice, penalizing conduct entirely reasonable, and inducing procedure detrimental to the interests of both court and litigants. And the same is true where not the whole period, but a substantial part of it is consumed on appeal." (9 Cal.2d at page 533, 71 P.2d at page 209.)

Respondent's citation of Hayashi v. Lorenz, 42 Cal.2d 848, 271 P.2d 18, does not advance her position. In that case plaintiffs contended that time was tolled for want of prosecution under section 583 because the opposing parties raised certain issues as to the validity of orders in a related guardianship proceeding which, according to plaintiffs, required determination before the case could go to trial. Since, however, plaintiffs claimed the guardianship orders were void, and hence subject to attack at any time, such proceedings provided "no excuse for plaintiffs' failure to bring this action to trial." (42 Cal.2d at page 851, 271 P.2d at page 19)

Respondent's final argument that in any event the order of dismissal should be sustained on the ground that this was a two-year discretionary dismissal under Code of Civil Procedure, section 583, fails completely. Respondent's Notice of Motion asked for dismissal upon the "ground that the action has not been brought to trial within five * * * years." The judgment itself provided that the "case has not been brought to trial within five years."

We conclude that section 583 is not to be construed to require the plaintiff to proceed with a wasteful, abortive trial upon the peril of losing his day in court; such an application of the statute induces an abhorrent sacrifice and partial destruction of the judicial process.

Since either of the two bases discussed above furnishes ample ground for reversal of the order, we do not consider the third argument raised by appellants that partial trial of the equitable issue satisfied the code requirement.

The judgment is reversed.

BRAY, P. J., and FRED B. WOOD, J. concur.

171 Cal.App.2d 572

Gerd HENIE, Plaintiff and Respondent,

v.

Leif W. HENIE, Defendant and Appellant.

Civ. 5872.

District Court of Appeal, Fourth District,
California.
June 29, 1959.

Wife's action for divorce. The Superior Court of San Diego County, C. M. Monroe, J., rendered interlocutory decree granting divorce, and husband appealed, contesting division of property. The District Court of Appeal, Griffin, P. J., held that evidence supported trial court's finding that trust which husband had established in another state was community property.

Affirmed.

1. Evidence 🔑594

Generally, uncontradicted and unimpeached testimony of a witness tending to establish an issuable fact may not be disregarded and should be accepted to establish the fact unless it is inherently improbable.

2. Evidence 🔑594

The most positive testimony may be overcome by circumstances in evidence that may satisfy court of its fallacy, and court may reject testimony although witness is not discredited by direct testimony.

3. Appeal and Error 🔑1010(1)

Whether statutory presumption that when any property is acquired by husband and wife by instrument in which they are described as husband and wife, unless a different intention is expressed therein, it is community property, shall be applied in a given instance, is a question of fact for trial court, and its conclusions, unless manifestly without sufficient support in evidence, are conclusive on appeal. West's Ann.Civ. Code, § 164.

4. Husband and Wife 🔑262(1)

In wife's divorce action, evidence was sufficient to support trial court's application of statutory presumption that property in trust which husband had established in another state, and under which he was listed as donor, was community property. West's Ann.Civ.Code, §§ 146, subd. 1, 148, 164.

5. Divorce 🔑252

On division of community property, in divorce action based on extreme cruelty, court is authorized to award innocent spouse more than one-half of community property. West's Ann.Civ.Code, § 146, subd. 1.

6. Divorce 🔑286

Reviewing court will be slow to interfere with trial court's division of community property in those divorce actions in which division lies in court's discretion. West's Ann.Civ.Code, § 146, subd. 1.

7. Divorce 🔑286

Record, on appeal from judgment granting wife divorce on ground of extreme cruelty, revealed no abuse of discretion in awarding her more than one-half of community property. West's Ann.Civ.Code, §§ 146, subd. 1, 148, 164.

◆

N. E. Youngblood, Beverly Hills, for appellant.

Holt, Macomber & Graham, San Diego, Raymond F. Feist, Glenn R. Feist, Oceanside, Robert G. Beverly, Los Angeles, of counsel, for respondent.

GRIFFIN, Presiding Justice.

On May 17, 1956, plaintiff-respondent Gerd Henie brought this action against her husband Leif W. Henie, for separate maintenance, alleging extreme cruelty and seeking alimony, support and custody of their three minor children, Wilhelm, aged 12; Robert, aged 8; and Tom, aged 6 years, and disposition of the community property. Certain described property, located in California, was listed. The parties were married in Oslo, Norway, June 3, 1938, and separated April 8, 1956. An order was made for temporary allowance, attorney's fees, etc., and a receiver of the assets was appointed.

Defendant answered, admitted therein the parties owned certain real and personal property, filed a cross-complaint alleging the accumulation of certain community property, most of which was then under the control of the receiver, and also seeking a divorce on the ground of extreme cruelty, joint custody of the children, and division of the community property in an equitable manner. A pre-trial order on the issues thus framed was entered on February 28, 1957. On June 7, 1957, plaintiff, by order of court, was permitted to file a supplemental amendment to the complaint alleging two acts of adultery by defendant husband on or about May 24, 1957. By answer thereto, defendant denied such allegations.

The matter proceeded to trial upon the issues presented. On the third day it was agreed between the parties that plaintiff wife amend her complaint and ask for a divorce on the sole ground of extreme cruelty and defendant husband would strike his cross-complaint and plaintiff proceed, without contest, on her action for divorce, and the parties would proceed on the issues of alimony, child support and custody, and property disposition.

There was some form of stipulation at the time that the matter proceeded to trial upon the issues thus presented and that "the disposition of this matter in the manner indicated shall be without prejudice to the defendant in connection with the setting of any alimony for the plaintiff, the support of the children, or the determination of the status or nature of the property or its disposition * * *"; that "the mere fact that we have made this stipulation shall not militate against this defendant for failure to put on any defense that he might have." It was so ordered. After the close of trial, but before final findings were signed plaintiff filed an amended complaint in which she set forth a more detailed description of the community property, including a certain trust fund, not theretofore listed as community property, which was opened by defendant as "donor" in Chicago, on July 3, 1940, in the sum of $20,000, and which on the date of trial had increased to the sum of $80,413. It is the court's finding in respect to this item being community property which presents the major argument on this appeal. Some complaint is made that this amendment was not sought in conformity "with the proof adduced at the trial". We see little merit to this contention. The whole case was tried upon the theory that the nature, extent and value of the parties' holdings were in issue. No objections were made as to the admission of evidence pertaining to the trust fund. An order to show cause was issued and served on defendant as to why the complaint should not be thus amended. By order of court it was granted. The record further shows counsel for defendant, in effect, stipulated it could be filed, as amended.

The evidence pertaining to the property rights of the parties consumes over 700 pages of transcript, numerous depositions of the parties, and testimony of witnesses, as well as bookkeeping accounts of defendant's transactions in business. Generally speaking, it appears therefrom that defendant's father owned some fur business in Oslo which defendant later attempted to operate without too much success. He left his wife in Oslo and came to New York in an endeavor to negotiate for some importation business with the United States. After three or four months he returned to Oslo. In 1939, he again came to the United States and "when the war broke out" in 1940 he sent for his wife to join him. She came in February, 1940, and shortly afterwards (in March) they came to California to reside. Soon thereafter they took a trip with defendant's sister Sonja (world famous ice-skating star) and her mother, and then returned to California and lived in various houses rented by Sonja. Plaintiff and her husband would reside in California four or five months and then would go on tours with Sonja from the time of plaintiff's arrival in the United States until 1944. Defendant worked for his sister, traveling on her tours and handling a souvenir business or other matters in connection with her shows. From income tax returns filed by defendant it might well appear that from 1943 to 1949, defendant received in excess of $40,000 each year. There was no evidence that the parties maintained a residence in any other part of the United States, and never in Chicago, Illinois. Their children were born in Los Angeles and schooled there. In 1955, they moved to Oceanside, in San Diego County, and lived there permanently. They invested in extensive acreage there and later subdivided it. During their 17 years of married life they accumulated a wealth of approximately three-quarters of a million dollars. From the findings, that property generally consisted of (1) A promissory note for $414,016 payable to these parties secured by a deed of trust; (2) Another one for $80,000 similarly secured; (3) Cash in the sum of $21,000; (4) Lots 60, 38 and 45 in Henie Hills Subdivision in Oceanside; (5) Four additional notes and deeds of trust approximating $7,000; (6) Interest in Henie Hills Country Club and shares approximating $50,000; (7) Residence of the parties plus 28 acres in Oceanside; (8) Personal property, including life insurance policies; and a *trust fund in Chicago valued at $80,413.*

Defendant does not question the finding of the trial court that the property in California was community property but expressly contends the evidence is insufficient to show the Chicago Trust fund was community property. In a written opinion signed August 2, 1957, the trial judge summed up the evidence pertaining to the acquisition of the several properties and held all of them to be community property of the parties. However, in apportioning such property it, in general, by findings and judgment, gave the home property and personal property, with some exceptions, to plaintiff for the benefit of a home for the wife and three boys. It allowed the trust property in Chicago, valued at $80,000 to remain intact and to be held by defendant as his own. As an offset thereto it assigned to plaintiff the promissory note in the principal amount of $80,000 (No. 2 above) as her separate property, and generally provided for a division of the remaining community property between them after payment of community debts. A divorce was granted to plaintiff. In addition, an order for payment by defendant of $100 per month for each child was entered and their custody was given to plaintiff with visitation rights to defendant. The court provided therein that there was no immediate alimony order required as to plaintiff but specially reserved jurisdiction to award support money to her upon proper application and showing in the future.

As pointed out by the trial judge, the evidence as to the character of the property is "somewhat unsatisfactory". He said:

> "The real controversy between the parties is with reference to property. Plaintiff and defendant were married in Norway in 1938, and shortly thereafter moved to the United States. The evidence is satisfactory that the parties have been domiciled in California since shortly after arriving here. The sister and mother of defendant were residents of Los Angeles County and plaintiff and defendant lived with them in houses owned by them most of the time. For several years defendant spent much of his time on tours in connection with the theatrical performances of his sister, but it is plain that the only domicile that these parties had was in California.
>
> "It follows, therefore, that the property acquired during the period of the marriage is presumed to be the community property of the parties and the burden rests upon the party claiming otherwise to produce satisfactory evidence to overcome the presumption * * *. It is undisputed that plaintiff wife left all matters of business to her husband and that she had very little knowledge of his property or his business affairs. She is unable to give to the court much assistance in determining the character of the property.

"Shortly after the commencement of the suit the deposition of the defendant was taken, at which time inquiry was made as to the various properties owned by him in the State of California. At that time he stated unequivocally that these properties were acquired with funds which he earned during the period of his marriage. He conceded that the wife, according to the laws of California, had, therefore, an interest in the property. In short, his entire testimony at that time was equivalent to his admission that the property which stood in his name was community property. At some time thereafter defendant changed his testimony and changed some of the answers to his deposition. At the trial he seeks to contend that everything he owns is separate property. Although he originally testified that he brought from Norway but a very small amount of money which had been long since spent and dissipated, at the trial he sought to make it appear that he had brought to this country and invested large sums of money and that these investments had been paying him large dividends ever since. When it came to details, however, of how much money and from what source and what was done with it, he had no recollection whatever. He failed to produce much evidence that was obviously available to him. His testimony was greatly weakened and impeached by his own contradictions and by his failure to produce evidence. The court is therefore forced to the conclusion that he has failed to meet the burden and has failed to establish his contention that the properties in question are separate property. In this connection there is involved the matter of a trust in Chicago. What purports to be a partial copy of the trust agreement appears in evidence as defendant's Exhibit B. It purports to have been made on the 3rd day of July, 1940. The only evidence as to the source of the money which went into this trust is the one statement of defendant that his sister, Sonja Henie, 'gave' him the money which went into this trust. There is no evidence as to what assets did go into the trust and there is no evidence as to whether, since its inception, additional assets have been deposited therein. Some of the provisions of the trust agreement are consistent with the thought that this trust was established as the result of a gift from the sister. On the other hand, had the trust been set up by the sister for the benefit of the brother the transaction would have taken, obviously, a somewhat different form. There is no evidence as to the circumstances of the alleged gift and the court is left to speculate as to whether, by using the word 'gave', the witness intended to mean that the property or funds came from the sister with or without consideration. The evidence is plain that for a good many years defendant was receiving large sums as compensation for services rendered to the sister and which he treated and referred to as earnings. The details of this transaction, the amounts or property originally deposited and the manner of handling the affair subsequently were all within the knowledge of the defendant and unknown to the plaintiff and he has not seen fit to produce that evidence. The court is compelled, therefore, to find that with regard to this property as well, defendant has failed to meet the burden of proof that the funds so deposited were his separate property. In this connection it is to be noted that this trust was set up without the knowledge of the wife and without her consent. The agreement takes the form of a transaction purporting to place whatever property went into the trust beyond the reach of the wife.

"In connection with the California property there have been introduced in evidence to date, deeds signed by the

> wife, in which she purported to quitclaim to her husband any interest she might have in the California property. She testified she has no recollection of the transactions; that she signed instruments as a matter of course which were presented to her and that the purpose of the execution of these deeds was never discussed. That testimony is not disputed by the defendant, who admits that the deeds were signed as a matter of course and without discussion. In fact, defendant disclaims all knowledge or recollection of the reason why the deeds were executed. It would appear that from time to time during the marriage, and even at a time when relations between the parties were more harmonious, defendant was seeking to divest his wife of any record interest in property which he was acquiring."

The evidence appears to support the conclusions the trial court reached as to the effect of this evidence. After this informal opinion the court allowed the defendant to produce any additional evidence he desired in respect to the character of the trust fund. In a subsequent opinion of September 27, 1957, based on additional evidence the judge said:

> "With reference to the Chicago trust, the defendant was permitted to introduce additional evidence. The additional evidence introduced is not persuasive and has not changed the view of the court. The observations which the court made with reference to the testimony of the defendant in the opinion heretofore rendered are still applicable. In the testimony given on September 24th, the defendant testified that this trust in Chicago was set up as a gift by his sister and without his knowledge and that he found out about it later. The gift was set up by a declaration of trust executed by the defendant himself as a trust agreement between him and the bank. I am still of the belief that this is community property."

Defendant never produced the testimony of his sister, Sonja, which evidence was available, if true, that she set up or "gave" the original $20,000 into the trust fund for the benefit of the defendant. There was no evidence produced that any gift tax was paid thereon. The record does show that plaintiff testified she learned about the trust fund account from Mr. Henie and his sister, Sonja, after it was set up and he did tell her his sister had given it to him. It also appears that Mrs. Henie, as it is the custom in her country to be a "housewife", left all of the business details to her husband and fully trusted him; that he obtained a general power of attorney from her for this very purpose, and that all she knew of the trust fund was what her husband told her.

Appellant argues that this evidence is not sufficient to support the finding of the trial court that it was community property, claiming

> "A. Before the property will be presumed to be a community asset, plaintiff has the burden of proving that the property was *acquired* during the marriage *and* while the parties were domiciled in California.
>
> "B. There is no presumption as to when property is acquired, and plaintiff has offered no evidence as to when the $20,000.00 was acquired by the defendant. The evidence, when viewed most favorably to plaintiff, is that the parties lived temporarily in California at the home of Sonja Henie for about four months during the period from March, 1940, to July, 1940, and then left on Tour. (The first California State Tax Return was filed for the calendar year 1947.)
>
> "C. Property is classified at the time of its acquisition, and remains as such in the absence of an agreement to the contrary. There being no suggestion in the pleadings or proof that the $20,000.00 trust fund was transmuted to community property, said sum, now of the value of $80,000.00,

cannot be classified as community property.

"D. The evidence merely establishes that defendant 'had' $20,000.00 on July 3, 1940, and wholly fails to support the finding that the $20,000.00 was 'acquired' during marriage and while the parties were 'domiciled' in California.

"E. The evidence supports only three possible conclusions as to the source of the $20,000.00: (1) that it was money defendant had earned; (2) that it was a gift from defendant's sister; or (3) that it was money derived from the sale of defendant's father's business. None of these conditions justifies the classification of these funds as community property." Citing such authority as Sec. 164, Civ. Code; In re Estate of Frees, 187 Cal. 150, 201 P. 112; Fidelity and Casualty Co. of New York v. Mahoney, 71 Cal. App.2d 65, 61 P.2d 944; In re Estate of Niccolls, 164 Cal. 368, 129 P. 278; and In re Estate of Bruggemeyer, 115 Cal.App. 525, 2 P.2d 534.

It is therefore argued that in the absence of the application of the presumption the trial court should have distributed the community property without considering the trust fund, which was his separate property, and defendant is therefore entitled to a comparable asset to replace it, and this court, under section 148 of the Civil Code, should reverse the judgment as to distribution in the interest of justice, citing De Burgh v. De Burgh, 39 Cal.2d 858, 250 P.2d 598; Simonton v. Los Angeles Trust & Savings Bank, 205 Cal. 252, 270 P. 672; and Nichols v. Mitchell, 32 Cal.2d 598, 197 P.2d 550.

[1, 2] In reply plaintiff, in support of the finding, argues that since defendant earned approximately $40,000 each year from 1943 to 1949, it would not be unreasonable for the court to believe the defendant earned $20,000 during the 4-months period from March 1 to July 1, 1940, when he was engaged in business on tour with his sister, Sonja, since her tours did not occupy the entire year; that she may have paid this sum or a portion of it to him in advance for services to be performed in the future; that under such circumstances it would be acquired during the marriage of the parties while residing in California, and the presumption would be applicable. There is merit to this argument. Generally, uncontradicted and unimpeached testimony of a witness tending to establish an issuable fact may not be disregarded and should be accepted to establish the fact unless it is inherently improbable, but there are exceptions to the rule. The most positive testimony may be overcome by circumstances in evidence that may satisfy the court of its fallacy and the court may reject that testimony although the witness is not discredited by direct testimony. In re Estate of Bernatas, 162 Cal.App.2d 693, 328 P.2d 539.

[3, 4] At the trial defendant testified he liquidated his fur business in Norway for $100,000, and brought those funds to the United States. Although defendant did not directly testify that any of this claimed money went into the trust fund, his counsel suggests it might have furnished the corpus for it. On cross-examination, as to any bank or banks where defendant kept this large sum of money, he replied "he did not recall" that he put it in any bank; that he was too much concerned about putting money in banks; that he was traveling around the country with thousands of dollars in his suitcases and that he put some in safe deposit boxes, but he could not remember where. His next story was that his sister gave the money to him; that she arranged for the creation of the trust; that he had nothing to do with it, and did not sign anything; that he did not learn of it until after its establishment when his "mother called up from New York", and that he gave no consideration for it. The trust agreement was obtained and received in evidence. It showed on the date thereof that defendant was the *donor* and it bore his signature, which defendant then admitted. In defendant's deposition, previously taken, he stated all the properties and

other assets of the couple were obtained from his earnings during the 18 years of their marriage; that he brought only about $4,000 to the United States and the rest was earned here. He, at that time, made no claim that he owned any separate property. In his deposition he said he had received about five or six thousand dollars from the sale of a small mountain cabin and other real property upon his father's death; that this sum was not received until about three years prior to this trial and that sum was put in the subdivision property in Oceanside; that the $4,000 brought here was used for living expenses; that although he had taken over his father's fur business in Norway in 1936, it was then losing money and upon his assuming control a strike occurred which lasted for one year and it was not a profitable venture. There is evidence that when in the United States he would send his wife a 20-dollar bill in his letters to her because "there just was not anything there in Norway". Defendant was served with a subpoena duces tecum seeking examination of his books, records, and tax returns for 1941. He claimed his accountant had them and the accountant claimed he returned them to defendant. In short, they were not produced. It becomes apparent that the testimony of the defendant was discredited to a great extent and the trial judge was justified in rejecting it. Ordinarily, whether or not the presumption under section 164 of the Civil Code is applicable or should be applied is a question of fact for the trial court, and its conclusions, unless manifestly without sufficient support in the evidence, are conclusive on appeal. Nichols v. Mitchell, supra; Simonton v. Los Angeles Trust & Savings Bank, supra. We conclude the evidence was sufficient to apply the presumption. The finding has sufficient evidentiary support.

[5–7] Lastly, it is argued that an excessive portion of the community assets was awarded to plaintiff, contrary to a stipulation that default of the defendant would not militate against him. On division of the community property in an action for divorce for extreme cruelty, the court is authorized to award the innocent spouse more than one-half of the community property. Sec. 146, subd. 1, Civ. Code; Barham v. Barham, 33 Cal.2d 416, 202 P.2d 289. A reviewing court will be slow to interfere with the trial court's division of community property in those divorce actions in which the division lies in such court's discretion. LeFiell v. LeFiell, 108 Cal.App.2d 321, 324, 239 P.2d 61. No abuse of discretion here appears. It does not affirmatively appear that the trial judge did not take full cognizance of the stipulation agreed upon.

Judgment affirmed.

MUSSELL and SHEPARD, JJ., concur.

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171 Cal.App.2d 444

Bruce F. ALLEN, Petitioner,

v.

SUPERIOR COURT of State of California, IN AND FOR COUNTY OF SAN DIEGO, and Honorable Clarence Harden, One of Judges of Said Superior Court, Respondents.

Nate Rosenberg, Real Party in Interest.

Civ. 6154.

District Court of Appeal, Fourth District, California.

June 18, 1959.

Hearing Denied Aug. 12, 1959.

Proceeding in prohibition to compel the Superior Court of San Diego County to desist from further proceedings in an action for assault and battery brought against chairman of interim committee of Legislature by witness at committee hearing. The District Court of Appeal, Mussell, J., held that chairman was authorized to demand that a paper to which witness was referring and from which witness was answering questions be shown to him, and, upon witness' refusal to deliver it, to direct the sergeant at arms to obtain the paper for inspection, without subjecting himself to harassment and expense of defending himself in civil proceedings commenced by such witness.

Writ issued.

1. Assault and Battery ⚷2

Where chairman of interim committee of Legislature first asked witness to hand over a paper, and, on witness' refusal, directed sergeant at arms to obtain it, and there was no physical contact between chairman and witness, chairman's action did not constitute assault and battery of witness.

2. Prohibition ⚷5(3)

Where demurrer to complaint charging assault and battery raised question of defendant's legislative immunity, and demurrer was overruled, prohibition was an appropriate remedy to prevent subjection of defendant to harassment and expense of defending himself in trial in civil proceeding.

3. States ⚷28(2)

Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good.

4. Evidence ⚷33

Courts will take judicial notice of official acts of Legislature. West's Ann. Code Civ.Proc. § 1875, subd. 3.

5. Evidence ⚷33

In ruling on demurrer to complaint charging chairman of interim committee of Legislature with assault and battery of a witness during a hearing, court could take judicial notice of the resolution under which the hearing involved was conducted. West's Ann.Code Civ.Proc. § 1875, subd. 3.

6. States ⚷28(2), 34

Chairman of interim committee of Legislature was authorized, at hearing, to demand that a paper to which witness was referring and from which witness was answering questions be shown to him, and, on witness' refusal to deliver paper, to direct sergeant at arms to obtain it for inspection, without subjecting himself to harassment and expense of defending himself in civil proceeding for assault and battery brought by such witness.

7. States ⚷34

It is not function of courts to prescribe rigid rules for Legislature to follow in drafting resolutions establishing investigating committees, but matter is one peculiarly within realm of Legislature, and its decisions will be accepted by courts up to the point where their own duty to enforce constitutionally protected rights of individuals is affected.

8. States ⚷34

In proceeding for writ of prohibition to compel Superior Court to desist from further proceedings in an action for assault and battery brought against chairman of interim committee of Legislature by witness at committee hearing, who claimed inapplicability of chairman's legislative immunity on ground that committee had no authority to conduct hearing involved and was without legal standing, record established that committee was lawfully constituted by Assembly with power to conduct the investigation involved.

◆

Stanley Mosk, Atty. Gen., Edward M. Belasco, Deputy Atty. Gen., Ralph N. Kleps, Legislative Counsel, Sacramento, Gray, Cary, Ames & Frye, and Eugene L. Freeland, San Diego, for petitioner.

No appearance for respondents.

Thomas Whelan, San Diego, for real party in interest.

MUSSELL, Justice.

On February 16, 1959, an amended complaint was filed in the Superior Court of

San Diego county in which Nate Rosenberg was plaintiff and Bruce F. Allen, petitioner herein, was defendant. In this complaint it was alleged, in substance, that plaintiff appeared in San Diego on October 15, 1958, in response to a subpoena to appear before what was purported to be a Subcommittee on Rackets of the Interim Committee on Judiciary then purporting to be in session at that time and place by virtue of Resolution No. 224 of the California State Assembly; that at said time and place defendants, Bruce F. Allen and Joseph B. Tracy, did wilfully, intentionally, wrongfully and unlawfully assault plaintiff and commit a battery upon his person and did twist and pinch his arm and disarrange his clothing, and did then and there, by means of force and violence, take from plaintiff a certain document, to plaintiff's damage in the sum of $25,000.

Defendant Joseph B. Tracy was not served with process in said action and has not appeared therein. Defendant Bruce F. Allen filed a general and special demurrer in which, inter alia, he raised the question of legislative immunity from civil liability for acts arising out of the performance of legislative functions. The said House Resolution No. 224, the Final Calendar of Legislative Business, Assembly Final History 1958, Regular Budget Session Page 30, and a copy of defendant's letter dated August 7, 1957, establishing the Assembly Interim Committee on Judiciary, Subcommittee on Rackets, were incorporated in the demurrer by reference and made a part thereof. The demurrer was overruled by the trial court on March 27, 1959, and the defendants were granted twenty days from notice within which to answer. On April 8, 1959, Bruce F. Allen filed in this court his petition for a writ of prohibition to require the trial court to desist from further proceeding in said action until further order of this court. An order to show cause was issued herein on April 24, 1959, returnable on May 13, 1959, at which time the matter was argued and it was conceded by Mr. Whalen, counsel for the real party in interest, that the transcript of the testimony and proceedings before the subcommittee at the time involved was considered by the trial court and received in evidence. This transcript and the record before us shows that on October 15, 1958, petitioner Bruce F. Allen was a member of the State Assembly and was Chairman of the Assembly Interim Committee on Judiciary and also Chairman of its Subcommittee on Rackets. Pursuant to House Resolution No. 224 this subcommittee was conducting an investigation in San Diego on subject matter referred to in paragraph 1. (g) of said resolution, which provides as follows:

> "1. The Assembly Standing Committee on Judiciary of the 1957 Regular Session is hereby constituted an interim committee and is authorized and directed to ascertain, study and analyze all facts relating to the system of laws and judicial administration of this State, including but not limited to the following subjects:
>
> "(g) All provisions of law relating to civil and administrative actions and proceedings and remedies and all laws relating to crimes and the manner of punishment therefor, including capital punishment, and criminal procedure, including all matters relating to county jails, and including the principles of contributory and comparative negligence and the rules of evidence, and all provisions of law relating to the tort liability of the State and its agencies and subdivisions, and uniform acts."

Nate Rosenberg, real party in interest herein, in response to a subpoena, appeared before the said subcommittee and, in response to questions asked by the committee, read from a paper, whereupon the following questions were asked and answers by Rosenberg given:

> "Q. Have you consulted Mr. Whelan with regard to your subpoena to appear before this Committee?

A. As a matter of fact, I consulted with him last week when I received the subpoena and that criminal case was in recess for a day because of the illness of one of the defendants, and I hoped that he might be able to be present this morning.

"However, I have consulted with him and retained him under any circumstances, and because of his inability to be here today I refuse to answer the questions.

"Q. Did Mr. Whelan agree to represent you at this hearing? A. Yes, sir.

"Q. Well, Mr. Whelan certainly hasn't made any effort to contact this Committee with regard to his representation of you.

"Assemblyman Bradley: I was going to raise that point, Mr. Chairman, and also ask that the Chair examine the document which the witness is referring to.

"The Witness: I don't think you have any authority to examine anything. If the court so orders me to give this paper to anyone, I will. But as you are—I don't believe you have the authority to subpoena any of my personal papers on me, and if the court so orders me to deliver this paper, I will.

"Q. By Chairman Allen: Mr. Rosenberg, you have been sitting here reading from a piece of paper. A. That is correct.

"Q. Hand it over. A. I refuse to give it to you. You have no authority, I don't believe, to personally search me for any papers.

"Q. You have been sitting here reading in front of this Committee from a piece of paper. A. That is correct. If you wish to see—

"Q. Where did you get that piece of paper? A. I refuse to answer that question, as I told you, and I will repeat it again, under Section 94.12 of the Penal Code, until the attorney is here.

"Chairman Allen: Mr. Tracy, will you get us that piece of paper?

"The Witness: I don't care what you are. I don't think you have the authority to search me.

"Mr. Tracy: I am so instructed by the Chairman. Let's not have any—

"The Witness: Take your hand off it, and I will give it to him.

"Mr. Tracy: Okay. Thank you."

On the basis of the foregoing questions and statements by Allen as chairman of the committee, Rosenberg filed suit against Allen and Tracy for damages for unlawful assault, battery and for allegedly taking the paper involved from him by force and violence. As noted, the trial court overruled Allen's demurrer to the amended complaint, whereupon Allen filed herein his petition for a writ of prohibition.

The basic question here is whether the trial court erred in overruling the demurrer to the amended complaint in the Superior Court action.

[1] While the amended complaint alleged an assault and battery and the use of force on plaintiff, the record of what actually took place at the hearing does not, in our opinion, substantiate the charge or constitute an assault and battery or the use of force and violence by petitioner Allen. As chairman of the committee he first asked Rosenberg to hand the paper over and when Rosenberg refused, Allen told Tracy, the Sergeant at Arms, to obtain it. It is conceded by counsel for Rosenberg that there was no physical contact by Allen with Rosenberg and that at the time involved, Allen was sitting behind a desk some distance from Rosenberg. There is nothing in the record to indicate that Allen directed Tracy to commit an assault or battery on Rosenberg or to obtain the paper involved by unlawful means or the use of force.

[2] Where, as here, the demurrer to the amended complaint raised the question of

legislative immunity, prohibition is an appropriate remedy to prevent the subjection of the petitioner to the harassment and expense of defending himself in a trial in a civil proceedings. People v. Superior Court, 29 Cal.2d 754, 756, 178 P.2d 1, 40 A.L.R.2d 919; 45 Cal.Jur.2d sec. 159, p. 513.

[3] As is said in Tenney v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 788, 95 L.Ed. 1019:

> "Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives."

In Perry v. Meikle, 102 Cal.App.2d 602, 605, 228 P.2d 17, it was held that when judicial officers act within their jurisdiction, they are not amenable to any civil action for damages; that no matter what their motives may be, they cannot be inquired into; and that judges of courts of record of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously and corruptly.

In Hardy v. Vial, 48 Cal.2d 577, 582, 311 P.2d 494, it was held that the rule of absolute immunity, notwithstanding malice or other sinister motive, is not restricted to public officers who institute or take part in criminal actions; that it has been extended by the federal decisions to all executive public officers when performing within the scope of their power acts which require the exercise of discretion or judgment.

In Cross v. Tustin, 165 Cal.App.2d 146, 331 P.2d 785, it is said that this immunity protects public officers and employees acting within the scope of their duties, even against charges of malicious personal torts, such as libel, slander, and false prosecution. (Citations.)

In White v. Towers, 37 Cal.2d 727, 733, 235 P.2d 209, 28 A.L.R.2d 636, it was held that a public officer is liable for injuries caused by acts done outside the scope of his authority and that the duties of public office include those lying squarely within its scope, those essential to accomplishment of the main purposes for which the office was created, and those which, although only incidental and collateral, serve to promote the accomplishment of the principal purposes.

[4, 5] In Hancock v. Burns, 158 Cal.App.2d 785, 323 P.2d 456, it is stated as follows (syllabus 1a, 1b):

> " 'The Senate Fact Finding Committee on Un-American Activities,' and its individual members, were protected by legislative immunity from suit as a result of their action in recommending that an employer discharge certain employees who refused on constitutional grounds to answer questions before the committee where such action was within the authority conferred on the committee by Senate resolution creating the committee as authorized by Const., art. IV, § 37, and it was proper to sustain without leave to amend a demurrer to the employees' complaint against the committee and its members for damages resulting from loss of their jobs, since the court, in ruling on the demurrer, could take judicial notice of the resolution, which was referred to in the complaint, and could thus determine the immunity of the committee and its members from the face of the complaint and that it was useless to allow amendment."

The court there held, 158 Cal.App.2d at pages 789, 790, 323 P.2d at page 459, that

> "Although it is often stated that in considering a demurrer a court is bound to accept the truth of the allegations

> thereof, this statement may, in certain instances, be modified where, by the nature of the pleading, the court is apprised of the existence of a fact or facts of which it is bound to take judicial notice under the laws of this state. In 39 California Jur. 2d § 22, under the title 'Facts Judicially Noticed' it is said: '* * * In determining the sufficiency of a pleading, it may be read as though it included all such facts, though not pleaded, and even when the pleading contains an express allegation to the contrary. But the general rule of pleading that a demurrer admits the facts pleaded has no application to facts of which the court may take judicial notice. Allegations contrary to facts which the court may judicially notice are not admitted by demurrer, but must be disregarded and treated as a nullity.' The complaint here containing, as it does, a reference to Senate Resolution Number 127 would appear well within this rule. The trial court was bound to consider the contents of this Senate resolution."

While it is further stated therein that the Senate resolution there involved could not authorize the commission of a tortious act and that if the committee or its members were charged with the commission of some bodily injury inflicted on another in the course of conducting their hearings, such act could not reasonably be urged to come within the immunity. In the instant case the record does not support a charge of bodily injury on the part of chairman Allen. Courts will take judicial notice of the official acts of the Legislature (Code Civ.Proc. sec. 1875, subd. 3; Samish v. Superior Court, 28 Cal.App.2d 685, 690, 83 P.2d 305.) In ruling on the demurrer the court can take judicial notice of the resolution under which the hearing involved was conducted.

[6] The reporter's transcript of the proceedings before the committee was received and considered by the trial court in connection with its ruling on the demurrer and admitted in evidence, showing that Rosenberg suffered no bodily injury at the hands of petitioner and that Rosenberg, after telling the Sergeant at Arms to "take your hand off it", stated that he would give it (the paper) to him (Allen), which he did. Allen, as chairman of the committee, was, in our opinion, authorized to demand that the paper be shown to him inasmuch as the witness was referring to it and answering the questions from it. Allen was also authorized to direct the Sergeant at Arms to obtain the paper for inspection. Under these circumstances petitioner herein should not be subjected to the harassment and expense of defending himself in civil proceedings commenced by Rosenberg.

[7] It is claimed by counsel for Rosenberg that the committee had no authority to conduct the hearing involved and was without legal standing. However, it is not the function of the courts to prescribe rigid rules for the Legislature to follow in drafting resolutions establishing investigating committees. That is a matter peculiarly within the realm of the Legislature and its decisions will be accepted by the courts up to the point where their own duty to enforce the constitutionally protected rights of individuals is affected. Watkins v. United States, 354 U.S. 178, 204, 77 S.Ct. 1173, 1 L.Ed.2d 1273.

[8] Said Resolution No. 224 contains an avowal of contemplated legislation in respect to several subjects within the scope of prospective legislation and control within the meaning of Article IV, section 37, of our State Constitution. The record before us shows that the Interim Committee was lawfully constituted by the Assembly with power to conduct the investigation involved. In re Battelle, 207 Cal. 227, 277 P. 725, 65 A.L.R. 1497.

The demurrer herein should have been sustained without leave to amend and the Superior Court action dismissed. Let the writ of prohibition issue as prayed for in the petition.

GRIFFIN, P. J., and SHEPARD, J., concur.

Hearing denied; PETERS, J., dissenting.

171 Cal.App.2d 518

ORANGE COUNTY WATER DISTRICT, a Public Corporation, Plaintiff and Respondent,

v.

CITY OF RIVERSIDE et al., Defendants and Appellants.

Civ. 5717.

District Court of Appeal, Fourth District, California.

June 25, 1959.

Proceedings on petition for modification or clarification of writ of supersedeas (154 Cal.App.2d 345, 316 P.2d 43) and on motion for order interpreting or modifying or amending writ of supersedeas, pending appeal from a judgment of the Superior Court of San Bernardino County, Albert F. Ross, J., in a water rights case. The District Court of Appeal held that cities' use, pending appeal from injunctive decree in water rights case, of water obtained from mutual water companies would not substantially impair water supply within county water district or increase pollution of such water supply, and held, accordingly, that supersedeas writ proviso, as to diversion of water in excess of that taken by cities from river system in water year in which judgment was entered, would not operate to deprive cities of right to obtain from such other agencies water already appropriated by those agencies; and held that it would be immaterial whether cities had exercised diligence in seeking water from sources outside watershed of river.

Writ amended and interpreted.

1. Appeal and Error ⚿478

Reviewing court would be reluctant, in determining applications for pendente lite relief, to discuss at all matters involved in ultimate determination of appeals, though it could not decline to do so to extent that they were necessarily involved in preserving, so far as could be, rights of parties ad interim; however, reviewing court would not thereby preclude itself from reexamining such matters upon final argument, to whatever extent their reexamination might appear to be justified.

2. Waters and Water Courses ⚿153

A lawful appropriator of water may at his discretion alienate his rights as such. West's Ann.Water Code, §§ 1200, 1201.

3. Appeal and Error ⚿485(1)

Cities' use, pending appeal from injunctive decree in water rights case, of water obtained from mutual water companies would not substantially impair water supply within county water district or increase pollution of such water supply and, accordingly, supersedeas writ proviso, as to diversion of water in excess of that taken by cities from river system in water year in which judgment was entered, would not operate to deprive cities of right to obtain water from such other agencies already appropriated by them; and it would be immaterial whether cities had exercised diligence in seeking water from sources outside watershed of river.

◆

Albert H. Ford, City Atty., Riverside, Cosgrove, Cramer, Diether & Rindge, Special Counsel, Los Angeles, William A. Flory, City Atty., James L. King, San Bernardino, and DeWitt A. Higgs, Special Counsel, San Diego, for appellants.

Rutan, Lindsay, Dahl, Smedegaard, Howell & Tucker, Santa Ana, Pillsbury, Madison & Sutro, Eugene M. Prince, and James Michael, San Francisco, for respondent.

PER CURIAM.

The appellant City of San Bernardino, on June 2, 1959, filed what it describes as a "Petition for Modification and Clarification" of the Writ of Supersedeas granted by this court in the above-entitled action on October 10, 1957 (154 Cal.App.2d 345, 316 P.2d 43) "so as to provide that the City of San Bernardino is not prohibited, nor was it intended to be prohibited, from acquiring water for beneficial use of its inhabitants from mutual water companies with fixed and vested water rights, in excess of that which it was taking and diverting during the water year in which said judgment was entered". This defendant has also given notice that a motion would be made to the court accordingly, at a time and place specified in the notice. On June 12, 1959, the appellant City of Riverside gave notice that it would at the same time fixed for making the motion of the City of San Bernardino, make on its own behalf a motion (1)—for "an order interpreting the writ of supersedeas herein to mean that, irrespective of the quantity of water that appellant City of Riverside itself takes or has taken from the watershed of the Santa Ana River during any water year, said city is not prohibited from acquiring water for domestic or reasonable beneficial uses from a corporation not a party to this action by virtue of stock ownership therein or otherwise, when said corporation itself takes and appropriates said water from said watershed and itself owns the right to take and appropriate said water. (2)—In the event said writ of supersedeas is not so interpreted, for an order modifying or amending said writ in order that it may be so interpreted".

Respondent District has filed what it describes as a "demurrer and answer" to the San Bernardino petition.

The matter was brought on for hearing in due course, appearances made for the respective parties, and the motions are now before us for decision.

The writ of supersedeas, as heretofore granted, suspends the enforcement of the judgment rendered in the action "and all proceedings in the trial court against appellants or any of them" and directs that "none of appellants shall be required to take any affirmative action required by said judgment, and said judgment shall be ineffective for any purpose until the final determination of the cause on appeal". It, however, and the order granting it, conclude with this proviso:

> "Provided, however, that this court reserves jurisdiction to amend or modify its said order or this writ in the event that appellants or any of them take or divert water from the Santa Ana River System in excess of the amounts of water which they were taking and diverting in the water year in which said judgment was entered."

From the present San Bernardino petition and various affidavits and exhibits attached to it, it appears that a water year, as the term has been used in connection with the instant case begins on October 1 of one year and ends with September 30 of the next; that during the current water year the rainfall in the San Bernardino Valley has been only 7.61 inches or about 45.4% of the average, and that the winter and spring were unusually warm, besides which the population of the City has constantly increased; all resulting in the increased use of water. It further appears that in the water year in which the judgment was entered San Bernardino produced and used 21,393.93 acre feet of water of which 8,711.07 acre feet were used in the first seven months of that year, whereas in the first seven months of the current water year 10,433.69 acre feet have been used, whence it results that if the 21,393.93 limit were observed, there would remain only 10,960.24 for the last five months of the current year, which are always the months of highest water use; that during the last five months of the water year in which the judgment was entered the City used 12,682.86 acre feet and during the last five months of the water year 1957–1958 it used 13,023.39 acre feet; that it is estimated that, if the 21,393.93 acre feet limit is observed this year, there will be a water shortage for the remaining five months of the year of about 3,750 acre feet. All this, according to the City's petition and affidavit showing, is occurring despite all possible efforts by the city to conserve water. It is further stated that the City is expending large sums provided by a bond issue, in the effort more efficiently to make properly treated sewer effluent water available to increase the storage in the basin which forms the source of water supply. It is stated, however, that unless additional water can be secured the City of San Bernardino with an estimated present population of over 83,000 people will, for the latter part of the present water year, be wholly without water, thus threatening imminent disaster to its inhabitants, their property and the business and economy of the City. It is further stated that there is no source from which San Bernardino can at this time or within the current water year, obtain additional water, except by resorting to certain mutual water companies which have prescriptive appropriative rights, and from which, by leasing or purchasing their stock the City may, without in any manner increasing the production of water from the Santa Ana River System, obtain the additional supply of water presently required. The City is in doubt whether or not the language of the above-quoted proviso in the supersedeas writ prohibits it from obtaining and using water additional to what it is now allowed itself to take from the basin. For this reason it seeks such clarification or modification of the writ of supersedeas as will enable it, without violating the intent or purpose of the writ, to do so.

In its demurrer and answer to the San Bernardino petition and in its opposition to the motion made in behalf of that City, respondent District disputes the sufficiency of the petition, and affidavit showing made, to state or make out any ground for the interpretation asked of the language of the writ or for its modification to admit of such an interpretation. It is claimed that as a matter of law mutual water companies may not be used as a device to enable appellants as appropriators to take from the Santa Ana River System more water than their own prescriptive rights entitled them to take and that to allow them to do so would be to sanction new appropriations on their part. It is pointed out that appellants' claim of right to obtain further water through mutual water companies is one of the matters involved in the final disposition of the pending appeals, and it is claimed that it should not be dealt with until the appeals are dealt with in their entirety. Respondent District, moreover, disputes the sufficiency of the showing made to prove that the mutual water companies have any such appropriated water as is claimed to be available for use by appellants. It is claimed that, even if they have, its diversion to appellants' use would damage the water users of respondent District. It is further claimed that by neglect to obtain water from outside the Santa Ana River System appellants have failed to use such diligence as to entitle them to relief by this court from their present difficulties. Respondent District has also filed a memorandum of points and authorities in opposition to the motion of the City of Riverside.

At the hearing figures for the use of water by the City of San Bernardino for May, 1959, were produced which showed a water consumption for that month somewhat less than anticipated so that it now appears that if the 21,393.93 acre feet limit for that city for the current water year is observed, there will remain 10,913.97 acre feet available for the months of June, July, August and September, but that is still far short of the anticipated demand.

We cannot be otherwise than sensible of the seriousness of the emergency shown to exist by the petition and supporting affidavit presented by the City of San Bernardino. Although no such affidavit showing has been made on behalf of the City of Riverside it is clear that if one of appellant cities is entitled to such interpretation or modification of the writ of supersedeas as it seeks, the rest are entitled to the same relief whether they ask it or have made any affidavit showing of emergency or not. Whether the mutual water companies from which the City of San Bernardino seeks to obtain additional water taken from the River System, have such water to which they are entitled under prescriptive rights is a matter into which we need not inquire. If they have, well and good. If they have not, then the City of San Bernardino obviously cannot obtain it from them. What we are here concerned with is whether or not, if they have it the City can properly be allowed to use it, in addition to what it is permitted itself to divert, pending the decision of the instant appeals, without substantial prejudice to the rights of respondent District and its water users. This is the essential inquiry involved by the motion of appellant City of San Bernardino and the answer to the same essential question must be decisive of the motion made by the City of Riverside.

[1] It is with reluctance, of course, that in determining applications for *pendente lite* relief, we find it necessary to discuss at all matters involved in the ultimate determination of the appeals. But we may not decline to do so to the extent that they are necessarily involved in preserving so far as may be the rights of the parties *ad interim*. This will not preclude reexamination of such matters upon the final argument to whatever extent their reexamination may appear to be justified.

[2, 3] It is undoubted law that a lawful appropriator of water may at his discretion alienate his right as such (Spargur v. Heard, 90 Cal. 221, 228, 229, 27 P. 198; Calkins v. Sorosis Fruit Co., 150 Cal. 426, 88 P. 1094; Copeland v. Fairview Land & Water Co., 165 Cal. 148, 166, 131 P. 119; E. Clemens Horst Co. v. Tarr Mining Co., 174 Cal. 430, 433, 163 P. 492; Harrison v. Chaboya, 198 Cal. 473, 245 P. 1087; 25 Cal.Jur. Title "Waters" Sec. 209, p. 1198.) It has often been held that an appropriator may at his discretion change the place of application of his water, though not where the change causes injury to those having superior rights (Maeris v. Bicknell, 7 Cal. 261, 263; Davis v. Gale, 32 Cal. 26; Ramelli v. Irish, 96 Cal. 214, 217, 31 P. 41; Jacob v. Lorenz, 98 Cal. 332, 340, 33 P. 119; Gallaher v. Montecito, etc., Co., 101 Cal. 242, 246, 35 P. 770; Santa Paula Water Works v. Peralta, 113 Cal. 38, 45, 45 P. 168; City of San Bernardino v. City of Riverside, 186 Cal. 7, 28, 29, 198 P. 784.) It has likewise often been held that an appropriator of water may at his discretion change the use to which his water is put, provided it continues to be devoted to some legitimate beneficial use, and provided the change in its use does not injure those having superior rights (Davis v. Gale, supra; Ramelli v. Irish, supra; City of San Bernardino v. City of Riverside, supra; 26 Cal.Jur. Title "Waters", Sec. 379, p. 174.) These decisions continue to state the law except as affected by subsequent statutes. Beginning with the State Water Commission Act of 1913 (Stats.1913, c. 586, pp. 1012 et seq.) several times amended and afterward superseded by subsequent legislation, the State has undertaken extensive regulation of water appropriation and the use of appropriated water. For the most part this legislation relates only to appropriation from surface water and subterranean *streams* and the use of the water appropriated therefrom as distinguished from appropriations from underground lakes or basins (State Water Code Secs. 1200, 1201.) We do not deem this the proper time to inquire whether any legislation has affected the rights of appropriators from such underground lakes or basins to dispose as they like of water lawfully appropriated therefrom. We have the right to assume that, should appellant cities find duly appropriated water available for acquisition to augment their supplies, both the appropriators and appellants themselves will comply with any State requirements, if such there be, that may be needful to validate such transfers. In our view the proviso contained in our writ of supersedeas should not in itself operate to deprive appellant cities of any legal right that they may have to obtain water already appropriated from other agencies unless their doing so pending the present appeals will work some substantial injury to the respondent District and its water users.

We do not feel it incumbent on us, in the present exigency, to enter upon any inquiry as to the degree of diligence or lack of diligence that appellants may have shown in seeking water from sources outside the watershed of the Santa Ana River.

We confine ourselves, then, to the inquiry whether from the relief now sought any reasonable probability of injury to respondent's water users can ensue. Such injury could only result from (1) a diminution of the water supply affecting lands within respondent District or (2) from increased pollution of such water supply.

It must be kept in mind, as we have repeatedly noted, that in securing the additional water sought there is involved no suggestion of drawing any additional water from the river system. The result is sought to be accomplished only by using waters already validly appropriated by a change in the locality and nature of their use. The only diminution then that could result in the downstream water supply would be merely that which might be produced, not by any increased diversion of water, but by these changes alone. It is true that, in its finding XVII, the trial court found that the change in the use of water from agricultural to domestic, municipal and industrial purposes in "paved and other impervious areas" has resulted in no saving of water, but that the effect has been the contrary. Inevitably consumptive use of either sort will result in some diminution of the available supply. The return flow from irrigation, in consequence of evaporation and plant transpiration will always be less than the quantities spread upon the soil. On the other hand in the case of domestic and industrial uses in urban areas the return flows will be discharged into the stream system either through the urban storm drain system or in the form of sewage. In the one case it is possible, as here found by the trial court, that the loss from evaporation may be greater than in the irrigation of agricultural lands. In so far as sewage is concerned, however, evaporation losses can hardly be otherwise than negligible. In the finding just referred to no attempt has been made to determine by what percentage the loss in return flow is greater in urban than in agricultural areas. It is questionable here whether the difference can be very considerable. In the instant case it would be difficult to believe that in the relatively short period before these appeals can be finally determined the difference in such return flows, from changing the use of the quantities of additional water sought, from agricultural to urban uses, would be sufficient to appreciably impair the water supply within the respondent District, particularly when it is considered that such losses in return flows, if any, would be spread over the period required for water from the upper basin of the river system to reach the land within the District.

As respects the other question of pollution of the water supply on which the District inhabitants depend in case the relief now sought is granted, we have even less apprehension. Such pollution, if any, is already occurring. The natural effect of pouring more water into the mains of appellant cities would seem to be to dilute rather than increase any pollution.

All in all we are satisfied that the relief sought in behalf of defendant cities will result in no appreciable damage,—certainly in no irreparable damage to respondent or its water users.

It is ordered that there be and there is hereby added to the writ of supersedeas heretofore issued the following paragraphs:

> "Should appellants or any of them, obtain additional water from the Santa Ana River System from mutual water companies or other agencies having prescriptive rights to take the same, as appropriators, such acquisition of water shall not be deemed a taking by such appellant or appellants of excess water, within the meaning of this proviso, if such acquisition of additional water from such mutual water companies or other agencies does not increase the taking from the system, by such mutual water companies or other agencies, or any of them, beyond the amounts which they, respectively, are by prescription entitled to take therefrom.
>
> "Nothing herein contained shall be construed to sanction increased drafts from the Santa Ana River System by

any mutual water company or other agency from which appellants or any of them may obtain water.

"Jurisdiction, in addition to that hereinbefore specifically reserved, is reserved generally to hereafter make any modifications or changes in this order or the writ of supersedeas that may appear to be justified."

171 Cal.App.2d 587

Edmund P. DE MARTINI and Elmo L. De Martini, copartners, doing business under the fictitious firm name and style of De Martini Bros., Plaintiffs and Respondents,

v.

Arthur H. LAMB and Elizabeth Lamb, also known as Phyllis Lamb, and as Elizabeth Kent, Defendants and Appellants.

Elizabeth L. LAMB, also known as Phyllis K. Lamb, and as Elizabeth Kent, Petitioner,

v.

MUNICIPAL COURT, CENTRAL JUDICIAL DISTRICT OF MARIN COUNTY, State of California, Respondent.

Civ. 18382, 18781.

District Court of Appeal, First District, Division 2, California.

June 30, 1959.

The first proceeding was an action for declaratory judgment, wherein the Superior Court, Marin County, Jordan L. Martinelli, J., rendered judgment in favor of plaintiffs, and an appeal was taken. The second proceeding related to trial of action for unlawful detainer, temporarily restrained by alternative writ of prohibition. The District Court of Appeal, Kaufman, P. J., held that evidence would not sustain contention that trust deed had been given only to secure prospective deficiency if one should arise on sale of property which was subject of grant deed to secure repayment of debt and that it was thus invalid.

Declaratory judgment affirmed and peremptory writ issued.

Mortgages 🔑86(3)

In action for declaratory judgment, evidence would not sustain defendants' contention that trust deed had been given only to secure prospective deficiency, if one should arise on sale of property which was subject of grant deed to secure repayment of debt, and was thus invalid.

Fernhoff & Wolfe, Oakland, Freitas, Allen, McCarthy & Bettini, San Rafael, for petitioners and appellants.

Royal E. Handlos, Alfred E. Graziani, San Francisco, for respondents.

KAUFMAN, Presiding Justice.

We are here concerned with two proceedings arising out of the same transaction between the parties and concerning the same question. In the first No. 18382, defendant Elizabeth Lamb (also known as Phyllis K. Lamb and Elizabeth Kent) appeals from a judgment in favor of the plaintiffs, DeMartini Brothers in an action for declaratory relief. The second proceeding, No. 18781, relates to the trial of an action for unlawful detainer, filed by the plaintiffs, which we temporarily restrained by an alternative writ of prohibition. We will first dispose of the appeal, which is confined to certain alleged errors and inconsistencies in the findings of fact and conclusions of law.

In 1955, Elizabeth and her husband Arthur Lamb owned several parcels of real property in Mill Valley, California, hereinafter referred to as the Bolsa Avenue property and the Oakdale Avenue property. In August 1955, the plaintiffs, who are licensed contractors, and the defendants entered into an oral agreement for the construction of a residence on the Bolsa Avenue property. There was a construction loan on the properties, but plaintiffs did not receive sufficient funds to continue construction and pay the subcontractors. Work ceased in December 1955. By this time plaintiffs had completed the foundation and the exterior work; only the interior trim remained.

January 5, 1956, the parties executed an agreement which set forth the conditions under which the construction of the Bolsa Avenue residence was to be resumed and completed. The agreement provided that complete title to the Bolsa Avenue property be conveyed to the DeMartini Brothers as well as a second deed of trust on the Oakdale property in the amount of $12,000 and a first deed of trust in the amount of $4,500 on an unimproved lot for the period of one year from the date of the agreement. DeMartini Brothers was assigned the remaining loan payments and agreed to complete these, and to complete the work on the house as it saw fit as expeditiously and economically as possible, and to pay all costs involved in the construction, including labor, materials, insurance, taxes and interest on the loan. Defendants were given the right to purchase the Bolsa Avenue property at cost plus a fee of $2,000 for a period terminative 35 days after the completion of the building and the right to offer the Bolsa Avenue property for sale for $37,500, for a period terminating 35 days after completion. The agreement further provided:

> "12. DeMartini Brothers agree that payment at any time for all outstanding obligations will release Arthur H. Lamb and Phy*l*is K. Lamb from his agreement.
>
> "13. DeMartini Brothers hereby agree to reconvey title and Deeds of Trust mentioned above to Arthur H. Lamb and Phy*l*is K. Lamb upon payment of above indebtedness."

On the same date defendants executed the trust deed to the Oakdale Avenue properties to secure performance of the agreement, and a grant deed to the Bolsa Avenue property on January 26, 1956. Plaintiffs made certain changes in the Bolsa Avenue residence to suit themselves and make it more attractive to a prospective purchaser. Notice of completion was filed in March 1956. Plaintiffs paid property taxes and other obligations on the Bolsa Avenue property. In April 1956, defendants offered the Bolsa Avenue property for sale at $47,500 but did not obtain a purchaser. On May 29, 1956, plaintiffs filed their complaint in this action, seeking a determination of their rights under the agreement of January 5, 1956. Arthur Lamb died just before the trial, leaving no estate. Defendant offered no evidence at the trial.

The court made findings of fact and conclusions of law as follows: that the amount owing to the plaintiffs from the defendants was $27,452.75; that the grant deed to the Bolsa Avenue properties was given as security for the repayment of the debt; that the deed of trust was given to secure the sum of $16,500, and was a valid deed, and that the indebtedness matured on January 5, 1957; that the defendants were not entitled to any injunctive relief against the plaintiffs or the trustee in the deed of trust.

Defendant on appeal disputes only that portion of the findings and judgment relating to the trust deed on the Oakdale Avenue property. She argues that: (1) the grant deed on the Bolsa Avenue property was given to secure all sums owed to the plaintiffs, and that no other sums were owing except the costs of constructing the Bolsa Avenue residence; (2) this grant deed to the Bolsa Avenue property was in effect a mortgage, and that the plaintiffs must first exhaust that security by foreclosure; (3) the trust deed on the Oakdale property was not given to secure $16,500, but only to secure a possible prospective deficiency if one should arise on the sale of the mortgaged Bolsa Avenue property; (4) the trust deed is void as an attempt to secure a possible future deficiency or to realize satisfaction by sale before the determination of such deficiency.

There is no merit to any of these contentions. The agreement of January 5, 1956, grant deed and deed of trust must be construed together, as plaintiff points out. There is nothing in any of these instruments to indicate that under the terms of the agreement defendants are required to first exhaust the security of the grant deed to the Bolsa Avenue property. Both instruments secured a single debt owing from defendant to plaintiffs. The deed of trust to the Oakdale Avenue property recites that it is made for the purpose of securing the performance of the agreement of January 5th. There is no evidence in support of defendant's contention that the deed of trust expired on January 5, 1958. By its terms the deed of trust does not expire until the agreement of January 5th has been performed. There is also no evidence to support defendants' contention that the trust deed was given only to secure a prospective deficiency if one should arise on the sale of the Bolsa Avenue property. The record fully supports the conclusions and finding of the trial court.

On December 3, 1958, plaintiffs filed in the Municipal Court a complaint for unlawful detainer seeking to gain possession of the Oakdale Avenue property under the trustee's deed discussed above. After the overruling of defendant's demurrer and special defense of a prior action, we issued an alternative writ of prohibition in No. 18781, prohibiting further proceedings pending the final determination of the appeal in No. 18382. Both proceedings were heard by this court on June 9, 1959.

As the Superior Court in No. 18382 first assumed jurisdiction over the rights of the parties to the Oakdale Avenue properties, the bringing of the unlawful detainer action was premature and any further unlawful detainer proceedings must be stayed pending final determination of the appeal in No. 18382.

Peremptory Writ of Prohibition to issue in case No. 18781 staying unlawful detainer proceedings pending final determination of the appeal in No. 18382.

The judgment in No. 18382 is hereby affirmed.

DOOLING and DRAPER, JJ., concur.

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171 Cal.App.2d 620

PEOPLE of the State of California, acting by and through the Department of Public Works, Plaintiff,

v.

Charles A. NORTHCUTT et al., Defendants.

County of San Diego (Sued herein as Doe Three), Defendant and Appellant.

Vaughan W. DeKirby and Perry Louise DeKirby, Defendants and Respondents.

Civ. 5886.

District Court of Appeal, Fourth District, California.

June 30, 1959.

Action in eminent domain by state against owners and claimants of certain parcels of real estate, wherein county in which land was located claimed lien for taxes for fiscal years of 1951–1952 and 1957–1958. The Superior Court, San Diego County, L. N. Turrentine, J., entered judgment denying county's claim for tax for last half of fiscal year, 1957–1958, and extinguishing lien of county therefor on parcel, and county appealed. The District Court of Appeal, Mussell, J., held that where title to condemned property did not pass to state until final order of condemnation had been signed or entered in judgment book two days after county tax on property for last half of fiscal year for 1957–1958 was due and almost 11 months after lien for the tax had attached, although trial had been held before date on which installment became due, trial court should have allowed claim of county taxes for last half of fiscal year of 1957–1958 out of the award.

Reversed in part.

1. Eminent Domain ⟾320

Where state had not taken possession of property and had not made deposit or security or obtained order of taking prior possession before trial, title to property did not pass to state until final order of condemnation was signed or entered in judgment book by trial court.

2. Eminent Domain ⟹152(1)

Where title to condemned property did not pass to state until final order of condemnation had been signed or entered in judgment book two days after installment of county tax on property for last half of fiscal year had become due and almost 11 months after lien for tax had attached, although trial had been held before date on which installment became due, trial court should have allowed payment of claim of county for taxes out of the award. West's Ann.Rev. & Tax.Code, §§ 2187, 2192, 2606.

◆

James Don Keller, Dist. Atty., and Donald L. Clark, Dep. Dist. Atty., San Diego, for appellant.

No appearance for respondents.

MUSSELL, Justice.

This is an action in eminent domain brought by the State of California against owners and claimants to certain parcels of real property in San Diego county. Appellant, County of San Diego, having been served with summons and complaint in said action, appeared and filed therein its second amended answer, claiming a lien on Parcel 1 of the property involved for taxes for the fiscal year 1951–1952 in the amount of $1,589.85, for the year 1957–1958 in the amount of $327.86, and the right to be paid these taxes out of the condemnation award. The amount claimed for taxes for the fiscal year 1951–1952 had been assessed by appellant on said parcel for that year and appeared on the delinquent tax roll. The amount claimed for taxes on said parcel for the fiscal year 1957–1958 had been assessed by appellant and appeared on the tax roll for that year. Trial was held as to said parcel 1 on January 27, 1958. No possession of the property had been taken by the state nor had it made a deposit or security or obtained an order for taking prior possession before said trial. The fair market value of the property was agreed upon by the parties and the court determined the priorities of their claims to the condemnation award. Appellant's claims for taxes for the year 1951–1952 ($1,589.85), together with the first installment ($159.16) of the taxes for the year 1957–1958, and the penalties thereon ($9.54) were allowed. However, the court held that the second half of said 1957–1958 taxes was not payable until February 1, 1958, and denied appellant's claim therefor in the sum of $159.16. The county appeals from those parts of the judgment, entered on January 30, 1958, "which deny the claim of the defendant County of San Diego for the second half of the said 1957–1958 taxes in the sum of $159.16 which terminate, cancel and extinguish the lien of the defendant county on said parcel 1 for said amount and which award to defendants Vaughan W. DeKirby and Perry Louise DeKirby the sum of Two Hundred Dollars ($200.00)."

Every tax on real property is a lien against the property assessed (Rev. & Tax. Code, § 2187) and all tax liens attach annually as of noon on the first Monday in March preceding the fiscal year for which the taxes are levied (Rev. & Tax. Code, § 2192). Pursuant to these sections the taxes claimed by the county and levied upon the property involved for the entire fiscal year 1957–1958 became a lien on the property on the first Monday in March, 1957. The first installment of such taxes was due on November 1 following the levy and the second installment was due on February 1 of the year following. Rev. & Tax. Code, secs. 2605, 2606.

Apparently the trial court's ruling and judgment denying appellant's claim as to the second half of the 1957–1958 taxes was based upon the fact that the second installment of such taxes was not due until February 1, 1958, a date subsequent to the trial date of January 27, 1958. However, as is said in City of Long Beach v. Aistrup, 164 Cal.App.2d 41, 51, 330 P.2d 282, 288:

> "It is the general rule that the subjection of the award in a proceeding in eminent domain to the payment of real property taxes depends on whether such taxes became a lien prior or subsequent to the time title passed or is deemed to have passed. See cases col-

> lected 45 A.L.R.2d 529, 555. The majority view is that where the taxes became a lien prior to the passage of title or prior to the time title is deemed to have passed to the condemner, they are to be deducted from the award. Annotation, 45 A.L.R.2d 529, 555."

It was further held (164 Cal.App.2d at page 53, 330 P.2d at page 290) that

> "The statutory scheme would seem to leave no doubt that it was the intention of the Legislature to prevent a lien which attached on the first Monday in March of any year from being extinguished by reason of the fact that after the lien has attached title to the property passes or is deemed to pass to a tax-exempt public corporation in a proceeding in eminent domain. The obligation to pay the taxes accrued the date the lien attaches. The lien has the effect of a judgment and of an execution duly levied. The judgment is not satisfied or the lien removed until the tax is paid or legally canceled."

And it was also held (164 Cal.App.2d at pages 47–48, 330 P.2d at page 286):

> "There is no passage of title in condemnation proceedings until an award has been made and the final judgment in condemnation filed in the office of the county recorder. § 1253, Code Civ. Proc.; Metropolitan Water Dist. [of Southern California] v. Adams, 16 Cal.2d 676, 107 P.2d 618. However, as an exception to the strict application of the law, it is recognized that a 'taking' of sufficient consequences is deemed to have the same effect of finality of transfer for specific purposes as does the passage of title."

[1, 2] Since there was no "taking" in the instant case within the meaning of the exception and the final order of condemnation was not signed by the trial court herein or entered in the judgment book until February 3, 1958, and could not have been recorded prior to that date, it follows that the title to the property involved did not pass to the state prior to the time the lien of the county attached or prior to the date the second installment was due and that the court erred in denying appellant's claim to be paid the amount claimed by it.

The parts of the judgment from which the appeal is taken are reversed.

GRIFFIN, P. J., and SHEPARD, J., concur.

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171 Cal.App.2d 677

In the Matter of the GUARDIANSHIP OF the Persons and Estates of Lois M. ROSE, also known as Lois M. Hinshaw, and Kelly A. Rose, Minors.

Jack WEBB and Jean Webb, Respondents,
v.
Leslie A. ROSE, Appellant.
Civ. 18490.

District Court of Appeal, First District, Division 2, California.
July 2, 1959.

Proceeding respecting appointment of guardians of person and estate of minor whose deceased mother had been given custody of minor by divorce decree. The Superior Court, City & County of San Francisco, Timothy I. Fitzpatrick, J., entered judgment in appointing deceased's brother-in-law and his wife as guardians of estate and person of minor and natural father appealed. The District Court of Appeal, O'Donnell, J. pro tem., held that under evidence disclosing that divorce decree had given custody of minor to his mother and provided for support payments which natural father had made until mother's death, even though father had not visited minor nor kept in contact with him since the divorce, it could not be said that father had knowingly and wilfully abandoned minor, and as father he was natural guardian of minor.

Reversed with directions.

1. Guardian and Ward ⟹13(4)

Where proceeding was brought to appoint guardian of person and estate of minor and there was no finding that minor's natural father was an unfit parent, presumption was that he was a fit parent.

2. Parent and Child ⟹2(3.7)

In order to constitute such abandonment of child by natural parent as will forfeit right to minor's custody, there must be an actual desertion, accompanied with an intention to entirely sever, so far as it is possible to do, the parental relation and throw off all obligations growing out of the same. West's Ann.Prob.Code, § 1409.

3. Parent and Child ⟹2(3.7)

Where divorce decree gave custody of minor child to its mother and provided that father was to have visitation rights and to pay $30.00 per month support, and father although not visiting child and not writing to him because, as he contended, child's mother forbade it did keep up support payments, it could not be said that father had abandoned child thereby forfeiting right to custody upon mother's death. West's Ann.Prob.Code, § 1409.

4. Guardian and Ward ⟹10, 13(4)

Minor's right to appoint guardian of his person upon reaching age of 14 is not absolute, and while statute gives 14-year-old minor privilege of directly petitioning for appointment of a guardian, such procedure does not eliminate need for making required showing of necessity or convenience as basic ground for appointment. West's Ann.Prob.Code, § 1409.

5. Guardian and Ward ⟹4

Father of minor whose mother was deceased was minor's natural guardian.

Francis N. Crawford, Morgan Hill, for appellant.

Carr, McClellan, Ingersoll & Thompson, Burlingame, Tobin & Tobin, San Francisco, for respondents.

O'DONNELL, Justice pro tem.

This is an appeal from an order appointing respondents, Jack Webb and Jean Webb, guardians of the person and estate of Kelly A. Rose, one of the minors above named.

Appellant Leslie A. Rose is the father of Kelly. The mother, Mary, is deceased. Leslie and Mary were married in 1944. Kelly was born in 1945. Leslie and Mary were divorced in 1948. The decree of divorce awarded custody of Kelly to Mary and directed Leslie to pay the sum of $30 per month for Kelly's support. Thereafter Mary married George F. Webb, a brother of respondent Jack Webb. This marriage, too, ended in divorce.

Mary died in 1958. By her will Mary appointed respondents guardians of Kelly's person and estate. Respondents thereupon petitioned the lower court for their appointment as such guardians. Appellant filed objections to their appointment, together with a petition for his own appointment as Kelly's guardian. After a hearing the court found that appellant had not visited Kelly or kept in contact with him since the divorce in 1948, although the divorce decree granted him the right of visitation, and further that appellant had knowingly and wilfully abandoned Kelly. The court further found that it is to Kelly's best interests that respondents be appointed his guardians. The court thereupon made its order appointing respondents guardians of Kelly's person and estate.

[1] The fitness of appellant to have the custody of Kelly is not questioned. He was not found by the lower court to be an unfit parent. The presumption is therefore that he is a fit parent. Stewart v. Stewart, 41 Cal.2d 447, 260 P.2d 44; In re Campbell's Estate, 130 Cal. 380, 62 P.

613. "It is settled in this state that in either guardianship proceedings or custody proceedings in a divorce action, the parents of a legitimate child have preference over a non-parent and the custody shall not be given to a non-parent unless the parent is found unfit." In re Guardianship of Smith, 42 Cal.2d 91, 92, 265 P.2d 888, 889, 37 A.L.R.2d 867. However, section 1409 of the Probate Code provides: "A parent who knowingly or wilfully abandons or, having the ability so to do, fails to maintain his minor child under fourteen years of age, forfeits all right to the guardianship of such child; * *"

The issue to be decided in this case is whether appellant, though a fit parent, has abandoned his son and has thus lost the right to his custody.

[2] "In order to constitute abandonment, 'there must be an actual desertion, accompanied with an intention to entirely sever, so far as it is possible to do so, the parental relation and throw off all obligations growing out of the same.'" Guardianship of Snowball, 156 Cal. 240, 243, 104 P. 444, 446. In re Estate of Moore, 179 Cal. 302, 176 P. 461, considered the question of abandonment in the light of facts similar to those of the instant case. In that case it appeared that Mr. and Mrs. Moore and their minor child lived in New York. The couple separated in 1911, the wife coming to California with the child. She had means of her own with which she supported the child. He contributed nothing to the child's support. He did not write to the child or send presents. He testified, however, that his wife forbade his corresponding with the child. The wife died in 1917, six years after the separation. The husband thereupon sought letters of guardianship but the probate court appointed the wife's testamentary guardian. Of this appointment the Supreme Court said (179 Cal. at page 305, 176 P. at page 462): "The court was not authorized, on this evidence, to find that the father had abandoned the child and thus lost his right to its guardianship. * * * The mere fact that the father permitted the child to remain with the mother is not enough to show such intent. The spouses had separated, and his right to the custody of the child was in no way superior to that of the mother."

[3] We think that the position of the father in the case at bar is even stronger than that of the father in the Moore case. In our case Mary had been awarded the sole custody of Kelly by the divorce decree. It is difficult to see how appellant could be said to have "abandoned" his son when the right to his custody had been awarded to someone else. Moreover appellant has, all through the years, paid the allowance provided by the divorce decree for Kelly's support. Further, appellant, who first learned of Mary's death when he was served with a notice of respondents' petition for letters of guardianship proceeded with dispatch to obtain the custody of Kelly.

Inasmuch as Kelly has at this time attained the age of fourteen years, we deem it advisable to comment on the following statement contained in the findings of fact made by the lower court: "That it is true that within approximately one year the said Kelly A. Rose will have the right, pursuant to Section 1406 of the Probate Code of the State of California, to appoint his own guardian; that the said minor has indicated he will nominate Jack and Jean Webb when he reaches the age of fourteen years and his right under the said section of the Probate Code matures."

[4] The minor's "right" to appoint his own guardian, in so far as a guardian of his person is concerned is not as absolute as the quoted statement would seem to indicate. In In re Guardianship of Kentera, 41 Cal.2d 639, 642–643, 262 P.2d 317, 319, the court said: "While the statutes give the fourteen-year-old minor the privilege of directly petitioning for the appointment of a guardian, such procedure does not eliminate the need for making the required showing of necessity or con-

venience as the basic ground for the appointment. It is only *after* such showing has been made to the satisfaction of the court that the law distinguishes between the fourteen-year-old and the younger minor, granting to the former the right to have his nominee appointed if approved by the court as a suitable person. Otherwise, in the case of the fourteen-year-old, the words 'necessary or convenient' would be given no meaning, with the result that every minor attaining that age would have the absolute right to select any fit person as his personal guardian regardless of the fitness of his natural parents. The statutory provisions were not intended to upset the normal relationship of parent and child or to disrupt normal family discipline by allowing the fourteen-year-old minor to withdraw from the family circle at his whim. In other words, sections 1405 and 1440 apply in every case of the appointment of a guardian of a minor in that there must be the initial showing of necessity or convenience; and it is only thereafter that the right of the fourteen-year-old minor to have his nominee appointed his personal guardian, if fit, may be said to be 'absolute.' (Prob.Code, sec. 1406.)"

[5] Appellant, as father of Kelly, is his natural guardian. It does not appear from the facts of this case that it is either "necessary or convenient" that Kelly have a court appointed guardian of his person. Prob.Code, §§ 1405, 1440; In re Adoption of McDonnell, 77 Cal.App.2d 805, 813, 176 P.2d 778; In re Guardianship of Kentera, supra.

The only property of the minor is one ring of an undetermined value. The record does not indicate from whom or by what means the ring was acquired. Whether or not it is necessary that a guardian of Kelly's estate be appointed, and if so, who would have the right to such appointment, will depend upon whether the facts bring the case within sections 1402 and 1406.5, or section 1430 of the Probate Code.

Order reversed with directions to annul order in so far as it appoints respondents guardians of the person of Kelly and to take further testimony concerning the right to guardianship of his estate.

DOOLING, Acting P. J., and DRAPER J., concur.

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171 Cal.App.2d 531

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Walter CAREY, Jr., Defendant and Appellant.

Cr. 6466.

District Court of Appeal, Second District, Division 3, California.

June 26, 1959.

Hearing Denied Aug. 19, 1959.

Prosecution for unlawful possession of heroin. The Superior Court, Los Angeles County, Richard C. Fildew, J., entered judgment of conviction and denied a motion for new trial and defendant appealed. The District Court of Appeal, Parker Wood, J., held that where defendant did not assert at the trial that his arrest without a warrant was illegal, or that he was relying on refusal to identify an informer to establish illegality of his arrest and search, or that by reason of the failure to identify the informer, he was deprived of the opportunity of trying to obtain the informer as a witness, and defendant did not move to strike the testimony of a police officer as to communications he received from the informer, and defendant was granted a continuance in order to try and locate a person whom he thought was the informer and whom he believed had placed narcotics in defendant's pocket prior to his arrest, trial court would not be deemed to have erred in refusing to require disclosure name of the informer.

Judgment and order denying motion for new trial affirmed.

1. Criminal Law 🔑1144(19)

Where a defendant's notice of appeal from conviction stated "I hereby appeal", it would be assumed that defendant appealed from the judgment and order denying his motion for a new trial.

2. Witnesses 🔑216

When the prosecution seeks to show reasonable cause for a search without a warrant, by testimony as to communications from an informer, either the identity of the informer must be disclosed when the defendant seeks disclosure, or such testimony must be struck on proper motion of the defendant.

3. Arrest 🔑63(4)

Testimony of an arresting officer as to communications he received from an informer was properly admitted in a criminal prosecution, as evidence of reasonable cause for defendant's arrest without a warrant.

4. Witnesses 🔑216

In prosecution for unlawful possession of heroin, where defendant did not assert at the trial that his arrest without a warrant was illegal, or that he was relying on refusal to identify an informer to establish illegality of his arrest and search, or that by reason of the failure to identify the informer, he was deprived of the opportunity of trying to obtain the informer as a witness, defendant did not move to strike the testimony of a police officer as to communications he received from the informer, and defendant was granted a continuance in order to try and locate a person whom he thought was the informer and whom he believed had placed narcotics in his pocket prior to his arrest, trial court would not be deemed to have erred in refusing to require disclosure of name of the informer.

5. Arrest 🔑63(4)

In prosecution for unlawful possession of heroin, evidence was sufficient to support a finding of reasonable cause for defendant's arrest without a warrant.

6. Arrest 🔑71

Where a search of a defendant charged with unlawful possession of heroin was an incident to his lawful arrest, such search was legal even though conducted without a warrant.

7. Poisons 🔑9

Evidence sustained conviction for unlawful possession of heroin.

◆

Maynard D. Davis, Los Angeles, under appointment by the District Court of Appeal, for appellant.

Stanley Mosk, Atty. Gen., and Arthur C. de Goede, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

[1] Defendant was convicted, in a nonjury trial, of unlawfully possessing heroin. His notice of appeal (in propria persona) states, "I hereby appeal." It will be assumed that he appeals from the judgment and the order denying his motion for a new trial. He contends that the court erred in not requiring the prosecution to disclose the name of an informer.

On March 11, 1958, about 5 p. m., an informer told Officer Stephenson by telephone "that the defendant was on Fifth Street [in Los Angeles] and had been seen in various bars, had considerable heroin in his possession and was selling it on Fifth Street." The officer had known defendant for more than a year. During the preceding year and a half, the officer had received information from the same informer about ten times, and the information had been reliable. About 15 minutes after receiving the information on the occasion involved here, Officers Stephenson and Labbey entered the bar portion of the Rose Room on Fifth

Street and went to the archway entrance to the cafe portion of that place. While the officers were entering the cafe, through the archway, Officer Stephenson saw defendant sitting at the counter and looking toward the street. Then defendant arose and walked toward the front of the cafe. Officer Stephenson went behind the defendant and caught him by the elbows and said, "Police officers, you are under arrest. Are you holding Walter?" Then defendant put his hand in his coat pocket. Officer Stephenson withdrew defendant's hand from the pocket and observed a plastic wrapped bindle in defendant's hand. The officer forced defendant's hand open and the bindle fell to the floor and the officer recovered it. That bindle (Exhibit 1) contained ten bindles of heroin.

Officer Stephenson testified, among other things, that after the arrest the defendant said that there were eight bindles and he was going to take them to the "West Side" and deliver them to someone there. On cross-examination, the officer testified that defendant said that he had just gotten out of Mira Loma where he had been "for an addiction charge"; after the arrest herein, the officers talked to defendant about some other arrests, and they also had conversation with him "with respect to why" he had not been an informer for them; prior to the arrest herein, the officers had talked to defendant about "making a buy" from one Mitchell, and they asked defendant to introduce an "under-cover officer" to Mitchell so that "a sale could be made"; defendant agreed to do that, but the next time the officer saw defendant he (defendant) was under arrest for burglary.

Also, on cross-examination of Officer Stephenson, there were questions and answers, as follows: "Q. [By counsel for defendant] What was the name of the informant? Mrs. Linn [Deputy district attorney]: Object to that under Section 1881, Subdivision 5 of the Code of Civil Procedure. The Court: Would revealing the name of the informant jeopardize his well-being and safety? The Witness: It would. The Court: It would affect his value to the Police Department as an informant? A. I think it would. The Court: Objection sustained."

Also, on cross-examination, Officer Stephenson testified that he relied upon the information received from the informant, but for identification of defendant he relied on his own knowledge of defendant; he (witness) was acquainted with Eddie Thomas, but he did not see Eddie at the cafe; he (witness) did not know where Eddie could be found but he believed that, approximately a month ago (month preceding trial), Eddie lived at the Sunset Hotel on Fifth Street. Counsel for defendant asked the officer if Eddie was the informant. The officer replied, "I decline to state."

When Exhibit 1 for identification (the heroin) was offered in evidence, at the close of the prosecution's case, the judge said: "It will be so received." Thereupon, counsel for defendant said: "I am going to object and move to strike the evidence on the ground that we feel that the identity of the informant should have been disclosed, and that it is material to our defense. We believe it would indicate that this informant would have been Eddie Thomas also known as 'Hip Enuff' and it would be our contention in this case Hip Enuff was the one who had the narcotics; that it was Hip Enuff who placed this package in his pocket where they could find it and tie it in with the defendant. * * * [W]e would like to object and move to strike the evidence. We feel that the defense cannot put in their entire defense to this matter without the identity of the reliable informant." Then the judge said: "It will be overruled for this reason. The Officer says he knows Thomas and Thomas is not the one. That the defendant had the narcotic in his pocket, reached in and got it and had it in his hand. No showing that Eddie Thomas was present or that Thomas was the informant. * * *"

Joseph Pierce, called as a witness by defendant, testified that after 4 p. m. on the day of the arrest he went into the cafe and sat next to defendant at the counter; about 5 minutes after he (witness) arrived there, Eddie Thomas, who was known as Hip Enuff, came into the cafe and told him and the defendant that he (Eddie) had some stuff (narcotics); Eddie and defendant argued about a jacket; Eddie went away, but he returned and sat next to defendant and flashed a package which was similar to Exhibit 1; Eddie asked defendant if he wanted to exchange the jacket for some stuff; defendant replied that he did not want any stuff; when Eddie left, the officer came in the door; defendant was sitting at the counter when he was arrested; he (witness) did not see the officers get anything from defendant's hand or pocket. Pierce also testified that he was under the influence of narcotics when the officers arrived; he had been arrested on a car theft charge, and he was then "in jail" in the same tank with defendant; he (witness) had known Eddie previously —they were in jail "together a couple of times"; Eddie had a reputation of being an informer.

Defendant testified that he had been out of jail eight days at the time of the arrest; about 4 p. m. on the day of the arrest he went to the counter in the cafe and ordered a sandwich; Eddie Thomas came into the cafe and asked him and Joe Pierce if they wanted to buy "some smack" (narcotics); they replied that they did not want any; defendant told Eddie that the jacket which Eddie was wearing belonged to defendant; after they had argued about the jacket, Eddie said that he would give defendant some narcotics for the jacket; defendant refused the offer, and then Eddie sat next to him at the counter; soon thereafter Eddie went away, but he returned within 5 or 10 minutes and stood by the side of defendant; soon thereafter defendant's arms were "grabbed from behind" and he was handcuffed; the officer said to defendant, "Walter, do you have it?"; the officer took him into another room and searched him; he (defendant) did not have any heroin in his possession; defendant saw the heroin (Exhibit 1) in Eddie's hand before the officers arrived; defendant did not tell the officers that he was going to deliver the heroin to someone on the west side; in 1956, when he was arrested on a charge of burglary, Officer Stephenson told him that he would get a lighter sentence if he would work on narcotics (with the police); the officer also said that a fellow named Mitchell was dealing in narcotics in the vicinity of Compton; defendant replied that he could not do the work; defendant was sentenced on the burglary charge to nine months in the county jail; soon after defendant was released from Mira Loma (on a narcotics conviction), Officer Stephenson went to defendant's home and arrested him again, stating that the six months defendant had served at Mira Loma was only part of the time fixed, and he asked defendant if he "would rather go through with him and be an informer" or go to jail. On cross-examination, defendant testified that he first met Officer Stephenson in 1956 when the officer arrested him on the burglary charge, and at that time the officer wanted defendant to be an informer; when defendant was arrested in June, 1957, no charge was placed against him, but Officer Stephenson asked him to be an informer; in July, 1957, he was arrested for possessing marijuana; in October, 1957, he pleaded guilty to "vag addict" and was sentenced to six months in jail.

Officer Stephenson testified further that when he arrested defendant on the burglary charge he did not have any conversation with defendant "as to turning informer"; that he did not have any other conversation which defendant had testified to, but he (witness) did talk to him about Mitchell.

The judge granted defendant's motion for a continuance in order that defendant might try to locate Eddie Thomas. When the trial was resumed, after the continuance, it was stipulated that the manager of the Sunset Hotel would testify that he did not know any one by the name of Eddie Thomas, and that no one by that name had been registered at the hotel since January 1, 1958.

[2, 3] The arrest and search were made without a warrant. The prosecution relied upon communications from an informer to show reasonable cause for the arrest. "[W]hen the prosecution seeks to show reasonable cause for a search by testimony as to communications from an informer, either the identity of the informer must be disclosed when the defendant seeks disclosure or such testimony must be struck on proper motion of the defendant." Priestly v. Superior Court, 50 Cal.2d 812, 819, 330 P.2d 39, 43. In the present case, appellant objected to the introduction of the heroin in evidence, and he moved "to strike the evidence" on the ground that the identity of the informer should have been disclosed, and that it was material to his defense. Appellant asserted, with reference to such objection and motion, that he believed the disclosure would indicate that the informer was Eddie Thomas; and that appellant would contend that Eddie Thomas had the narcotics and placed them in appellant's pocket. Appellant did not assert, at the trial, that the arrest was illegal, or that he was relying on the refusal to identify the informer to establish illegality of the arrest and search, or that by reason of the failure to identify the informer the appellant was deprived of the opportunity of trying to obtain the informer as a witness. The testimony of the officer as to the communications he received from the informer was properly admitted as evidence of reasonable cause for the arrest, and that testimony was not challenged by appellant. Appellant did not move to strike that testimony or otherwise make his position clear that he was claiming illegality of the arrest or search because the name of the informer was not disclosed. As above shown, the appellant asserted that the disclosure was material to his defense, and that his defense was to the effect that Thomas was the informer and that the informer had placed the narcotics in appellant's pocket. In Coy v. Superior Court, 51 Cal.2d 471, 334 P.2d 569, at page 570, it was said: "In the present case no motion to strike the officer's testimony was made after the identity of the informer was refused, and neither in his objection to the introduction of the narcotics in evidence nor by argument elsewhere in the record did defendant indicate that he was relying on the refusal to identify the informer to establish the illegality of the arrest and search. The magistrate did not err in sustaining the objection to the question asking the identity of the informer, for the prosecution was entitled to elect between disclosure and having the officer's testimony struck. It was incumbent on defendant to compel this election, however, by moving to strike or otherwise making his position clear. The prosecution may have had evidence other than the information of the informer to justify the search or it may have been willing to waive the privilege of nondisclosure if its case would otherwise fail, and it was entitled to an opportunity to produce such evidence or waive nondisclosure. It was not called upon to do so, however, while evidence of reasonable cause stood unchallenged in the record. * * * No undue burden is placed on the defendant by requiring him to make a motion to strike when the basis for excluding evidence theretofore properly admitted becomes apparent, and there is no basis for departing from the settled rule requiring such a motion [citations] in the present situation."

[4] The court did not err in refusing to require disclosure of the name of the informer.

Appellant knew Eddie Thomas and was afforded an opportunity to try to obtain him as a witness.

[5-7] The evidence was sufficient to support a finding of reasonable cause for the arrest. The search was an incident to the arrest and was not illegal. The evidence was sufficient to support the judgment.

The judgment and the order denying the motion for a new trial are affirmed.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; PETERS, J., dissenting.

171 Cal.App.2d 302

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Fred NAHABEDIAN et al., Defendants, Lydia Mascotti, Appellant.

Civ. 23536.

District Court of Appeal, Second District, Division 1, California.

June 12, 1959.

Rehearing Denied July 8, 1959.

Condemnation proceedings to acquire land for freeway purposes. From a judgment of the Superior Court of Los Angeles County, Joseph L. Call, J., the owner appeals. The District Court of Appeal, White, P. J., held that the trial court should have received evidence in support of the owner's defense that the taking by the state was not for a public use but was for a private use and that testimony of the owner as to asking price of comparable properties was properly excluded.

Reversed and cause remanded for a new trial.

1. Appeal and Error ⇨882(6)

Where parties in the court proceed throughout the trial upon a theory that a certain issue has been presented for adjudication, the doctrine of estoppel precludes either party from thereafter asserting that no such issue was in controversy even though it was not actually raised by the pleading.

2. Eminent Domain ⇨262(2)

In proceeding to condemn property for a freeway, where owner contended that the property was being taken for a private and not a public use, and though her pleadings were deficient in that respect, the state did not challenge the sufficiency and the case was tried upon the theory that the owner was contending that the state was taking the parcel exclusively for private use, the doctrine of estoppel precluded the state from thereafter contending that no such issue was in controversy.

3. Eminent Domain ⇨14

In condemnation proceedings, the character of the use and not its extent determines the question of public use.

4. Eminent Domain ⇨196

In proceeding to condemn land, where the court clearly understood the owner's contention was that the real purpose of the condemnation to take her property not for freeway purposes but for private purposes without any relation to the freeway project, sustaining objection to introduction of evidence to show such cause was error, since if such contentions could be proved, the state could not acquire the property for private use. West's Ann.Streets & High.Code, § 103; West's Ann.Const. art. 1, § 14; U.S.C.A.Const. Amends. 5, 14.

5. Eminent Domain ⇨68

In proceeding to condemn land for a freeway, conclusion of the trial court that the question of whether the proposed taking was for a public purpose was committed to the conclusive determination of an administrative agency of the condemning body was error.

6. Evidence ⇨501(7)

An owner should be permitted to state the reasons for his opinion on market value of land condemned. West's Ann.Code Civ. Proc. § 1872.

7. Evidence ⇨568(4)

Generally, an opinion on the value of property is worth no more than the reasons upon which it is based, but in stating his opinion as to the value of the property the owner is bound by the same rules of admissibility of evidence as is any other witness.

8. Evidence ⇨142(1), 488

In condemnation proceedings, the witness cannot state his opinion of the value of neighboring land, but he may give evidence of prices paid for similar property in the vicinity of the land condemned.

9. Evidence ⇨568(4)

In condemnation proceeding, facts stated for reason for the opinion of the witness as to value of property do not become evidence in the sense that they have independent probative value upon the issue as to market value, but they serve only to reinforce the judgment of the witness.

10. Evidence ⇨501(7)

General rule which permits a witness to state the reasons upon which his opinion as to value of his premises may not be used as a vehicle to bring before the jury incompetent evidence.

11. Evidence ⇨142(1)

In proceeding to condemn land for a freeway, testimony of owner concerning her inquiry as to the asking price of comparable properties in order to establish value of the property condemned was properly excluded.

12. Evidence ⇨5(1)

The matters of which the courts have judicial knowledge are uniform in text and do not depend upon certain testimony, and as soon as a circumstance becomes disputable, it ceases to fall under the head of common knowledge and so will not be judicially recognized.

13. Evidence ⇨4

A matter properly a subject of judicial notice must be "known", that is, well established and authoritatively settled, not doubtful or uncertain.

See publication Words and Phrases, for other judicial constructions and definitions of "Known".

14. Evidence ⇨5(2)

In proceeding to condemn land for a freeway where owner contended that a certain area was non-comparable, the court was not entitled to take judicial notice that the character of improvement in such area was entirely different from the character of improvements along the streets testified to by the state's expert witness.

15. Eminent Domain ⇨255

In condemnation proceedings, objections to testimony of expert witness could not be raised for the first time on appeal.

16. Eminent Domain ⇨262(5)

In condemnation proceedings permitting the state to introduce evidence of noncomparable transactions during testimony of an appraiser of property who testified as an expert for the condemnor was not prejudicial where, had proper objections been made to the vulnerable parts of his testimony, and sustained, there would yet remain admissible testimony as to other sales of comparable property. West's Ann. Code Civ.Proc. §§ 53, 1845.5.

Irl Davis Brett, Los Angeles, for appellant.

George C. Hadley, Hugh R. Williams, S. Philip Teresi and Charles E. Spencer, Jr., Los Angeles, for respondent.

WHITE, Presiding Justice.

This is a proceeding in Eminent Domain instituted by the State of California, acting through its Department of Public Works, wherein the latter seeks to acquire the full fee interest in certain parcels of land, including the whole of the improved premises which were owned by appellant, Lydia Mascotti, and which were identified in the pleadings and will hereinafter be referred to as Parcel 3. Respondent, in its complaint alleges "that public interest and necessity require the acquisition of (Parcel 3) for State Highway purposes", and further alleges that Parcel 3 is being taken "for freeway purposes." The evidence disclosed without contradiction that Parcel 3 consisted of three contiguous lots or portions thereof situated on and westerly of the southwest corner of South Broadway and West 17th Streets in Los Angeles, having frontage on the west side of South Broadway of 120 feet. The total parcel consisted of 2½ lots. The easternmost lot, which was the half lot on the corner, was 26 feet in width by 120 feet deep. It was paved and used for parking facilities in conjunction with the use of the commercial structures on the adjacent, contiguous lots immediately west, each of which were 51 x 120. Thus the overall unit was 120 feet x 128 feet or 15,360 square feet. Counting the portion of Lot 7, said Parcel 3 had a total of 15,445 square feet as alleged in the complaint. Lot 8, which was the easterly of the two improved lots, was identified as 138–140 West 17th Street and was a one-story commercial and warehouse brick building having a mezzanine floor in the front. The improvement on Lot 9, which was adjacent, contiguous and immediately to the west of the improvement on Lot 8, was identified as 146 West 17th Street and was improved with a one-story brick commercial and warehouse building. The date of valuation was July 30, 1957. On such date the entire parcel was rented to and occupied by tenants. Although Parcel 3 was consolidated with other parcels in the complaint, the trial which resulted in the judgment upon the verdict which is here being appealed from was limited to the valuation of all of Parcel 3 and the separate valuation of the rights of the County of Los Angeles, as lessee in possession of 140 and 146 West 17th Street, in the total award. Appellant Mascotti testified in her own behalf and adduced the valuation testimony of expert witness, Francis McGarry. The State presented the valuation testimony of expert witness, George Wigmore, and the County adduced the valuation testimony of expert witness, Arthur George Gazdik. In addition, various writings, drawings and photographs were received in evidence. The verdict of the jury fixed the fair market value of the fee in appellant's property as $115,000 which was within the range of the testimony of the expert witnesses' opinions, which range of the experts' opinions was from $106,500, as given by respondent's witness, and $140,000 as testified to by appellant's witness. A separate verdict denied any apportionment to the County of Los Angeles and judgment was entered upon the verdicts. The County took no further action and the judgment has become final as to it. Appellant's motion for a new trial was denied and from the judgment she prosecutes this appeal.

As her first ground for reversal, it is urged by appellant that the trial court erred in ruling that it would not receive evidence in support of her special defense that the taking by the State was not for public use but was, instead, for a private use. Respondent insists that appellant has not pleaded sufficient facts to set forth the defense that the taking was not for public use. In her answer filed *in propria persona*, appellant pleaded, "this defendant denies as to Parcel III the allegation that public interest and necessity require the acquisition of Parcel III for freeway purposes, but in truth and fact said property is sought for other purposes. She subsequently filed an amended answer *in propria persona*, in which she repeated the same allegations.

[1, 2] While conceding that such pleadings were deficient in that they did not allege that the "other purposes" were for *private* as distinguished from *public* use, and did not expressly and formally allege fraud, bad faith or abuse of discretion on the part of the State, appellant urges that nevertheless, the State did not demur or in any other way challenge the sufficiency of the pleading and that the cause was tried upon the theory that appellant was contending that the State was taking Parcel 3 exclusively for a private use. We find ourselves in accord with appellant's contention. It is a time honored rule that where the parties and the court proceed throughout the trial upon a theory that a certain issue is presented for adjudication, the doctrine of estoppel precludes either party from thereafter asserting that no such issue was in controversy, even though it was not actually raised by the pleadings (Miller v. Peters, 37 Cal.2d 89, 93, 230 P.2d 803; People ex rel. Department of Public Works v. Lucas, 155 Cal.App.2d 1, 5, 317 P.2d 104).

In the case at bar the issue of whether taking of Parcel 3 was for a public use was presented at the pre-trial hearing, wherein, the court's order reads in part:

"As to Parcel No. 3, it is the defendant owners' position that the public necessity and convenience does not exist for the taking of said parcel, and that the resolution of condemnation as adopted on behalf of the plaintiff was not duly adopted. *Said owner contends that only a portion of the property herein sought is required for public purposes, and that the property is not being acquired for freeway purposes as alleged.*" (Emphasis added.)

That the issue was presented to the trial judge and by him considered is evidenced by the fact that at the inception of the trial the judge stated:

"Now to get to your contentions in your answer, Mr. Porter (counsel for appellant). See if I state it correctly. That the real purpose of this condemnation proceeding is not to condemn for the purposes of a State highway or a public highway, but to condemn certain portions of your client's land, *the real purpose of which is to lease it for an auto park*, is that a correct statement?" to which appellant's counsel replied, "That is a correct statement * * *". (Emphasis added.) After further argument between counsel, in the course of which appellant's attorney insisted that Parcel 3 was not being taken for highway purposes, but "just simply to turn it over to Walt's Auto Park * * * without any relation to the highway", and respondent argued that the highway commission's resolution was conclusive upon the court under the provisions of Section 103 of the Streets and Highways Code, the trial judge stated:

"Well, I am prepared to stand on the validity of the Statute. That being the case, I will conclude the matter therefore is not legally raised by the answer, or a proper answer, because of the way the Statutes, the Condemnation Statute has been written, and that it is not a matter of judicial concern as to the reason, necessity, *or the bona fides. I might say, of the condemnation is not a matter for judicial determination.* In other words, I will stand on the resolution of the condemnation, and when the time comes, then, *so we will know where we stand, I will sustain any objection to the introduction of evidence tending to show what may be, as Mr. Porter thinks, the true purpose of the condemnation proceedings. And there you have an issue for the Appellate Court.* That will be my determination, and I will try to rule to give you a clear issue toward an appellate holding." (Emphasis added.)

[3, 4] To us, it is manifest that the trial court confused "necessity" with "public use". Respondent concedes that "* * * the mere declaration by the legislature of a purpose for which property may be taken for a public use is not conclusive and does not preclude a person whose land is being condemned from showing upon the trial that, *as a matter of fact, the use sought to be subserved is a private one*, or from assailing the complaint on the ground that it so appears therefrom. The character of the use and not its extent, determines the question of public use." (Emphasis added.) (Stratford Irr. Dist. v. Empire Water Co., 44 Cal.App.2d 61, 67, 111 P.2d 957, 961). Yet, in the case at bar, the court announced, "* * * so we will know where we stand, I will sustain any objection to the introduction of evidence tending to show * * * the true purpose of the condemnation proceedings". This was error. There can be no doubt that both the court and counsel for respondent clearly understood that appellant's contention was that the "real purpose" of the condemnor was to take part of appellant's property not for freeway purposes, but to lease it to Walt's Auto Park for private purposes, without any relation to the freeway project. Certainly, if such contentions could be proved, respondent could not acquire the portion of the property in question, because the latter is without authority in law to acquire the property of a citizen for private use (U.S.Const. Fifth and Fourteenth Amendments; Const. of California, art. I, Sec. 14; People v. Chevalier, Cal. App., 331 P.2d 237; City and County of San Francisco v. Ross, 44 Cal.2d 52, 59, 279 P.2d 529).

[5] Respondent argues that the instant action is a taking for the Santa Monica Freeway, which is being built on "stilts" or piers so that it is an elevated freeway. That therefore, the need for a clearance of the surface of the land under the bridge

and the approaches to it will serve the public interest. As respondent puts it, "*Not only will it be of 'public utility' to have complete control of the property during construction but it is also obvious that the State must have access to the understructure of the bridge at all times for necessary repairs, maintenance and possible remodeling.*" (Emphasis added.) Crockett Land & Cattle Co. v. American Toll Bridge Co., 211 Cal. 361, 365, 295 P. 328. Respondent also contends that appellant's argument of the lack of public use due to a future lease for private parking lacks substantiality because of the need for the property during construction, even though the property is later leased or sold to private parties (Redevelopment Agency of City and County of San Francisco v. Hayes, 122 Cal.App.2d 777, 803, 266 P.2d 105). However, the holding in the case just cited was contingent upon the determination that the taking initially is for a public purpose. In the case at bar, all efforts of appellant to establish that the taking was not for a public purpose were excluded by the trial court. Here, the court seemingly concluded that the question whether the proposed taking is for a public purpose, was committed to the conclusive determination of an administrative agency of the condemning body. Such is not the law (People ex rel. Department of Public Works v. Lagiss, 160 Cal.App.2d 28, 35, 324 P.2d 926).

Appellant next contends that the court erred in striking her testimony as to asking prices for comparable properties.

In this regard, the record reflects that appellant had qualified to give her opinion as to the value of Parcel 3 in her capacity as owner thereof. She had testified that the value of Parcel 3, as of the date of valuation was $250,000. To support her testimony concerning the value of her property, appellant testified as to the investigation and inquiry she made as to the "asking" prices of comparable properties, by contacting various owners and real estate brokers with a regard thereto. Such testimony was admitted over objection by respondent but was later stricken by the court on the ground that no foundation was laid to show comparability and because the inquiries made by appellant were not as to "sales" but only as to "asking" prices.

Appellant challenges the ruling on the ground that having given her owner's opinion as to value, she was entitled to give the reasons upon which she predicated such value.

[6, 7] It is undoubtedly the law that an owner should be permitted to state the reasons for his opinion on market value (Code Civ.Proc. sec. 1872; Long Beach City High School Dist. of Los Angeles County v. Stewart, 30 Cal.2d 763, 772, 773, 185 P.2d 585, 590, 173 A.L.R. 249), for as stated in the case just cited, "It is a general rule that an opinion is worth no more than the reasons upon which it is based". However, "In stating his opinion as to the value of property, the owner is bound by the same rules of admissibility of evidence as is any other witness" (People v. La Macchia, 41 Cal.2d 738, 747, 264 P.2d 15, 22).

[8] Appellant's testimony concerned her inquiry as to the "asking" prices of comparable properties. As stated in Sacramento and San Joaquin Drainage Dist. v. Jarvis, 51 Cal.2d 799, 336 P.2d 530, 533, "The rule is settled that in a condemnation proceeding a witness cannot state his *opinion* of the value of neighboring land. * * * 'The rule has been held very strictly that the opinion of experts as to the value of other lands is not to be received.' * * * However, he may give evidence of the prices paid for similar property in the vicinity of the land condemned. (County of Los Angeles v. Faus, 48 Cal.2d 672, 676(2a), 312 P.2d 680)" (Emphasis by the court).

As stated by respondent, "The estimate of an owner or expert of the market value of the subject property is substantiated or checked by the objective evidence of sales of other property. The sales are the objective evidence. An *opinion* of the market value of *another* piece of property, even if the property is comparable, sheds no light on the market value of the subject property. It is merely an opinion to substantiate another opinion. It may well be only wishful thinking where stated by an owner not under oath. If the one expressing the opinion is qualified to testify in court as to his opinion then the only opinion he should give is his estimate of the market value of the *subject* property and not as to another property. Then he may substantiate his opinion with his experience, *sales* of other comparable property and other objective evidence. The jury would then have a chance to observe the manner of the testimony and whatever facts he has to back his opinion and properly weigh the value of the testimony.

"In the instant case the portions of the defendant's testimony which the Trial Court struck went even further than the opinion evidence. It was not made clear whether the property owners and real estate salesmen gave prices that they would be willing to sell their property for, if anyone would pay it, or whether it was their opinion of what their property would sell for—their opinion of market value of their property. If the 'asking' figure was their opinion of fair market value then the testimony of the defendant was an attempt to get an 'expert's' opinion before the jury without first qualifying him and without an opportunity to cross-examine. The State's objections that such testimony was hearsay was well taken."

[9] It must be remembered that the facts stated as reasons for the opinion of the witness do not become evidence in the sense that they have independent probative value upon the issue as to market value. On the contrary, they serve only to reinforce the judgment of the witness, that is, they go to the weight to be accorded his opinion (Long Beach City High School Dist. of Los Angeles County v. Stewart, supra, 30 Cal.2d at page 773, 185 P.2d at page 590). Consequently, as said in People v. La Macchia, supra, 41 Cal.2d at page 745, 264 P.2d at page 21, quoting from Peirson v. Boston El. R. Co., 191 Mass. 223, 77 N.E. 769: "'(T)here is no right to put in evidence of matters which are incompetent as substantive evidence for the purpose of fortifying the opinion of an expert witness, even though they are offered under the guise of the reasons for his opinion, and even though they might properly have been admitted on cross-examination to test and diminish the weight to be given to his opinion.' 191 Mass. at pages 233–234, 77 N.E. at page 773. The rule is similarly expressed in United States v. 25.406 Acres of Land, 4 Cir., 172 F.2d 990, 993, and Nichols states it in substantially the same language. 5 Nichols on Eminent Domain (3d ed.) § 18.45(1), p. 181.

[10] *"The general rule which permits a witness to state the reasons upon which his opinion is premised may not be used as a vehicle to bring before the jury incompetent evidence.* To so open up the inquiry would create a disastrous break in the dike which stands against a flood of interminable investigation." (Emphasis added.) See also Sharp v. United States, 191 U.S. 341, 348, 24 S.Ct. 114, 48 L.Ed. 211.

[11] It is important to remember that in the case of County of Los Angeles v. Faus, supra, the court was dealing only with comparable *sales* prices and *not with "asking prices" or offers.* And, subsequent to the case just cited, section 1845.5 was added to the Code of Civil Procedure by the legislature, which provides that a witness may testify to his knowledge of *sales* prices in establishing his qualifications. We are therefore persuaded that the trial court did not err in striking the aforesaid testimony of appellant.

[12–14] Appellant next asserts that the court erred in allowing respondent to introduce evidence of non-comparable transactions. The challenged testimony came into the record during the testimony of George Wigmore, an appraiser of property for some twenty-five years, and who testified as an expert witness for respondent condemnor. As heretofore noted, the subject property is located at South Broadway and 17th Street in the City of Los Angeles.

The witness testified as to *sales* made of property located along Grand Avenue, Hope, Flower and Figueroa Streets, some two to four blocks west of appellant's property but, like hers, situated between Pico and Washington Boulevards. It is appellant's contention that the trial court and this court should take judicial notice that the development and character of improvements along South Broadway, South Main and Hill Streets between Pico and Washington Boulevards is entirely different from the development and character of improvements along the streets testified to by respondent's expert, though located between the same east and west thoroughfares as is appellant's property (Varcoe v. Lee, 180 Cal. 338, 343, 181 P. 223). That therefore, the trial court erred in permitting respondent to place in evidence sales in what the court should have judicially noticed as being "wholly non-comparable areas". However, appellant overlooks the fact that matters of which courts have judicial knowledge are uniform and fixed, and do not depend upon uncertain testimony. That as soon as a circumstance becomes disputable, it ceases to fall under the head of common knowledge, and so will not be judicially recognized. As was said in Varcoe v. Lee, supra, 180 Cal. at page 345, 181 P. at page 226: " 'A matter properly a subject of judicial notice must be "known", that is, well established and authoritatively settled, not doubtful or uncertain.' " The area which appellant contends to be non-comparable is at least debatably comparable. As pointed out by respondent, "This is particularly true when it is noted that the property of the defendant fronts on 17th Street and that the only entrance is on 17th Street. Furthermore, the buildings are of the warehouse type and it was expert witness Wigmore's contention that the existing buildings were the highest and best use of the property. The properties used by expert witness Wigmore as comparable property were such as to require the same type of use as the subject property."

[15, 16] Furthermore, the testimony was introduced as part of the investigation of the expert witness, and to establish his qualifications and pursuant to Code of Civil Procedure, Section 1845.5 he was permitted to testify as to sales prices. While some of the testimony of this witness was subject to objection, none was made thereto at the trial and cannot be raised for the first time on appeal. In any event, had proper objections been made to vulnerable parts of the testimony, and sustained, there would yet remain admissible testimony as to five sales.

Although the judgment must be reversed we have, pursuant to Section 53 of the Code of Civil Procedure, considered and determined all the questions of law presented upon this appeal and necessary to the final determination of the case.

The judgment is reversed and the cause remanded for a new trial.

FOURT and LILLIE, JJ., concur.

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